No. 24–_____

IN THE
SUPREME COURT OF THE UNITED STATES

ELLVA SLAUGHTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Duren v. Missouri, 439 U.S. 357 (1979), announced a three-part test for establishing a prima facie violation of a right embodied in the Sixth Amendment: the right to a jury drawn from a fair cross-section of the community. *Berghuis v. Smith,* 559 U.S. 314, 319 (2010). The "defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364.

The question presented is:

Whether *Duren*'s "systematic exclusion" prong can be satisfied by proof that a distinctive group has been consistently underrepresented in the jury-selection process over a long period—or instead requires evidence of specific procedures causing the disparity, or evidence of discriminatory intent in those procedures—an issue that divides both the federal courts of appeals and the state courts of last resort.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ellva Slaughter respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and sentence.

OPINIONS AND ORDERS BELOW

The Second Circuit's opinion (Pet. App. 1a-31a) is reported at 386 F.3d 401. The district court's judgment (Pet. App. 33a-39a) and oral ruling denying petitioner's motion to dismiss the indictment (Pet. App. 44a-60a) are unreported.

JURISDICTION

The Court of Appeals entered judgment on August 8, 2024. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court had jurisdiction under 18 U.S.C. § 3231.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

> and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Jury Selection and Service Act of 1968, as amended, 28 U.S.C. §§ 1861-1878, is reproduced at Pet. App. 67a-94a.

INTRODUCTION

This case presents an ideal opportunity for this Court to resolve a split concerning the fair cross-section requirement of the Sixth Amendment, as articulated in *Duren v. Missouri*, 439 U.S. 357 (1979): what must a defendant show to establish a group's "systematic exclusion" from jury service?

Nearly 45 years ago, this Court set out a three-part test for demonstrating a prima facie case for infringement of a defendant's right to a jury drawn from "a fair cross section of the community," *Duren*, 439 U.S. at 359—a right enshrined in the Sixth Amendment's right to an impartial jury and codified in the Jury Selection and Service Act of 1968 ("JSSA"), 28 U.S.C. §§ 1861-78. The right is intended to guard against jury pools "made up of only special segments of the populace" and those where "large, distinctive groups are excluded." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). To make out a prima facie violation of the right, a defendant

must establish "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364.

This petition concerns the third requirement. Unlike with Equal Protection challenges, a defendant alleging a violation of his fair cross-section right need not show discriminatory intent, and thus need not rule out innocent or "benign" explanations for disproportionate representation. Instead, "systematic disproportion *itself* demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section." *Duren*, 439 U.S. at 368 n.26 (emphasis added). For that reason, numerous courts—including at least four federal circuits—have ruled that a defendant need not prove precisely *which* mechanism in the jury-selection process is to blame for the disproportion; instead, establishing "a large discrepancy repeated over time" is sufficient to establish "that the system … br[ought] about the underrepresentation." *United States v. Weaver*, 267 F.3d 231, 244 (3d Cir. 2001); *see also United States v. Johnson*, 95 F.4th 404, 413 (6th Cir. 2024); *Barber v. Ponte*, 772 F.2d 982,

989 (1st Cir. 1985); *United States v. Test*, 550 F.2d 577, 586 (10th Cir. 1976).

But at least two other circuits—now including the Second Circuit—have concluded the opposite. In those circuits, it is not enough to point to a stark discrepancy in a group's representation that persists over time; instead, a defendant must specifically show "what factors intrinsic to the jury venire selection process, if any, systematically *drive* the identified and persistent disparities." Pet. App. 24a (emphasis added); *see also United States v. Garcia*, 991 F.2d 489, 492 (8th Cir. 1993). That means that, in those circuits, "the law expects defendants to untangle highly complicated questions of causal explanation" as part of their prima facie cases. Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism From Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954 (2011). And it means that the stark, persistent underrepresentation of Hispanic and Black jurors in Southern District of New York (S.D.N.Y.) venires—currently, close to a 10 percent disparity for Hispanic jurors—continues uncorrected.

Still other circuits go further. In at least four other circuits, a defendant must point to some sort of active *misconduct* by state officials to establish systematic exclusion—such as the intentional discrimination that, per this Court, is *not* a part of the fair cross-section analysis. *See,*

e.g., *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988); *United States v. Steen*, 55 F.3d 1022, 1030 (5th Cir. 1995); *Johnson v. McCaughtry*, 92 F.3d 585, 594 (7th Cir. 1996); *United States v. Hester*, 205 F. App'x 713, 715 (11th Cir. 2006).

