No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CLEMENTE HERNANDEZ-GARCIA,
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

Under the third step of *Batson v. Kentucky,* 476 U.S. 79 (1986), a trial court must determine whether one party exercised a peremptory strike with a discriminatory intent. If a trial court legally errs at this step, every court of appeals *except* the Ninth Circuit remands for the lower correct to reconsider its decision under the correct legal standard. The Ninth Circuit, by contrast, believes it has the discretionary authority to conduct appellate fact-finding and "decide *de novo"* under a totality of the circumstances whether the strike was motivated by purposeful discrimination. *United States v. Alvarez-Ulloa,* 784 F.3d 558, 565-66 (9th Cir. 2015). The question presented is:

If a trial court legally errs at step three of *Batson*, may an appellate court resolve the factual question of whether a party acted with discriminatory intent?

LIST OF PARTIES

1. Clemente Hernandez-Garcia, Petitioner

2. United States of America, Respondent

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Petitioner Clemente Hernandez-Garcia respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on August 19, 2022.

INTRODUCTION

The Court should grant this petition to resolve the question of whether the Ninth Circuit—and the Ninth Circuit alone—may resolve factual questions of discriminatory intent when a trial court legally errs at *Batson*'s third step. If a trial court has misapplied *Batson*, six circuits remand the case back to the trial court to permit it to properly apply the substantive law and make a factual finding regarding discrimination. But the Ninth Circuit claims it has the discretionary authority to conduct appellate fact-finding in the first instance to determine the party's intent based solely on its review of the written transcript. Only the Court can resolve this lopsided conflict.

This case presents an ideal vehicle to resolve the question presented. Not only did Petitioner preserve it at every stage, the Ninth Circuit issued a published opinion further entrenching its incorrect approach. The Ninth Circuit's fact-finding in this case was also particularly egregious because it not only determined that prosecutors did not discriminate at step three—it made the *underlying findings of fact* that this determination rested on (and blatantly erred in these findings). This case therefore squarely raises the question presented.

This is an important issue because the Ninth Circuit's outlier approach undercuts the fairness of the jury selection process. 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 means that either a juror and one party are denied equal protection or the other party is unfairly impugned as racist.

Finally, the Ninth Circuit's approach is flatly contrary to this Court's precedent. This Court has "frequently" reminded 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 "failed to make a finding because of an erroneous view of the law," remand to the trial court for it to resolve the factual dispute is "required." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 268 (2015) (quotations omitted). This rule is particularly appropriate in *Batson* cases, where the "best evidence of the intent of the attorney exercising a strike is often that

attorney's demeanor." *Thaler v. Haynes*, 559 U.S. 43, 49 (2010). Because an appellate court is especially ill-suited to make factual findings about alleged discriminatory motives and the facts underlying them, the Court should move swiftly to correct the Ninth Circuit's erroneous approach.

OPINION BELOW

A three-judge panel of the Ninth Circuit affirmed Mr. Hernandez-Garcia's conviction in a published opinion. *See United States v. Hernandez-Garcia,* 32 F.4th 1207 (9th Cir. 2022) (attached here as Appendix A). The panel then amended its opinion on other grounds, and both the panel and the full court denied Mr. Hernandez-Garcia's petition for panel rehearing and rehearing en banc. *See United States v. Hernandez-Garcia*, 44 F.4th 1157 (9th Cir. 2022) (attached here as Appendix B).

JURISDICTION

On May 4, 2022, the Court of Appeals denied Mr. Hernandez-Garcia's appeal and affirmed his conviction. *See* Appendix A. Mr. Hernandez-Garcia then filed a petition for panel rehearing and rehearing en banc, which the Court of Appeals denied on August 17, 2022. *See* Appendix B. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

In October 2019, Border Patrol agents arrested Petitioner near the U.S./Mexico border and charged him with attempting to illegally reenter the United States under 8 U.S.C. § 1326. The case proceeded to trial.

