No. _____

In The
Supreme Court of the United States

LUIS ANGEL CRUZ-CRUZ,
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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the trial of Luis Angel Cruz-Cruz, a prosecutor used a peremptory strike to keep a Latino man off the jury. The prosecutor said that he preferred an otherwise similar juror because she was (1) married and (2) an "Asian female."

The question is whether the *express* citation of race or gender as a reason for a peremptory strike means that the proponent did not provide a race- or gender-neutral explanation under *Batson v. Kentucky*, 476 U.S. 79 (1986), and thus was "motivated in substantial part by discriminatory intent," *Flowers v. Mississippi*, 588 U.S. 284, 303 (2019).

RELATED PROCEEDINGS

United States v. Cruz-Cruz, No. 22-50111, 2024 WL 3177787 (9th Cir. June 26, 2024).

United States v. Cruz-Cruz, No. 3:22-cr-1009-JO-1 (S.D. Cal. 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Luis Angel Cruz-Cruz respectfully prays that the Court issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unpublished panel decision of the court of appeals—amended following a petition for rehearing en banc—is available in the Westlaw database at 2024 WL 3177787 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a–7a. The Ninth Circuit's order denying en banc review and amending the panel decision also is available at 2024 WL 3177787 and is reprinted at Pet. App. 8a–9a. The relevant district court proceedings are unpublished and reprinted at Pet. App. 10a–17a.

JURISDICTIONAL STATEMENT

The Court of Appeals first entered judgment on December 8, 2023. *See* Pet. App. 8a. On June 26, 2024, following a timely petition for rehearing en banc, the panel amended one sentence in its decision; again affirmed Mr. Cruz-Cruz's conviction; and denied rehearing en banc. Pet. App. 7a–9a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

INTRODUCTION

More often than one would expect, lawyers let the cat out of the bag. In defending peremptory strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986), they admit that race or gender was a reason for the strike. And perhaps also more than one would expect, appellate courts are divided about what comes next.

The First Circuit and most state appellate courts to address the issue agree that once the lawyer expressly cites a prohibited ground, the strike is per se invalid under *Batson*—even if the lawyer also gave race- or gender-neutral reasons. *E.g.*, *Porter v. Coyne-Fague*, 35 F.4th 68, 82 (1st Cir. 2022); *Hart v. State*, 310 A.3d 1157, 1176–77 (Md. App. Ct. 2024). And that is so, they reason, because the lawyer failed to provide a race- or gender-neutral basis for the strike under the second step of *Batson*'s three-step framework to determine if a strike is discriminatory.[1]

By contrast, most federal courts of appeals and some state courts hold that the express citation of race or gender does not end the *Batson* inquiry. At least five circuits hold that the strike's proponent still can prove, at *Batson*'s third step, that the strike would have occurred without the prohibited ground. *E.g.*, *United States v. Douglas*, 525 F.3d 225, 239 (2d Cir. 2008). The Eleventh Circuit has suggested that especially is so when discrimination is used "to obtain a racially diverse jury."

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[1] That three-step process requires that:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster v. Chatman, 578 U.S. 488, 499–500 (2016).

United States v. Allen-Brown, 243 F.3d 1293, 1298 n.2 (11th Cir. 2001). Meanwhile, the Ninth Circuit and at least two state supreme courts hold that the strike's proponent can still prove that the strike was not substantially motivated by discriminatory intent—despite the express citation of race. *E.g.*, *People v. Johnson*, 549 P.3d 985, 997 (Colo. 2024). Finally, the Fifth Circuit holds that a *Batson* challenge can succeed only when the opponent of a strike demonstrates that *every* racially neutral explanation was mere pretext—despite the express citation of race. *See, e.g.*, *Sheppard v. Davis*, 967 F.3d 458, 472 (5th Cir. 2020).

This entrenched division is untenable. *Batson*'s purpose is to not just preserve the rights of litigants and jurors, but to maintain the public image of the judiciary. That is not possible if lawyers can expressly discriminate in some jurisdictions but not others.

Mr. Cruz-Cruz's case provides the right vehicle to resolve this division. The prosecutor said that he preferred one juror over another in part because she was an "Asian female." Pet. App. 15a. That error is preserved and is outcome-determinative. It also was not a slip of the tongue. Before the Ninth Circuit's panel and in opposing rehearing en banc, the U.S. Attorney's Office for the Southern District of California argued that the prosecutor's comments were lawful because he expressed a racial preference in *favor* of an "Asian female," *id.*, rather than *against* a Latino man. In other words, this case offers a chance not just to address one case, but also the federal government's view of the law.

The Ninth Circuit's approach to *Batson* is wrong. Citing race is not race neutral. Citing gender is not gender neutral. To conclude otherwise would give new life to the unseemly idea that one's race or gender has *any* bearing on one's fitness as a juror. The Court has not hesitated to intervene when lower courts try to sidestep *Batson* in the name of upholding a conviction. It must do so again.