This three-way, 4-2-4 split—with state courts of last resort joining all three sides—shows no sign of resolving. Indeed, the Eighth Circuit has resisted longstanding entreaties from its own members to convene en banc to "reconsider" its prior precedent. *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996). And with the Second Circuit now weighing in, the split is ripe for this Court's intervention.

This question is deeply important to defendants' vindication of their Sixth Amendment rights, as well as the public's right to represent the community through jury service. This Court "has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). Yet empirical evidence shows that fair cross-section challenges almost never succeed, and most often founder on *Duren*'s "systematic exclusion" requirement. Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It With Equal Protection*, 64 HASTINGS L.J. 141, 200 n.93

(2012). Sorting out the meaning of *Duren*'s third prong thus makes all the difference between a successful challenge and a failed one.

And this case is the perfect vehicle for sorting out that meaning. For starters, this case is a federal criminal case arising on direct appeal; as such, there are no potential alternative state-law grounds or AEDPA[1] issues complicating review. Petitioner timely moved to dismiss his indictment under the Sixth Amendment's and the JSSA's fair cross-section requirement. And both the district court and the Second Circuit rejected his challenge squarely on the grounds challenged here: The Second Circuit concluded that petitioner's evidence of a persistent and longstanding disparity in Black and Hispanic representation, while "troubling," was insufficient to satisfy *Duren*'s third prong. Finally, while review would be warranted no matter which side of the three-way split the Second Circuit chose, review is particularly appropriate here because the Second Circuit's position is wrong and contradicts *Duren* itself.

In the last few decades, this Court has repeatedly recognized the importance of representative juries by reviewing—and reaffirming—*Batson v. Kentucky*, 476 U.S. 79 (1986). Yet it has left unaddressed

[1] AEDPA refers to the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of title 28 U.S.C.).

another crucial foundation of impartial and representative juries. In the nearly half-century since this Court decided *Duren*, it has only once granted review in a case that discussed *Duren*'s third factor in any detail—and that case arose in the AEDPA context, where the prisoner had to demonstrate not merely that the state court's decision was incorrect, but "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Berghuis v. Smith*, 559 U.S. 314, 332 (2010); 28 U.S.C. § 2254(d)(1). That posture foreclosed any real opportunity for this Court to clarify what *Duren*'s "systematic exclusion" prong requires.

The time has come for this Court to clarify *Duren*'s meaning—and to correct courts that have long imposed nearly insurmountable barriers to fair cross-section challenges. This Court should grant review.

STATEMENT OF THE CASE

A. Legal Background

Under the Sixth Amendment to the Constitution, a criminal defendant has the right to be tried by an impartial jury, which, under the Jury Selection and Service Act of 1968 ("JSSA" or "Act"), must be drawn from "a fair cross section of the community." 28 U.S.C. §§ 1861-78; *see Taylor*, 419 U.S. at 527. This requirement extends to both petit and grand juries. *See Duren*, 439 U.S. at 359; 28 U.S.C. § 1861. A defendant may

challenge whether the local jury plan complies with the Constitution and the Act, and "may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of [the Act] in selecting the grand or petit jury." 28 U.S.C. § 1867(a). If the court determines that there has been a substantial failure to comply with the fair cross-section requirement in selecting the grand jury, the court may dismiss the indictment. *Id.* § 1867(d).

A defendant must establish three elements to make out a prima facie case of a violation of the fair cross-section requirement:

> (1) that the group alleged to be excluded is a "distinctive" group in the community;
>
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364. These same elements apply to a fair cross-section challenge under the JSSA. *See United States v. LaChance*, 788 F.2d 856, 864 (2d Cir. 1986) (collecting cases).

Importantly, the defendant "need not show discriminatory intent." *Weaver*, 267 F.3d at 237. As explained above, unlike Equal Protection cases, "in Sixth Amendment fair-cross-section cases, systematic

disproportion *itself* demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section." *Duren*, 439 U.S. at 368 n.26 (emphasis added).

Once a defendant has made a prima facie showing of an infringement of his fair cross-section right, "[t]he only remaining question is whether there is adequate justification for this infringement." *Id.* The burden therefore shifts to the government to show "that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process ... that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-68.

B. Factual and Procedural Background

The facts are simple and undisputed.