As part of the jury selection process, jurors were asked to fill out a short questionnaire with their name, place of residence, occupation, family information, prior jury experience, and military service. During voir dire, the trial court asked each juror to read their answers aloud. One potential Asian-American juror, Jocelyn Del Rosario, gave the following answers:

> My name is Jocelyn Del Rosario, and I reside in San Diego, I am a research scientist for Bristol Myers Squibb. And I am not married and I have no children. I did preside in a civil and a criminal case about 20 years ago. The criminal case ended in a hung jury, and the civil case reached a verdict. My family members are not in the law enforcement. And I have not served in the military.

C.A. E.R. 59. Another potential Asian-American juror, Brian Sanqui, gave the following answers:

> My name is Brian Sanqui. I reside in Poway. I am a software developer. I do not have a spouse or children. I have never served on a jury previously. I do not work in law enforcement, and I do not have any family members who work in law enforcement. And I have never served in the military.

C.A. E.R. 65. Prosecutors struck both Ms. Del Rosario and Mr. Sanqui, as well as one other Asian-American juror.[1]

Petitioner raised a *Batson* challenge to these strikes. Under step one of the *Batson* test, he first had to establish a "prima facie" case of discrimination. *Batson*, 476 U.S. at 94–97. To do so, Petitioner pointed out that prosecutors had used four of their seven strikes against people of color, three of whom were Asian-Americans.

[1] The third Asian-American juror stated that she previously testified against a Border Patrol officer and made negative comments about being directed to secondary inspection at a port of entry in the past. C.A. E.R. 39–40. Petitioner did not challenge this strike on appeal.

Because there were only "four or five Asian jurors in the venire," none of whom were eventually seated on the jury, Petitioner argued that the prosecutors' strikes "raise[d] an inference" of discrimination. C.A. E.R. 4.

Under step two, the prosecutors then had to articulate a race-neutral reason for their strikes. *See Batson*, 476 U.S. at 97–98. To justify their strike against Ms. Del Rosario, the prosecutors noted that she had previously served on a hung jury and that she was a "research scientist," which they "didn't like." C.A. E.R. 4. To justify a strike against juror Mr. Sanqui, prosecutors said he "appeared to be a loner" because "[t]he only thing he said during the inquiry was, 'I am a software developer, no spouse, no kids.'" *Id*. The prosecutor also noted that Mr. Sanqui "came in dressed in a hoodie." *Id*. Because he was "underdressed," and "based on his profession and lack of comments -- that was the basis for striking him." *Id*.

Under step three, the trial court then had to decide under a totality of the circumstances whether the prosecutors' peremptory strikes were discriminatory. *See Batson*, 476 U.S. at 98 n.21. But rather than conduct a step-three analysis, the court appeared to revert to step one, stating that it was "not prepared to find that there's a prima facie case that's been established[.]" C.A. E.R. 5.

The court then considered *different* reasons for striking the two jurors than the prosecutors themselves provided. For instance, the court found that it was a "valid explanation" that Ms. Del Rosario was "single, no children, previously served on a jury that did not reach a verdict." C.A. E.R. 5. But the prosecutors had not said that they struck Ms. Del Rosario because she was "single" with "no children."

Instead, they had claimed that they "didn't like" the fact that she was a "research scientist"—a fact that the trial court never mentioned or analyzed. C.A. E.R. 4.