STATEMENT OF THE CASE

Luis Cruz-Cruz took the wrong turn of a lifetime. While driving south near San Diego, Mr. Cruz-Cruz, then twenty-eight years old, missed his exit on Interstate 5. He had no option but to continue into Mexico.[2] After he tried to reenter the United States with his valid driver's license from Washington state, the federal government charged him with lying to the government, *see* 8 U.S.C. § 1001, and being a noncitizen who attempted to improperly enter the country through willful misrepresentation, *see* 8 U.S.C. § 1325(a)(3). At stake was the stable life—including his twin children and their mother—that he had built since he came to America as a teenager.

At trial, the government accused Mr. Cruz-Cruz of willfully misstating to a border guard that he had a U.S. passport. Mr. Cruz-Cruz's defense was simple: He said no such thing. The jury acquitted him of lying to the government, a felony, yet

[2] Although accidentally leaving the United States might strike one as odd, San Diego's motorists often are warned of that very real risk. E.g., Chris Jennewein, *Don't End Up In Mexico by Mistake: Last Freeway Exit Closing for Upgrades*, TIMES OF SAN DIEGO (June 6, 2022), https://timesofsandiego.com/life/2022/06/06/dont-end-up-in-mexico-bymistake-last-freeway-exit-closing-for-repairs/.

nonetheless convicted him of trying to enter the country through a lie, a misdemeanor. *See* Pet. App. 18a.

That single conviction rests on the prosecution's express statement during voir dire that he preferred a juror because she was an "Asian female." *See* Pet. App. 15a. Here is how that statement came about.

The venire included fifty prospective jurors. Appellant's Opening Brief at 7, *United States v. Cruz-Cruz*, No. 22-50111, 2024 WL 3177787 (9th Cir. June 26, 2024). Just more than 20% of them had Latino surnames. *Id.* That included Jared Carrillo, also known as prospective juror number 22. *Id.* Mr. Carrillo was young and lived in Carlsbad, a San Diego suburb known for its beaches. *Id.* He was unemployed, unmarried, and did not have children. *Id.* He had never served as a juror. *Id.* He said that he could "be fair and impartial." *Id.*

When given the chance to make its six peremptory strikes, the prosecution used half of them on people with Latino surnames. *Id.* at 9. Mr. Cruz-Cruz's trial lawyers challenged the strike against Mr. Carrillo. Pet. App. 10a. There was no way to explain it, his lawyer argued, other than race. *Id.* Mr. Carrillo, for example, had not raised his hand in response to a single follow-up question from the court about potential biases and did not receive any questions from the lawyers during voir dire. *See id.*

The court asked about the "race makeup of the jurors" who were seated. Pet. App. 11a. The defense acknowledged that, among other jurors, there were two Hispanic females. App. 11a. Nevertheless, the court asked the prosecutor to provide

a "race-neutral reason" for striking Mr. Carrillo under "step two" of the *Batson* framework. This was the prosecutor's initial response:

> It was really, sort of, [an] accumulation of factors that led us to proceed. He may lack experience, which would make it difficult to make the decision to convict or not convict in jury service. And it's a lot of the factor[s] that Defense counsel— he appeared to be young. He's single. He has no children. He's unemployed. And he's never been on a jury before. So it's really the accumulation of those factors with his age that led us to be concerned he may have l[ac]ked—lacked the likely experience of making tough choices and gave us concern about whether he would be able to, sort of, come to a decision in deliberations.

Pet. App. 12a.

Mr. Cruz-Cruz's lawyers responded that various empaneled jurors shared the traits that, apparently, engendered the government's strike of Mr. Carrillo. *See* Pet. App. 13a–14a.

The defense highlighted Hui Liu, prospective juror number 10. Pet. App. 13a– 14a. She too was "younger." Pet. App. 13a. She too was unemployed. Pet. App. 4a. She too lacked children. *Id.* She too had never been on a jury. *Id.* The only apparent difference from Mr. Carrillo—besides Ms. Liu's race and sex—was that she was married to a husband whom she described as "self-employed." Pet. App. 4a–5a. Yet the government did not strike her from the jury.

Given those inconsistencies, the court asked if the prosecutor wanted to withdraw his strike of Mr. Carrillo. Pet. App. 14a. He declined and doubled down. *Id.* As for Ms. Liu, the prosecutor said that:

> *[S]he also was an Asian female. We—I believe she maybe had an accent*. She has experience crossing the border that we may use in this case. [She] [h]ad likely used a passport to travel internationally and dealt with the immigration system that we believe would be relevant

to bear on this case.

Pet. App. 15a.

Nothing in the record indicated that Ms. Liu had experience crossing the border or that she used a passport to travel internationally. Nothing indicated that she had ever dealt with the immigration system. In other words, the prosecution relied on racial stereotypes after expressly citing race.

The district court then detailed its *Batson* analysis. At *Batson*'s first step, it found that Mr. Cruz-Cruz made a prima facie showing "that the challenge was . . . possibly based on a racial ground." Pet. App. 16a.