1. In 2021, a federal grand jury in S.D.N.Y. charged petitioner with one count of knowingly possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). Petitioner moved to dismiss the indictment, arguing that, for at least a decade, S.D.N.Y.'s jury-selection plan has systematically underrepresented Black and Hispanic (or Latino) people in violation of his right to a grand jury drawn from a fair cross-section of the community under the Sixth Amendment and the JSSA. His challenge tracked the framework set forth by this Court in *Duren*. *See* Pet. App. 7a. As for the final *Duren* factor—requiring a

defendant to prove "systematic exclusion"—petitioner argued that "the persistence of disparities over time, standing alone, demonstrates that underrepresentation is due to systematic exclusion." Pet. App. 8a. Petitioner demonstrated, for example, that a ten-year pattern showed underrepresentation of Hispanic people increasing every year, starting with .11 percent in 2011 and culminating with 9.07 percent in 2019. 2d Cir. App'x, A0029. In addition, petitioner submitted an expert report that identified several specific aspects of S.D.N.Y.'s jury-selection plan—including its exclusive reliance on voter registration rolls to summon jurors and refusal to follow up on jury qualification questionnaires that are not returned or returned as undeliverable—as causing the underrepresentation. Pet. App. 8a-9a.

2. The district court denied petitioner's motion. *See* Pet. App. 46a-57a. The court concluded that he had satisfied *Duren*'s first prong by pointing to "distinctive group[s]"—Black and Hispanic people—who had been disproportionately excluded from jury service, and assumed that he had established that the underrepresentation was unfair and unreasonable, thus satisfying *Duren*'s second prong. But the court held that petitioner's claim failed on the third prong. The court acknowledged the undisputed evidence of persistent Black and Hispanic underrepresentation in S.D.N.Y. venires going as far back as 1996 and

worsening over time. Pet. App. 53a-54a. And it acknowledged that the disparities were "substantially greater" than those the Second Circuit had approved in the past. Pet. App. 51a. But it rejected petitioner's argument that "the very existence of these persistent and increasing disparities proves that they are the result of systemic exclusion." Pet. App. 54a. The court also rejected petitioner's alternative argument that specific systematic practices were causing the underrepresentation, dismissing the underrepresentation as due to "external factors" beyond the control of the jury system. Pet. App. 57a.

3. Following the denial of his motion to dismiss, petitioner waived his right to a jury trial and proceeded to a bench trial on stipulated facts, *see* Fed. R. Crim. P. 23(a), thereby preserving his right to appeal the district court's pretrial ruling. Based on those stipulated facts—which included that the police had recovered a firearm from petitioner's car and that he had previously been convicted of a felony—the district court found petitioner guilty of violating § 922(g)(1), and sentenced him to time served plus one month. *See* Pet. App. 10a.

4. The Court of Appeals affirmed in a precedential decision. Pet. App. 1a-31a. Like the district court, the Second Circuit agreed that Black and Hispanic people are "distinctive group[s]," thus satisfying *Duren*'s first prong. The court accepted that *Duren*'s second prong had

been met, concluding that the underrepresentation of Black and Hispanic people in S.D.N.Y. venires was "troubling," particularly considering that the disparities had "only *increased*" in the preceding decades. Pet. App. 22a (emphasis in original). But the court ruled that petitioner had failed to satisfy *Duren*'s third prong. While acknowledging "several cases from other circuits concluding that significant disparities over a sustained period of time may prove systematic exclusion," the court ruled that a long period of substantial underrepresentation, "standing alone," is not sufficient to show that the underrepresentation is "systematic" within the meaning of *Duren*. Pet. App. 23a-24a. Instead, according to the Second Circuit, challengers like Slaughter must establish "what factors intrinsic to the jury venire selection process, if any, systemically drive the identified and persistent disparities." Pet. App. 24a. The court then concluded that petitioner's expert had put forth insufficient evidence that any specific factors "actually cause" the underrepresentation. Pet. App. 29a. The court recognized that petitioner's expert had concluded that certain inherent aspects of S.D.N.Y.'s plan, such as its exclusive reliance on voter registration rolls, cause underrepresentation, but ruled that, "without data to back that [conclusion] up," "systematic exclusion" could not be proven. Pet. App. 29a. On that basis, the court rejected petitioner's fair cross-section challenge and affirmed his conviction. Pet. App. 30a.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for four reasons. *First*, the question presented divides both the federal courts of appeals (4-2-4) and the state courts of last resort. *Second*, the question is extremely important and recurs frequently. *Third*, this case provides an excellent vehicle for resolving the question. *Fourth*, the Second Circuit's decision is incorrect, inconsistent with *Duren,* and incompatible with the Sixth Amendment and the JSSA.