The trial court then said that it was not an "illegitimate basis" to strike Mr. Sanqui, as he was "single" with "no children" and "no jury experience." C.A. E.R. 5. But again, the prosecutors had not said that they were striking Mr. Sanqui for any of these reasons. Rather, the prosecutors said they "mostly struck him because he appeared to be a loner." C.A. E.R. 4. They also said he was "underdressed," and, along with his "profession and lack of comments – that was the basis for striking him." *Id.*

Defense counsel then attempted to engage the court in a "comparative juror analysis," pointing out that there had been "multiple jurors" who said they had been on juries that did not reach verdicts. C.A. E.R. 5–6. She also pointed out that prosecutors had not struck multiple jurors who were single and had no children. C.A. E.R. 6. Without engaging in this comparative juror analysis, the district court simply responded, "The challenge is denied." *Id.*

At this point, even the prosecutor attempted to clarify the court's ruling, asking: "for the record, is the Court making a finding there is no purposeful discrimination?" *Id.* But the court again appeared to go back to step one, stating, "I have made a finding there's not a prima facie case. There's not discrimination." *Id.* It then denied the *Batson* challenge.

At trial, the selected jury then convicted Petitioner of illegal reentry. Petitioner filed an appeal with the Ninth Circuit challenging, *inter alia*, the trial

court's *Batson* ruling. In a published opinion, the Ninth Circuit affirmed the conviction. *See* Pet. App. A at 20.

In its opinion, the Ninth Circuit admitted that the trial court's *Batson* ruling was "not a paragon of clarity." Pet. App. A at 16. But it did not expressly hold that the court had erred. Rather, it "assume[d] without deciding that the district court erred" because the "*Batson* claim still fails under de novo review." Pet. App. A at 17 n.7. The Ninth Circuit then proceeded to determine "whether the stated reasons were the prosecutor's genuine reasons for exercising a peremptory strike." Pet. App. A at 17 (quotations omitted).[2]

But in making this determination, the Ninth Circuit did not review the trial court's factual findings—it made up its own. For instance, the court accepted the prosecution's characterization of Mr. Sanqui as a "loner" and used this to find no purposeful discrimination. Pet. App. A at 18–19. But the trial court itself had never found that Mr. Sanqui was a "loner." C.A. E.R. 5. And the Ninth Circuit cited no evidence in the record to support this conclusion. Pet. App. A at 18–19. For instance, the court did not claim that Mr. Sanqui's behavior was odd or anti-social, as in the case the court itself relied on. *See* Pet. App. A at 19 (citing *United States v. Daly*, 974 F.2d 1215, 1219 (9th Cir. 1992), involving a juror who "sat stone-faced

[2] The Ninth Circuit claimed that Petitioner "urge[d] us" to undertake this fact-finding role and that the panel "indulge[d]" his request. Pet. App. at 19 n.9. But Petitioner asked the court to conduct de novo review at step three *or* remand for the trial court to do so. *See* Petitioner's Reply Brief at 21. He also pointed to this circuit split and reserved the right to argue that the Ninth Circuit's "de novo" approach was improper. *Id.* Furthermore, Petitioner argued in his petition for rehearing en banc that the Ninth Circuit should reexamine its position as the only circuit that conducts fact-finding at *Batson* step three. Petitioner's Petition for Rehearing at 20–22.

when everyone else in the room laughed at a humorous situation"). Rather, the Ninth Circuit simply assumed as a factual matter that Mr. Sanqui *was* a loner. Pet. App. A at 18–19.

The Ninth Circuit made other fact-finding errors. For instance, the court claimed that "the prosecution did not strike Mr. Sanqui because of his profession" and thus refused to conduct a comparative juror analysis on this issue. Pet. App. A at 19 n.9. But the record showed the prosecutor himself said that "based on [Mr. Sanqui's] *profession* and lack of comments – that was the basis for striking him." C.A. E.R. 4 (emphasis added). In other words, the Ninth Circuit made a factual finding about the prosecutor's reasons for the strike that *directly* contradicted the prosecutor's own explanation.