But at Batson's second step, the court then found that, the government offered a "race[-]neutral reason" for striking Mr. Carrillo. *Id.* It made no mention of the prosecutor's "Asian female" comment.

Finally, under "step three," the court found that the prosecutor's strike was not "purposeful racial discrimination." *Id.* And that was so, the court reasoned, because the prosecutor ultimately was concerned about Mr. Carrillo's lack of "life experience to draw on." *Id.* The court also reasoned that various races were represented on the jury, even if it was not a "perfect mix." Pet. App. 17a.

Mr. Cruz-Cruz timely appealed. He argued that because the prosecutor expressly cited race when striking Mr. Carrillo, the Ninth Circuit—reviewing de novo—must hold that the prosecutor failed to satisfy *Batson*'s second step of offering race-neutral reasons for the strike. *See* Pet. App. 3a. Consequently, race per se played a substantial part in the decision to strike Mr. Carrillo. *See id.* He also

argued that the district court erred in concluding that the prosecutor satisfied *Batson*'s third step. *See* Pet App. 4a–5a.

The Ninth Circuit affirmed in a memorandum disposition issued without oral argument. *See* Pet. App. 1a. At first, the panel allowed that "the district court might have concluded that the prosecution's comment concerning Juror 10 [Ms. Liu] reflected an underlying bias."[3] *See* Pet. App. 8a. But it held that the district court did not "clearly err[]" in finding that the prosecutor was not motivated by race because Mr. Cruz-Cruz had not provided "additional evidence refuting the prosecution's race-neutral reasons" for the strike. *See id.* The memorandum made that holding in addressing *Batson*'s second step. *See id.*; Pet. App. 4a.

Mr. Cruz-Cruz sought rehearing or, in the alternative, rehearing en banc. He argued that the panel contravened precedent and fostered a circuit split by holding that a prosecutor could *expressly* cite race as a reason for a strike. He also argued that the panel applied the wrong standard of review in assessing whether the prosecutor provided a racially neutral explanation for the strike under *Batson*'s second step, which is reviewed de novo. *See* Pet. App. 4a.

The Ninth Circuit ordered the government to respond to the petition for rehearing en banc. Four months later, the panel declined rehearing and amended a sentence in its memorandum. Pet. App. 8a–9a. It deleted the suggestion that "the district court might have concluded that the prosecution's comment concerning Juror 10 reflected an underlying bias," but that Mr. Cruz-Cruz did not show clear

[3] As discussed below, the panel deleted this sentence from the amended opinion. Pet. App. 8a.

error. Pet. App. 8a. In that sentence's place, the panel wrote: "To the extent that Cruz's arguments are directed at *Batson*'s second step, we review those arguments de novo, and find that the prosecutor proffered race-neutral reasons for striking Juror 22." Pet. App. 4a.

Mr. Cruz-Cruz petitions the Court for review.

REASONS FOR GRANTING THE WRIT

Federal and state appellate courts are increasingly divided on how to handle a surprisingly common fact pattern: What happens when a prosecutor cites race or gender as one of several reasons for a peremptory strike? That question is worthy of the Court's attention. Trial judges, attorneys, jurors, and litigants must know what is fair game when lawyers engage in the critical and delicate task of determining who can serve on a jury.

The Court should use this case to resolve that split. Mr. Cruz-Cruz squarely presents the issue, which is outcome determinative for a conviction that affects Mr. Cruz-Cruz's immigration eligibility. The prosecutor's error here also appears to reflect not just a stray comment, but the view of a key U.S. Attorney's Office on the Southern Border. Meanwhile, the Ninth Circuit's approach is indefensibly wrong.

I. Federal and state appellate courts are divided on the consequence of a lawyer expressly citing race or gender as a reason for a peremptory strike.

Federal and state appellate courts are stuck in a four-way split over what to do when a prosecutor expressly cites race or gender. That division has shown no signs of resolving itself, even after the Court's clear, five-year-old holding that a

lawyer violates *Batson* if he or she "was 'motivated in substantial part by discriminatory intent.'" *Flowers v. Mississippi*, 588 U.S. 284, 303 (2019) (quoting *Foster v. Chatman*, 578 U.S. 488, 513 (2016)). To the contrary, the divergent approaches have become more entrenched.

A. The First Circuit, numerous state appellate courts, and the Court of Appeals for the Armed Forces hold that once a lawyer expressly cites race or gender as a reason for a strike, that strike is per se invalid under *Batson*.

The First Circuit, at least six states' appellate courts, and the U.S. Court of Appeals for the Armed Forces hold that a peremptory strike is per se invalid if a lawyer cites race or gender.

