No. 24-5659

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

REPLY BRIEF FOR PETITIONER

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The government does not dispute that courts are divided on whether the Constitution tolerates the express citation of race or gender as a reason among others for a peremptory strike. BIO 13–16.

It also does not dispute that there is a *Batson v. Kentucky*, 476 U.S. 79 (1986), "'issue' in preferring a seated juror over one who was struck 'because of' *the seated juror's* race." BIO 10 (emphasis added) (quoting Pet. 21).

Finally, it agrees that its prosecutor, when explaining that he preferred Juror 10 (an Asian female) instead of Juror 22 (a Latino male), said:

> [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.

That is all the Court needs to know. There is a split of authority on an important issue, and this case is on the wrong side. The government's main response is to contrive a vehicle problem and nitpick over *the extent* to which lower courts disagree—not the fact they disagree. Neither tack withstands scrutiny. And once that is settled, there is no dispute that Luis Cruz-Cruz satisfies each criterion for certiorari. The Court should grant the Petition.[1]

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[1] The Court has not "recently denied petitions . . . raising similar issues." BIO 6–7. For one, *Harper v. Lumpkin*, 144 S. Ct. 429 (2023) (No. 23-5089), presented an unrelated *Batson* question. Meanwhile, *Sheppard v. Lumpkin*, 141 S. Ct. 2677 (2021) (No. 20-6786), presented three questions, one of which addressed *Batson* and did not implicate division among lower courts. Finally, *Cook v. United States*, 140 S. Ct. 894 (2020) (No. 19-6190), presented *six* questions, one of which involved an unrelated *Batson* issue.

I. The prosecutor cited race as a reason for the strike during *Batson*'s second step.

1. The government's post hoc claim that the prosecutor did not cite race as a reason for the strike, but "only to 'make [the juror's] race clear for the record,'" cannot be squared with the prosecutor's words, the government's arguments below, or the court of appeals' holding. *See* BIO 12 (quoting Gov't Resp. to Reh'g Pet. 4).

Take the prosecutor's words citing race as a reason to seat a juror. At trial, after Petitioner highlighted seated jurors similar to the challenged struck juror (Juror 22), the prosecutor said that he could "*explain* some of these [similarities] if it would be helpful." Pet. App. 15a (emphasis added). The prosecutor noted that some seated jurors "were unemployed" and others "didn't have children or were single." *Id.* By contrast, Juror 22 was all of the above.[2] "And so that was really the distinction," he said. *Id.* Then, in the next breath, the prosecutor added, "I can speak to [Juror] 10," *id.*, whom the government agrees is the "closest analogue" to Juror 22, BIO 4. "I believe she had a husband who was self-employed. *But she also* was an Asian female. We—I believe she maybe had an accent." Pet. App. 15a (emphasis added).

Here, the prosecutor's use of "[b]ut she also" shows that he cited race as *another* reason he wanted her on the jury, in addition to her having "a husband who was self-employed."[3] *Id.*

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[2] The government notes that no seated juror was a *perfect* match for the struck juror. That is irrelevant. Because "potential jurors are not products of a set of cookie cutters," such a requirement "would leave *Batson* inoperable." *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 247 n.6 (2005).

[3] Petitioner does not argue that merely mentioning race or gender in any capacity contravenes *Batson*. *See* BIO 12. It is *citing* race or gender *as a reason* for a strike that crosses the line.

The next words out of his mouth buttress that plain language. The prosecutor said—with no basis in the record other than Juror 10's race and accent—that he liked that 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." *Id.*

That further confirms that race was a reason, not an identifier. The prosecutor assumed that Juror 10 had border experience because of her race and apparent accent. And concerningly, the government still argues that complies with *Batson*. BIO 12. But picking jurors because of racial stereotypes is just another name for picking jurors because of race. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("We may not accept as a defense to racial discrimination the very stereotype the law condemns.").

In case there was any lingering doubt, the "for-the-record" argument does not make sense for yet another reason: Juror 10's race already had been noted for the record by Petitioner at the district court's request. Pet. App. 11a. There was no need to say it again.