The Ninth Circuit also refused to conduct a comparative juror analysis as to either juror. Pet. App. A at 18–19. It did not consider that prosecutors failed to strike eight other non-Asian-American jurors who worked in science and technology—five of whom ultimately served on the jury. C.A. E.R. 46, 47, 49, 50, 51, 54, 55, 59, 77. It did not consider that prosecutors failed to strike nine other non-Asian-American jurors who were single with no children. C.A. E.R. 4, 57, 62, 63, 66, 68, 69, 70, 71. And it refused to consider the fact that prosecutors did not strike four other non-Asian-American jurors who had served on hung juries. Pet. App. A at 18. The Ninth Circuit then concluded that Petitioner had "failed to prove that the prosecution racially discriminated" against Asian-Americans. Pet. App. A at 20.

Petitioner filed a petition for panel and en banc rehearing. In this petition, he argued that the Ninth Circuit had made legal and factual errors in its *Batson* analysis. Particularly in light of the factual errors, Petitioner contended that the court should reexamine its position as the only circuit that conducts fact-finding at the third *Batson* step. Although the Ninth Circuit amended its decision to make several minor legal corrections, it denied the petition for rehearing and the request to examine its prior precedent allowing for fact-finding. *See* Pet. App. B. at 3. This petition follows.

REASONS FOR GRANTING THE PETITION

I.

The Ninth Circuit—unlike every other Court of Appeals—resolves factual *Batson* questions on a de novo standard of review.

In cases where a trial court has legally erred at the third step of the *Batson* framework, appellate courts must decide whether to conduct the fact-finding itself or remand for the trial court to do so. The Ninth Circuit stands alone in holding that it may resolve such factual questions in the first instance—a lopsided inter-circuit split that only this Court can resolve.

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

When a trial court legally errs in applying *Batson*'s third step, 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").

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 but "conflated steps two and three" of the analysis by incorrectly placing the burden of persuasion on defense counsel. *Id.*

at 47. 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. *See 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).

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).

This is also consistent with the Seventh Circuit's approach. 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 without determining whether the prosecutor's reason was pretextual. Faced with this "evidentiary gap," the court did not conduct appellate fact-finding and fill the gap itself. Rather, it 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) (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").

Nor does the Fifth Circuit 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.*

As these cases show, courts of appeals confronted with legal error in the *Batson* context do not make factual findings under the correct legal standard. Instead, they almost uniformly remand for the trial court to do so.

B. The Ninth Circuit—and only the Ninth Circuit—conducts its own fact finding when the trial court legally errs at *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" is the Ninth Circuit. *See Alvarez-Ulloa*, 784 F.3d at 565–66.

The Ninth Circuit first seized this purported authority in *United States v. Alanis,* 335 F.3d 965 (9th Cir. 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." *Id.* 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 without proceeding to step three. *Id.*

The Ninth Circuit reversed. The court first determined that the trial court had erred by simply 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 sign of retreating from this self-created rule of discretionary fact-finding. In cases of *Batson* error, the court continues to review the record *de novo*, weigh competing pieces of evidence, and make a factual finding

about purposeful discrimination. *See, e.g., 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).

In short, while other circuits unanimously hold that remand is the appropriate course, the Ninth Circuit has doubled down on its outlier fact-finding position. Because this split will not resolve itself, the Court should intervene to provide a uniform rule among the circuits.

II.

Petitioner's case is an excellent vehicle and presents an egregious example of the Ninth Circuit's incorrect approach.

Petitioner's case provides an excellent vehicle for this Court to resolve the circuit split. The Ninth Circuit decided Petitioner's case in a published opinion that further entrenches its overreaching approach to fact-finding. *See* Pet. App. A. And Petitioner specifically preserved this issue before the three-judge panel and again in his petition for rehearing en banc. Yet the Ninth Circuit expressly declined his invitation to reconsider a position that has put it at odds with every other circuit. *See* Pet. App. B at 3.