In *Porter v. Coyne-Fague*, 35 F.4th 68, 72 (1st Cir. 2022), "the only black person in the venire" expressed concerns about serving on the jury. That was because he worked at a state hospital where there was much chatter about the case among both patients and staff. *Id.* The potential juror worried that he would face hostile treatment at work regardless of the verdict. *Id.* But, pressed by the judge, the juror confirmed that any risk of workplace retaliation would not affect his decision-making. *Id.*

The prosecutor nonetheless struck the juror. *Id.* At first, the prosecutor gave a race-neutral explanation: The juror worried that he would face "blow-back" at work over the verdict. *Id.* Then the prosecutor started talking about race. *Id.* The prosecutor said that he also was worried that the prospective juror is "a member of *the African-American community*, the defendant at the bar is a member of *the*

African-American community, he's the only one on the panel who is, and if he were to vote guilty there could be consequences to it." *Id.* (emphases added).

The First Circuit concluded that "the *Batson* violation leaps off the page." *Id.* at 81. It held that the prosecutor's explicit citation of race made the explanation "inherently discriminatory and, thus, not race-neutral under *Batson*'s second step." *Id.* at 82. It reasoned that once "the trial court already has found a prima facie case of discrimination at step one, the prosecutor's failure to put forth a neutral explanation for his strike at step two will consummate the constitutional violation and the petitioner's conviction will be set aside." *Id.*

The Appellate Court of Maryland recently adopted that view, too.[4] In *Hart v. State*, the defendant accused the prosecutor of keeping men off the jury. 310 A.3d 1157, 1161 (Md. App. Ct. 2024). The prosecution first responded that it struck one man because he was sleeping and another because "it had no information about him." *Id.* But the prosecution also admitted that it struck the men because it wanted "diverse gender." *Id.* at 1161 n.3.

That was a bell that could not be unrung. After conducting an exhaustive survey of other courts, the court held that once "the proponent of the strike ha[s] admitted that the strike was based, in part, on an impermissible consideration, such as race, gender, or ethnicity[,] . . . a peremptory strike is per se invalid." *Id.* at

[4] Published opinions from the Appellate Court of Maryland are binding statewide unless overturned by the Maryland Supreme Court. *Appellate Court of Maryland*, MARYLAND COURTS, https://www.courts.state.md.us/acm (last visited Sept. 3, 2024). It does not appear that Maryland sought further review in *Hart*. *See Petitions for Writ of Certiorari*, MARYLAND COURTS, https://www.mdcourts.gov/scm/petitions (last visited Sept. 9, 2024).

1177. That is because "when the proponent of a strike admits that it exercised the strike in part for an impermissible reason, the proponent has not truly advanced a 'neutral' reason for the strike." *Id.* Rather, "[t]o be 'neutral,' within the meaning of *Batson*, a strike cannot be based on *any* impermissible criteria." *Id.*

Maryland is not alone. A broad cross-section of states agree that "where racially-neutral and neutrally-applied reasons are given for a strike, the simultaneous existence of any racially motivated explanation results in a *Batson* violation." *Lingo v. State*, 437 S.E.2d 463, 467 (Ga. 1993); *see also Clayton v. State*, 797 S.E.2d 639, 645 (Ga. Ct. App. 2017) (holding that remains Georgia law). That cross-section also includes Alabama,[5] Arizona,[6] Virginia,[7] and South Carolina.[8] Ohio's intermediate appellate court covering Cincinnati recently joined that chorus. *See State v. Saunders*, 162 N.E.3d 959, 963 (Ohio Ct. App. 2020) (holding that the "state's racial motivation, however, is not excused or made any less discriminatory because one aspect of the explanation was on its face race[-]neutral").

The U.S. Court of Appeals for the Armed Forces, then known as the U.S. Court of Military Appeals, succinctly explained that logic when it adopted the same

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[5] *Ex parte Sockwell*, 675 So. 2d 38, 40–41 (Ala. 1995) (holding that a strike may not "be upheld if it is based only partly on race, that is, if the prosecutor articulates both a racially motivated reason and a race-neutral reason for a strike").

[6] *State v. Porter*, 491 P.3d 1100, 1106 (Ariz. 2021) (holding that a "a race-neutral justification for a strike does not remedy a discriminatory reason").

[7] *Coleman v. Hogan*, 486 S.E.2d 548, 550 (Va. 1997) (holding that "peremptory strikes have not been upheld because one proffered reason was constitutionally acceptable even though another reason for the strike was constitutionally infirm").

[8] *Payton v. Kearse*, 495 S.E.2d 205, 210 (S.C. 1998) (holding that "[o]nce a discriminatory reason has been uncovered—either inherent or pretextual—this reason taints the entire jury selection procedure"); *see also* R*obinson v. Bon Secours St. Francis Health Sys., Inc.*, 675 S.E.2d 744, 746 n.3 (S.C. 2009).

position. "[A]n explanation, which includes 'in part' a reason, criterion, or basis that patently demonstrates an inherent discriminatory intent, cannot reasonably be deemed race neutral." *United States v. Greene*, 36 M.J. 274, 280 (C.M.A. 1993).