The government did not even claim otherwise until en banc briefing. *See* Gov't Resp. to Reh'g Pet. 4. Originally, the government acknowledged that its prosecutor "refused to strike a different venireperson—Juror 10—not only *because* she was married and her spouse was self-employed . . ., but *because* 'she also was an Asian female' who 'had an accent.'" Gov't C.A. Br. 23 (emphases added); *see also id.* at 16, 25. It even claimed that those facts allowed the prosecutor to infer "more

traits about her." *Id*. at 23. So the government's new argument "reeks of afterthought." *Foster v. Chatman*, 578 U.S. 488, 514 (2016) (quoting *Miller-El II*, 545 U.S. at 246).

Finally, the court of appeals never accepted this post hoc argument. The panel held that Petitioner's "argument is a step too far, when, as here, the prosecutor asserted a number of race-neutral traits for striking Juror 22." Pet. App. 4a. In other words, it affirmed because the prosecutor provided *other* reasons. The amended opinion did not even acknowledge the belated suggestion that the citation of race was an identification "for the record." BIO 12. Thus, the new rationalization offers no reason to deny certiorari.

2. The government's claim that its prosecutor cited race during *Batson*'s so-called "third step," rather than its "second step," is triply misplaced.

For one, the issue is a red herring. The question presented does not care if the prosecutor's comments fall under the second or third step. It just asks whether the express citation of race or gender means that the prosecutor necessarily failed Step Two *and* the defendant necessarily cleared Step Three by showing that the strike "was 'motivated in substantial part by discriminatory intent.'" Pet i. (quoting *Flowers v. Mississippi*, 588 U.S. 284, 303 (2019)). Either suffices to show a constitutional violation.

The government's step-three-not-step-two theory also is a merits argument in disguise. By claiming that the prosecutor's comments did not cross a bright line but remain just one fact among many to be considered at Step Three, the government

just takes a side on the question presented. Some courts hold that the express citation of race or gender as a reason for a strike per se violates *Batson*. Some courts hold that it depends. The government is free to side with the latter—after the Court grants certiorari.

Finally, the government is wrong. The Court repeatedly has held that Step Two covers the government's reason for the strike, and Step Three covers the trial court's assessment, "*in light of the parties' submissions*." *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 328 (2003) (emphasis added); *see also Foster*, 578 U.S. at 499–500; *Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008); *Johnson v. California*, 545 U.S. 162, 168 (2005); *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam). Because the facial neutrality of a lawyer's preference for one juror is part of "the parties' submissions" and not the trial court's "determin[ation]," *id.*, it is part of *Batson*'s second step and thus presents a question of law, not fact. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion); *United States v. Thompson*, 735 F.3d 291, 296 (5th Cir. 2013); *United States v. You*, 382 F.3d 958, 967 (9th Cir. 2004); *United States v. Alqahtani*, 73 F.4th 835, 847 (10th Cir. 2023).

The government's response makes no sense. It reasons that the prosecutor's preference here must fall under Step Three because that is when *a trial court* "consider[s] 'side-by-side comparisons' of 'panelists who were struck and . . . [those] allowed to serve.'" BIO 10 (emphasis added) (quoting *Miller-El II*, 545 U.S. at 241). A trial court considers *everything* at Step Three. But that does not make everything part of the third step, and *Miller-El II* did not hold otherwise. It just confirms that

Batson's third step covers the trial court's "consider[ation]." *Miller-El II*, 545 U.S. at 241. In sum, the prosecutor cited Juror 10's race as a reason to seat her on the jury in *Batson*'s second step.

II. The government does not dispute that courts are divided on the question presented.

The government does not actually dispute that courts are divided on the question presented. *See* BIO 14–16. At most, it suggests that *Flowers* overruled sub silentio *some* cases cited in the Petition and argues that *some* cases are irrelevant because of the contrived vehicle problem discussed above. Neither suggestion works.