I. The Second Circuit's opinion deepens a circuit split over *Duren*'s "systematic exclusion" prong.

Review is merited because *Duren* has generated a longstanding split over a recurring question of national importance: whether the persistent and significant underrepresentation of a distinctive group in the jury-selection process over a long period can suffice to establish that the underrepresentation is the product of "systematic exclusion"—or whether a defendant must instead establish which procedures cause the disparity, or prove discrimination or other misconduct underlying those procedures. The Second Circuit recognized that its position deviated from other circuits on this score. *See* Pet. App. 24a-25a (noting "several cases from other circuits concluding that significant disparities over a sustained period of time may prove systematic exclusion"). And the caselaw reveals

that lower courts are hopelessly divided over the meaning of "systematic exclusion," with circuit courts falling into three different camps on what a petitioner must show.

1. *Group One: "Systematic exclusion" can be inferred from longstanding, persistent underrepresentation.*

Several circuits—the First, Third, Sixth, and Tenth—embrace the position petitioner urged here, concluding that a defendant need not establish that specific procedures cause a given disparity. Instead, in those circuits, it is enough to show that significant underrepresentation has persisted over time. The First Circuit, for example, holds that "[a] large discrepancy occurring over a sustained period of time where there is an opportunity for arbitrary selection is sufficient to demonstrate that the exclusion of the underrepresentation is systematic—that is, inherent in the particular jury selection process utilized." *Barber*, 772 F.2d at 989 (citing *Duren*, 439 U.S. at 366).

The Third Circuit agrees. It has long held that "'systematic exclusion' can be shown by a large discrepancy repeated over time such that the system must be said to bring about the underrepresentation." *Weaver*, 267 F.3d at 244. In that circuit, a litigant can establish "systematic exclusion" under *Duren's* third prong even where "there is no

identifiable cause for the under-representation of" a particular group. *Howell v. Superintendent Rockview SCI*, 939 F.3d 260, 269 (3d Cir. 2019).

And the Sixth Circuit is in accord. *See Johnson*, 95 F.4th at 413 (explaining that, while "nonextreme statistical disparities, standing alone, are ordinarily insufficient to [show 'systematic exclusion'], … a routinely 'large discrepancy' may "'manifestly indicate[ ] that the cause of the underrepresentation was systematic—that is, inherent in the particular jury selection process utilized"') (quoting *Duren*, 439 U.S. at 366).

The Tenth Circuit holds likewise. *See Test*, 550 F.2d at 586 (recognizing, even pre-*Duren,* that "proof that a cognizable group had been totally excluded from jury service over a substantial period of time or had received only 'token representation' has been held sufficient to raise an inference of discrimination and systematic exclusion."). And so does Kentucky. *See, e.g.*, *Mash v. Commonwealth*, 376 S.W.3d 548, 552-53 (Ky. 2012) (recognizing that "a defendant may demonstrate systematic exclusion by providing statistical information showing that a particular group was underrepresented in a county's jury panels over a period of time." (citing *Duren*, 439 U.S. at 366-67)).

2. Group Two: "Systematic exclusion" requires a defendant to show, with particularity, which internal jury procedures caused the underrepresentation.

Other courts—including, now, the Second Circuit—hold otherwise. In these circuits, litigants must produce particularized evidence, backed by "data," Pet. App. 25a, proving that specific procedures caused the underrepresentation.

As the Second Circuit held, even where large disparities persist for a long period of time—or indeed, as here, *worsen* over time—a defendant must specifically show "what factors intrinsic to the jury venire selection process, if any, systematically drive the identified and persistent disparities." *Id.* This view aligns with decisions from the Eighth Circuit, which has continuously rejected the view that "systematic exclusion may be inferred from continued underrepresentation." *United States v. Garcia*, 991 F.2d 489, 492 (8th Cir. 1993).[2]

Courts of last resort in several states[3]—including California, Iowa, and Washington, as well as the District of Columbia—also embrace this

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[2] Although arguably not necessary to its holding, *Garcia* even has language suggesting that the Eighth Circuit would go further and reject a fair cross-section claim for failure to prove intentional discrimination. 991 F.2d at 492 ("Garcia does not contend that Iowa law imposes any suspect voter registration qualifications or that the Plan is administered in a discriminatory manner.").