Thus, the First Circuit, numerous state appellate courts, and the Court of Appeals for the Armed Forces hold that once a party expressly cites a discriminatory purpose in a peremptory strike, that taints any non-discriminatory reasons, and the strike contravenes *Batson*.

B. At least five federal courts of appeals and some state appellate courts hold that a strike violates *Batson* only when race or gender supplies the but-for cause of the strike.

By contrast, at least five federal courts of appeals and some state appellate courts hold that a party can cite an improper reason for a peremptory strike, so long as discrimination is not the but-for cause of the strike. This "dual motivation" analysis is associated with the Second Circuit's decision in *Howard v. Senkowski*, 986 F.2d 24 (2d Cir.1993). That court holds that "the *Batson* claim should be rejected if the prosecutor persuades the court 'that the challenges would have been exercised for race-neutral reasons even if race had not been a factor.'" *United States v. Douglas*, 525 F.3d 225, 239 (2d Cir. 2008) (quoting *Howard*, 986 at 24).

Other circuits agree. In *Gattis v. Snyder*, the prosecutor struck "an older gentleman" because "it [was] the state's point of view that [it] would prefer to have some more women on the jury." 278 F.3d 222, 232 (3d Cir. 2002). But the prosecutor also expressed the "belie[f] that this juror was very, very conservative in his application of the possible application of the death penalty." *Id.*

The district court ruled that this did not violate *Batson*. The Third Circuit held that was not an unreasonable application of this Court's precedents because it "agree[d] with [the Second Circuit] and the other cases cited that mixed motive analysis is appropriate in this context." *Id.* at 235.

Likewise, the Fourth Circuit holds that even if a

> party admits[] that the strike has been exercised in part for a discriminatory purpose, the court must consider whether the party whose conduct is being challenged has demonstrated by a preponderance of the evidence that the strike would have nevertheless been exercised even if an improper factor had not motivated in part the decision to strike.

Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995). So too has the Eighth Circuit. *See United States v. Darden*, 70 F.3d 1507, 1531–32 (8th Cir. 1995) (holding that "[t]he court's decision to allow the strike on the basis of the several racially neutral reasons was equivalent to a finding that the prosecutor would have exercised the strike even without the one non-racially neutral motive").

Finally, the Eleventh Circuit has suggested that citing race is fair game so long as it is "to obtain a racially diverse jury" and "combined with a non-race based motivation." *United States v. Allen-Brown*, 243 F.3d 1293, 1298 n.2 (11th Cir. 2001); *see also United States v. Tokars*, 95 F.3d 1520, 1533 (11th Cir. 1996).

At least some states agree. In *People v. Hudson*, the prosecution expressly acknowledged that the state was "looking for more men to balance out the jury," so it struck women. 745 N.E.2d 1246, 1253–54 (Ill. 2001). But the Illinois Supreme Court held that was not necessarily a constitutional violation, so long as "the State would have struck [the juror] even in the absence of the gender-related motivation."

Id. at 1258. The top Texas court for criminal appeals concluded the same. *See Guzman v. State*, 85 S.W.3d 242, 244 (Tex. Crim. App. 2002) (en banc) (holding "that when the motives behind a challenged peremptory strike are . . . both impermissible (race or gender-based) and permissible (race and gender-neutral), if the striking party shows that he would have struck the juror based solely on the neutral reasons, then the strike does not violate" *Batson*).

Thus, at least five federal circuits and some state appellate courts squarely hold that when a party expressly cites race or gender to justify a strike, that does not violate *Batson* so long as it is not the strike's but-for cause.

C. The Ninth Circuit and some state supreme courts hold that a lawyer's express citation of race or gender does not necessarily mean that a strike was motivated in substantial part by discriminatory intent.

Meanwhile, the Ninth Circuit and some state courts have adopted what—at first blush—resembles a middle path. Citing this Court's precedents, they recognize that a lawyer violates *Batson* when a strike was "motivated in substantial part by discriminatory intent." *Cook v. LaMarque*, 593 F.3d 810, 815 (9th Cir. 2010). But as this case and others show, that appears to give lawyers nearly the same ability to cite race or gender as the "dual motivation" approach discussed above.

For example, here, the Ninth Circuit did not dispute that the prosecutor "expressly justified keeping a[] person on the jury because of her race." Pet. App. 3a. Yet it concluded that this did not make for a *Batson* violation because "the prosecutor asserted a number of race-neutral traits" as well for striking a similar

Latino man. *Id.* at 4. It apparently mattered not that the "Asian female," Pet. App. 15a, shared almost all of those traits, Pet. App. 13a–14a.

And although this case was decided in an unpublished disposition, the Ninth Circuit's published opinions allow for the same result. In *Kesser v. Cambra*, the prosecutor struck a woman he described as a "darker skinned female" because "she worked for a tribe, and [the prosecutor] feared that she was inclined to favor Native American culture and institutions over 'the mainstream system.'" 465 F.3d 351, 353 (9th Cir. 2006) (en banc). He also cited his belief that "Native Americans were 'resistive' and 'suspicious' of the criminal justice system." *Id.* But the prosecutor also gave some race-neutral reasons, such as that he thought the woman was "pretentious," "self-important," "unstable," and someone who "would be easily swayed by the defense." *Id.* at 354.