1. The government's contention that *Flowers* implicitly overruled any cases applying a "dual motivation" analysis cannot be squared with *Flowers*.[4] *See* BIO 13–14. *Flowers* expressly held that it broke "no new legal ground. [It] simply enforce[d] and reinforce[d] *Batson* by applying it to the extraordinary facts of th[at] case."[5] *Flowers*, 588 U.S. at 316. Indeed, the government does not argue that any of the relevant jurisdictions overruled their "dual motivation" cases or held them to be abrogated by *Flowers*. It would be odd if they had because, again, *Flowers* held that it broke "no new legal ground." 588 U.S. at 316. Meanwhile, the Court repeatedly has declined to resolve whether a prosecutor *might* be able "to show that 'a discriminatory intent [that] was a substantial or motivating factor' behind a strike

[4] Dual-motivation analysis asks if race or gender was the strike's but-for cause. Pet. 13.

[5] *See also Flowers,* 588 U.S. at 315–16 ("[A]ll that we do decide[] is that all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of [a] black prospective juror . . . was not motivated in substantial part by discriminatory intent.").

was nevertheless not 'determinative.'" *Foster*, 578 U.S. at 513 n.6 (quoting *Snyder*, 552 U.S. at 485).

Two prominent treatises advise that the question remains unsettled. *See* 6 Wayne R. LaFave, *Criminal Procedure* § 22.3(d) (4th ed. 2024) (concluding that "[t]he Supreme Court has yet to announce specific guidance on this mixed-motive or dual-motive situation"); 2 Charles Alan Wright & Arthur R. Miller, *Federal Rules of Criminal Procedure* § 384 (4th ed. 2024) ("Courts have upheld the use of peremptory challenges . . . so long as the neutral reason(s) for striking the juror show that the same outcome would have occurred even without the discriminatory reason.").

And even if the government is right that *Flowers* silently abrogated all decisions applying a dual-motivation analysis—despite the Court saying it did not—the Ninth Circuit's decision here still presents a "conflict" on "an important federal question."[6] Sup. Ct. R. 10(a). Take the Second, Third, Fourth, Eighth, and Eleventh Circuits off the table. *See* Pet. 13–14. The First Circuit, six statewide appellate courts, and the Court of Appeals for the Armed Forces still hold that the express citation of race or gender per se invalidates a strike. *See* Pet. 10–12. The Ninth Circuit, Fifth Circuit, and at least three statewide appellate courts still hold that

[6] The government notes that the Ninth Circuit's decision here is nonprecedential. But the Ninth Circuit previously held that an expressly racial justification for a strike did not necessarily violate *Batson*. *See* Pet. 16 (discussing *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006) (en banc)). Furthermore, this Court still grants petitions arising from unpublished dispositions when they implicate an existing split. *See, e.g.*, *Diaz v. United States*, 602 U.S. 526 (2024).

the express citation of race or gender does not necessarily demonstrate that the strike was motivated by purposeful discrimination.[7] Pet. 15–18.

2. The government's contention that those remaining decisions lack relevance is meritless. It claims that they do not matter because they "assessed whether the prosecutor gave a facially race-neutral reason for striking a prospective juror at *Batson*'s second step," while this case involves "a challenge focused on the third step." BIO 15–16. Once again, that is a red herring. *Supra* 4–5. The government notes that cited decisions from the courts of last resort in Georgia, Alabama, and Arizona "found no *Batson* violation at all." BIO 16. Yet, whatever their results, the government does not dispute their holdings: that the express citation of race or gender—even as one reason among several—violates *Batson*.[8]

The government does no better challenging division among the First and Fifth Circuits. For example, it argues that *Porter v. Coyne-Fague*, 35 F.4th 68 (1st Cir. 2022), is immaterial because—on the government's reading—the "only" reasons for the challenged strike were race-based. *See* BIO 15. Not so. The prosecutor's explanation in *Porter* had "two basic stages." 35 F.4th at 80. First, the prosecutor

[7] In addition to the Colorado and Idaho decisions cited in the Petition, *see* Pet. 17, the Kentucky Supreme Court suggested that a prosecutor's statement that "[i]n all honesty, I was striking women," did not taint a strike. *See Ross v. Commonwealth*, 455 S.W.3d 899, 905 (Ky. 2015). That is because the court still considered the *other* reasons offered by the prosecutor. *See id.* at 908–09; *see also People v. Wright*, —N.E.3d—, 2024 IL App (1st) 161404-B, ¶ 21 (noting "concerns about the prosecutor's blatant use of the characteristic 'young African American'" but resolving on other grounds).