This case also presents an even more egregious example of appellate fact-finding than the Ninth Circuit's prior cases. Here, the Ninth Circuit not only concluded that prosecutors did not discriminate at step three—it actually made the underlying findings of fact that this determination rested on. For instance, prosecutors claimed that they struck Mr. Sanqui in part because he was a "loner." C.A. E.R. 4. The Ninth Circuit accepted this characterization and assumed Mr. Sanqui *was* a "loner," even though the trial court had never made such a finding below. C.A. E.R. 4–6; Pet. App. A at 18–19.

But there was good reason to be skeptical of this characterization. Nothing in the record suggested that Mr. Sanqui's behavior was odd or anti-social. Nor did prosecutors claim it was. Rather, prosecutors called him a "loner" based solely on his "lack of comments" during voir dire. C.A. E.R. 4.

But a "lack of comments" does not make someone a "loner." Jurors were simply asked to read the answers to their juror questionnaire, which some did more succinctly than others. And even if a "lack of comments" during voir dire *could* make someone a "loner," the defense pointed out that at least six other non-Asian-American jurors had given *shorter* voir dire responses than Mr. Sanqui. Pet. App. A at 19 ("According to Hernandez-Garcia, Mr. Sanqui's 58-word response was longer than at least six non-Asian jurors whom the prosecution did not strike[.]"). But the Ninth Circuit ignored this, simply stating that "[s]triking a perceived 'loner' is permissible because 'a loner may hamper the jury's ability to reach a unanimous verdict.'" Pet. App. A at 19 (quoting *Daly*, 974 F.2d at 1219). In other words, the

Ninth Circuit relied on an illogical inference to make the *first* finding of fact (that Mr. Sanqui's "lack of comments" made him a "loner") and then relied on this conclusion to make a *second* finding of fact (that the prosecutor's reasons were not pretextual).

Not only did the Ninth Circuit layer its questionable findings of fact, it did so by contradicting the prosecutors' own words. For instance, the panel claimed that "the prosecution did not strike Mr. Sanqui because of his profession" and thus refused to conduct a comparative juror analysis on this issue. Pet. App. A at 19 n.9. But the record showed the prosecutor himself stated, "based on his *profession* and lack of comments – that was the basis for striking him." So the Ninth Circuit made a factual finding about the prosecutor's reasons for striking Mr. Sanqui that was the complete opposite of what the prosecutor actually said.

These errors show precisely why this Court has admonished courts of appeal "not to decide factual questions de novo." *Taylor*, 477 U.S. at 145. Because this case shows the dangers of appellate fact-finding and provides an excellent vehicle to correct the Ninth Circuit's overreach, the Court should use it to resolve the question presented.

III.

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

The stakes of a *Batson* challenge makes its adjudication especially important. 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 their credibility. *See Kimbrel*, 532 F.3d at 468. Nor can an appellate court evaluate the demeanor and conduct of jurors themselves—such as whether a juror appears to be a "loner." Pet. App. A at 18–19. The Ninth Circuit's rule, then, undermines the fair administration of justice. 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.

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 is inconsistent with this Court's precedent on appellate fact-finding, as well as *Batson*.

"'Factfinding,'" this Court has stated, "'is the basic responsibility of district courts, rather than appellate courts[.]'" *Pullman-Standard v. Swint*, 456 U.S. 273, 291–92 (1982) (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; *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 v. Cockrell*, 537 U.S. 322, 339 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)); *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 v. Elem*, 514 U.S. 765, ~~at~~ 768 (1995). 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* 335 F.3d at 969. Since *Alanis*, the court has never attempted to reconcile this holding with the Court's precedent. And here, when Petitioner asked the court to reconsider its outlier position in his petition for rehearing en banc, the Ninth Circuit declined to do so without comment. *See* Pet. App. B at 3.

In short, the Ninth Circuit's appellate fact-finding rule is inconsistent with this Court's precedent. No justification for it 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." *Rice v. Collins*, 546 U.S. 333, 335 (2006) (reversing the Ninth Circuit on a *Batson* issue in a unanimous opinion).

CONCLUSION

To correct the Ninth Circuit's outlier position, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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