The Ninth Circuit reversed and granted the writ of habeas corpus, but only after taking the case en banc. *Id.* at 353. Even then, the majority suggested that the prosecutor's race-based reason did not per se taint his race-neutral reasons. Rather, it held that reversal was required because "an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor's nonracial grounds, compelling the conclusion that his actual and only reason for striking [the woman] was her race." *Id.* at 360. In other words, the majority's analysis suggested that parties may expressly cite race *if* their non-racial reasons survive judicial scrutiny. Meanwhile, two concurrences and a dissent debated what

to do about the prosecution's *express* citation of race. *See id.* at 371 (Wardlaw, J., concurring); *id.* at 376 (Berzon, J., concurring); *id.* at 377 (Rymer, J., dissenting).[9]

At least two state appellate courts also agree that the "motivated in substantial part" test permits some express discussion of race and gender.

In an Idaho sex-abuse case, a prosecutor admitted that he struck a man from the jury "in order to empanel an additional female." *State v. Ornelas*, 360 P.3d 1075, 1077 (Idaho Ct. App. 2015). But he also cited the struck juror's age, "his lack of life experiences, and the concern that he would be unable to identify with the victims because his child was only one year old." *Id.* Applying a "motivated in substantial part" analysis, the trial court denied the *Batson* challenge. *Id.* at 1078. The court of appeals affirmed.[10] *Id.* And that was because "[w]hile this impermissible statement is one factor in the district court's analysis, [it did] not find that statement to be dispositive." *Id.* at 1077.

The Colorado Supreme Court appears to have a similar understanding. In adopting the "motivated in substantial part test," it rejected a lower appellate court's conclusion that "a court must sustain a *Batson* challenge when the striking party gives both race-based and race-neutral reasons to support the strike." *People v. Johnson*, 549 P.3d 985, 997 (Colo. 2024).

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[9] To be sure, since *Kesser*, the Ninth Circuit has expressly rejected the "dual motivation" analysis in favor of the "motivated in substantial part by discriminatory intent" test. *Cook*, 593 F.3d at 815. But it has not explained in a published opinion how that test interacts with a lawyer's *express* citation of race or gender as a reason for a peremptory strike.

[10] Decisions from Idaho's court of appeals bind all courts in the state except Idaho's Supreme Court. *See State v. Guzman*, 842 P.2d 660, 665 (Idaho 1992).

Thus, the Ninth Circuit and at least two state supreme courts have concluded that, under the "motivated in substantial part by discriminatory intent" test, the express citation of race or gender as a reason for a peremptory strike does not necessarily taint that strike under *Batson*.

D. The Fifth Circuit holds that a *Batson* challenge can succeed only when the defendant "rebut[s] each of the prosecutor's legitimate reasons."

Finally, the Fifth Circuit holds that a *Batson* claim can succeed *only* when the strike's opponent proves that it was motivated *solely* by discriminatory intent. It has repeatedly held that "a *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons." *Sheppard v. Davis*, 967 F.3d 458, 472 (5th Cir. 2020); *see also Harper v. Lumpkin*, 64 F.4th 684, 697 (5th Cir.), *cert. denied*, 144 S. Ct. 429 (2023). At least two other circuits have held that this approach was not an unreasonable application of federal law at the time of the state court's decision, although they suggested that this approach is not compatible with current law. *See Washington v. Roberts*, 846 F.3d 1283, 1287 (10th Cir. 2017); *Akins v. Easterling*, 648 F.3d 380, 392 (6th Cir. 2011).

II. The division among the circuits and states demands the Court's attention because the use of peremptory strikes plays a critical function in all jury trials.

"[E]very day in federal and state criminal courtrooms throughout the United States," a jury is picked. *Flowers v. Mississippi*, 588 U.S. 284, 301 (2019). It is a big deal for all involved. For would-be jurors, "[o]ther than voting, serving on a jury is the most substantial opportunity that most [of them] have to participate in the

democratic process." *Id.* at 293. And for people facing court judgments or prison time, it is the only chance to determine the group of people who can most fairly decide their cases. As this Court has recognized repeatedly, that task is delicate and involves an incalculable number of judgments based on hard-earned experience. *See id.*; *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

Regardless of what standard the Court ultimately adopts, trial judges, litigants, and counsel need clear lines. The jury selection process is not akin to standard motion practice, much less a federal appeal or a petition for certiorari. Participants must make snap judgments without time for briefing. Thus, those actors need clear, administrable lines that can be followed with confidence.

Such clarity will not only facilitate practice before trial courts—and hopefully reduce federal appeals—but also guard the public image of the jury trial. One of *Batson*'s core functions is not just to "protect the rights of defendants and jurors," but also "to enhance public confidence in the fairness of the criminal justice system." *Flowers*, 588 U.S. at 301; *see also Miller-El*, 545 U.S. at 238 (holding that *Batson* protects "public confidence in adjudication").