[8] *Ex parte Sockwell*, 675 So. 2d 38, 40–41 (Ala. 1995) (holding that a prosecutor cannot "articulate[] both a racially motivated reason and a race-neutral reason for a strike"); *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"); *Lingo v. State*, 437 S.E.2d 463, 467 (Ga. 1993) (holding that "the simultaneous existence of any racially motivated explanation" violates *Batson*).

cited a neutral factor: the juror's fear of "[b]low-back" among coworkers familiar with the case. *Id.* (alteration in original). That was the race-neutral explanation. *See Id.* at 73. *Then* the prosecutor noted that the juror was "a member of the African-American community," and that "the defendant at the bar is a member of the African-American community," so "common sense indicates" that the juror would hesitate to convict. *Id.* at 80. The First Circuit held that this second explanation marked a "failure to put forth a neutral explanation for [the] strike at step two" and "consummate[d] the constitutional violation." *Id.* at 82. *See also* Pet. 10–11 (discussing *Porter*).

The government meanwhile does not dispute that the Fifth Circuit repeatedly has 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) (citing *Fields v. Thaler*, 588 F.3d 270, 277 (5th Cir. 2009); *Stevens v. Epps*, 618 F.3d 489, 500 (5th Cir. 2010)); *see also Harper v. Lumpkin*, 64 F.4th 684, 697 (5th Cir.), *cert. denied*, 144 S. Ct. 429 (2023).

Instead, it offers a distinction without a difference. It notes that those cases were decided under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. That does not change that the Fifth Circuit interpreted *Batson*'s scope. *Miller-El I* and *II*, after all, were decided under AEDPA. *Miller-El I*, 537 U.S. at 326; *Miller-El II*, 545 U.S. at 240.

The government's focus on trees makes it easy to miss the forest: The government does not dispute that courts are split about whether the citation of race

or gender as a reason taints a peremptory strike.

The government merely challenges that division's scope. That is insufficient. The Court routinely grants certiorari to resolve "one-to-one" circuit splits. *See, e.g.*, Pet. 3, *Diaz*, 602 U.S. 526 (2024) (No. 23-14); Pet. 4, *Bittner v. United States*, 143 S. Ct. 713 (2023) (No. 21-1195); Pet. 20, *Babb v. Wilkie*, 140 S. Ct. 1168 (2020) (No. 18-882); Pet. 2, *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768 (2020) (No. 18-1116). The split here is undisputedly greater.

III. The Ninth Circuit is wrong on what the government does not dispute is a question of exceptional importance.

The Ninth Circuit wrongly permits lawyers to cite race as a reason to keep someone off a jury. That contravenes the Court's commands and creates an untenable framework in which judges must decide if a lawyer's citation of race provided merely a reason or a "substantial" one. Pet. 25. "Equal justice under law requires a criminal trial *free* of racial discrimination in the jury selection process." *Flowers*, 588 U.S. at 301 (emphasis added). Not marred by a little bit of racial discrimination. Free of racial discrimination.

It is not clear the government disagrees. Its arguments rest on the false premise that race was cited as an identifier "for the record," not as a reason for the strike. BIO 12. The government concedes that *if* "the prosecutor, in preferring some seated jurors to others, was 'motivated in substantial part by discriminatory intent,' then under *Batson* the strike would be constitutionally impermissible." BIO 11 (quoting *Flowers*, 588 U.S. at 303). Petitioner agrees.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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