But perceptions that a process is not administered equally across the Nation's courtrooms can undermine that confidence. *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 132 (2011) ("But the additional component of fair treatment by a decisionmaking authority matters as well—and matters independently, apart from

the effect that fair treatment has on fair and good outcomes."), *cited with approval in Rosales-Mireles v. United States*, 585 U.S. 129, 144 (2018).

The courts of appeals and states have struggled for too long about when—if ever—a lawyer can expressly cite race or gender as a consideration about who is qualified to serve on a jury. It is time for the Court to end that division.

III. Mr. Cruz-Cruz presents the right case to resolve the issue because the question is squarely presented, preserved, outcome-determinative, and reflects the federal government's apparent interpretation of *Batson*.

Mr. Cruz-Cruz's case presents the right vehicle to resolve this circuit split for at least four reasons.

First, the issue is squarely presented and preserved. Mr. Cruz-Cruz objected to the strike of a young Latino man as a potential juror, citing *Batson*. Pet. App. 10a. As a consequence, the prosecutor admitted that he preferred an otherwise similar juror *because* she was an "Asian female." Pet. App. 15a. Mr. Cruz-Cruz then argued that the strike and race-based explanation violated *Batson* before the Ninth Circuit, both at the panel stage and in seeking rehearing en banc.

Second, the question presented will determine the outcome of Mr. Cruz-Cruz's appeal. That is because a *Batson* violation resulting from a prosecutor's failure to provide a race-neutral reason for the strike requires that a conviction be vacated. *Batson*, 476 U.S. at 100.

Third, vacatur of Mr. Cruz-Cruz's misdemeanor conviction under § 1325(a)(3) would provide tangible benefits. So long as that conviction stands, Mr. Cruz-Cruz likely is deemed ineligible for a visa or admission into the United States. *See*

8 U.S.C. § 1182(a)(6)(C). Vacating that conviction would give him at least the chance to rejoin his family in the United States.

Finally, this case gives the Court the opportunity to correct the federal government's apparent understanding of *Batson*. Before the Ninth Circuit's panel and in opposing rehearing en banc, the government argued that there is no *Batson* issue in *preferring* jurors because of their race or gender. And that is so, the government reasons, because "*Batson*'s second step only requires race-neutral bases 'for *striking the jurors in question*,'—not for retaining other jurors." Answering Brief for United States at 24, *Cruz-Cruz*, 2024 WL 3177787 (No. 22-50111) (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)); *see also* United States Response to Petition for Rehearing En Banc at 5, *Cruz-Cruz*, 2024 WL 3177787 (No. 22-50111) ("As noted in our panel brief, step two only applies to the struck juror who is the actual subject of a *Batson* challenge—not retained jurors.").

The government appears either unaware—or unconcerned—that this position is at odds with basic discrimination doctrine. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2161 (2023) (holding that "a benefit provided to some" on the basis of race necessarily means discriminating against someone else on the basis of race). It also is at odds with *Batson* itself.[11] Thus, this case raises not just the issue of one prosecutor's comments, but a busy U.S. Attorney's Office's view of the law.

[11] Imagine if in the trial of a Black defendant, a prosecutor struck all Black people from the venire. But, in doing so, the prosecutor claimed that he had no problem with Black jurors, he just thought white jurors would be more likely to convict. The idea that *Batson* has nothing to say about that scenario would reduce its holding to a semantic game.

That all makes this case an excellent vehicle for the Court to resolve the question presented. The issue is preserved, outcome-determinative, may determine whether Mr. Cruz-Cruz is ever admissible under immigration law, and reflects not an isolated incident, but the federal government's troubling view of the law.

IV. The Ninth Circuit's interpretation of *Batson* is wrong.

There is one last important reason that the Court should grant Mr. Cruz-Cruz's petition: The Ninth Circuit is wrong. *Batson* does not—and cannot—permit a party to expressly cite race or gender as a reason for a strike. It is no answer that naked discrimination merely is cited as one reason among others. Expressly citing race or gender represents the sort of "backsliding" into "racial discrimination" that the Court has refused to sanction. *Flowers v. Mississippi*, 588 U.S. 284, 301–02 (2019). It cannot start now.

The Court should use Mr. Cruz-Cruz's case to hold that the express citation of race or gender per se invalidates a peremptory strike. That is because the strike's proponent has failed to provide a race- or gender-neutral explanation under *Batson*'s second step. Furthermore, if the proponent expressly cites a discriminatory reason, it necessarily follows that, under *Batson*'s third step, the strike was "motivated in substantial part by discriminatory intent."[12] *See id.* at 303. That rule

[12] The Appellate Court of Maryland recognized as much when it resolved *Hart* under *Batson*'s second step, but concluded that the result would be the same if it proceeded to step three. That is because when a party "admit[s] that it exercised the strike, in part, for an impermissible reason, such as race, gender, or ethnicity, it is difficult to imagine how a court could find anything other than that the impermissible consideration was a substantial motivating factor for the strike." 310 A.3d at 1176.

is most consistent with the Court's precedents, furthers *Batson*'s goal of eradicating the use of race in jury selection, and provides the most administrable framework.

First, the Court has suggested that a lawyer cannot expressly cite race in any capacity. For instance, one of the "overt wrong[s]" targeted by *Batson* is "[w]hen the government's choice of jurors is *tainted* with racial bias." *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (emphasis added) (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991)); *see also Purkett v. Elem*, 514 U.S. 765, 768 (1995) (holding that discriminatory intent cannot be "inherent in the prosecutor's explanation").

And five years ago, the Court held that "[e]qual justice under law requires a criminal trial *free* of racial discrimination in the jury selection process." *Flowers*, 588 U.S. at 301 (emphasis added); *see also id.* at 302 (holding that "the prosecutor must provide *race-neutral reasons* for the strikes" (emphasis added)). Not "based mostly on things other than racial discrimination," but "free of racial discrimination." *Id.* at 301.

That reading of the Court's cases is supported not just by parsing sentences, but doctrine. In *Flowers*, after all, the Court appeared to reject the suggestion that a strike's proponent should be able "to show that this [prohibited] factor was not determinative." *See Snyder v. Louisiana*, 552 U.S. 472, 485 (2008). Instead, *Flowers* held that the inquiry ends once the opponent of the strike demonstrates that the strike's proponent was "motivated in substantial part by discriminatory intent." 588 U.S. at 303. Under other types of discrimination law, that necessarily is a lesser

showing than proving that race or gender was the dispositive factor. *See Snyder*, 552 U.S. at 485 (citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)).

Putting the express mention of race or gender out of bounds also furthers *Batson*'s goals. Once again, *Batson* is not just about preventing discrimination itself, but about preventing public "cynicism respecting the jury's neutrality." *Miller-El*, 545 U.S. at 238. But cynicism is inherent in a system in which lawyers are allowed to expressly sight a juror's race or gender. Try telling a Black would-be juror that even though a prosecutor said that his Blackness was, indeed, one of the reasons he was struck from the jury, it was not a "substantial" reason. One struggles to imagine a reaction that involves a straight face. "That is because [t]o excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd." *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari). "If such 'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination." *Id.*

Adopting a per se rule also provides the most administrable framework for frontline practitioners in American courtrooms. If a party cites race or gender as a reason for a peremptory strike, that strike is invalid because it does not rest on a facially neutral reason.[13] "To be 'neutral,' the explanation must be based *wholly* on nonracial [and non-gendered] criteria." *Id.* That is the sort of bright line that practitioners crave. *See supra* 19.

[13] The party, of course, would still have the opportunity to strike that juror for cause.

Proceeding to *Batson*'s third step—and assessing if the strike really was substantially motivated by discriminatory intent even though the proponent says that the strike was, at least in part, based on discriminatory intent—opens up a host of problems.

"[A]ttorneys are advocates with partisan objectives" and "[a] *Batson* hearing is not . . . psychotherapy." Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 323 (2007). In other words, a lawyer explaining her strike is not trying to reveal all in hopes that the trial judge, like a therapist, will help her understand what really is going on in her mind. Rather, the lawyer has an objective: to make sure that the strike is sustained.

Given this "self-serving" incentive, *id.*, it is hard enough to "ferret[] out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences," when an attorney sticks to race- or gender-neutral explanations for a strike, *Miller-El*, 545 U.S. at 238. Turning a blind eye to a lawyer's express admission of a prohibited ground needlessly makes a hard job harder. That is because the only evidence of how much various criteria mattered in an attorney's mind are that same attorney's words.

An "inquiry designed to safeguard a criminal defendant's basic constitutional rights should not rest on the unverifiable assertions of a prosecutor who, having admitted to racial bias, subsequently attempts to reconstruct what his thought process would have been had he not entertained such bias." *Wilkerson*, 493 U.S. at

927–28 (Marshall, J., dissenting from denial of certiorari). Indeed, requiring a strike's opponent to prove that race mattered more than a strike's opponent concedes it mattered creates the sort of "'insurmountable' burden" the Court has repeatedly avoided. *Flowers*, 588 U.S. at 298 (quoting *Batson*, 476 U.S. at 93 n.17). The Court need not sanction that Pandora's Box when a simpler resolution exists that better protects *Batson*'s values.

* * *

This Court has been consistent: "A person's race simply 'is unrelated to his fitness as a juror.'" *Batson*, 476 U.S. at 87. Yet even in the twenty-first century, a surprising number of lawyers appear to believe that it is constitutional to cite these prohibited characteristics in shaping the jury so long as they are either a positive preference, or at least not the *only* reason for a peremptory strike. The Court must take this opportunity to disabuse them of that notion.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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