[3] "This Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated

position when analyzing Sixth Amendment fair cross-section claims. *E.g.*, *State v. Lilly*, 969 N.W.2d 794, 797 (Iowa 2022) (holding that, to establish "systematic exclusion," "a defendant must prove that the underrepresentation resulted from a particular feature (or features) of the jury selection system," meaning the defendant "must tie the disparity to a particular practice and show that the practice caused the systematic exclusion of the distinctive group in the jury selection process" (citations and quotation marks omitted); *State v. Rivers*, 533 P.3d 410, 423 (Wash. 2023) (en banc) (holding that "systematic exclusion" "requires the claimant to identify a specific jury selection practice that causes persistent and constitutionally significant exclusion of a particular group from the jury pool"); *People v. Bell*, 778 P.2d 129, 139 (Cal. 1989) (en banc) (holding that "systematic exclusion" requires a defendant to do more than "demonstrate only that underrepresentation has occurred over a period of time"); *People v. Henriquez*, 406 P.3d 748, 763 (Cal. 2017) (rejecting the argument "that statistics demonstrating that a particular group is consistently underrepresented in the jury pool, standing alone, suffice to demonstrate that the group has been systematically excluded"); *Diggs v.*

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against the States under the Fourteenth Amendment." *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020) (citing *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968)).

United States, 906 A.2d 290, 297-98 (D.C. 2006) (rejecting the argument that the third *Duren* prong was satisfied by merely showing that a high comparative disparity existed over a long period of time and that the underrepresentation probably did not happen by chance).

Notably, although these courts generally do not use the word "discrimination," they often allow Equal Protection requirements to creep in. For example, these courts often demand that a defendant establish "improp[riety]" in jury-selection procedures, *see Henriquez*, 406 P.3d at 763, or rule out innocent or "benign" explanations for the disparities, *see id. See also United States v. Biaggi,* 909 F.2d 662, 678 (2d Cir. 1990) (rejecting a cross-section challenge and describing underrepresentation caused by the use of voter registration lists as "benign"); *see generally* Chernoff, *Wrong About the Right*, *supra*, at 177-83 (discussing how Equal Protection requirements bleed into fair cross-section cases).

3. ***Group Three: "Systematic exclusion" requires discrimination or other intentional mischief in jury-selection procedures.***

Still other circuits go further than the Second Circuit. Even decades after *Duren* made clear that fair cross-section challenges do not require proof of intentional discrimination, at least four circuits—the Fourth, Fifth, Seventh, and Eleventh—still hold precisely that. Those circuits interpret "systematic exclusion" to require *intentional* systematic

exclusion—discrimination or some other affirmative misconduct by jury officials.

Take the Fifth Circuit. In *United States v. Steen*, 55 F.3d 1022 (5th Cir. 1995), the court rejected a fair cross-section challenge on *Duren*'s third prong. The court concluded that the defendant had not "provide[d] any evidence of systematic exclusion of African-Americans from the jury selection process" because—quoting a previous Fifth Circuit case *in the Equal Protection* context—the defendant had not shown that the exclusion of African-Americans was "'due to some form of intentional discrimination.'" *Id.* at 1030 (quoting *United States v. Lopez*, 588 F.2d 450, 451-52 (5th Cir 1979)). That is, the court rejected the defendant's challenge because it found no evidence that African-Americans had been excluded—from the defendant's jury pool or jury pools in the district more broadly—"on account of their race." *Id.* More recent Fifth Circuit cases have echoed this requirement. *See, e.g.*, *Rivas v. Thaler*, 432 F. App'x 395, 403 (5th Cir. 2011) (rejecting a *Duren* challenge because the defendant had not pointed to "the type of affirmative barrier to selection for jury service that is the hallmark of a Sixth Amendment violation").

The same is true of the Fourth Circuit. In rejecting a challenge to a jury-selection system that relied exclusively on voter registrations, the court held that "the Constitution does not require that the juror selection

process be a statistical mirror of the community; it is sufficient that the selection be in terms of a fair cross-section gathered *without active discrimination*." *Cecil*, 836 F.2d at 1445 (emphasis added; internal quotation marks omitted)). Dissenting in relevant part, three judges noted the "critical assumption made by th[e] court that the fair cross-section requirement only protects against intentional discrimination in the jury selection process," an assumption that *Duren* "undermines." *Id.* at 1464 (Phillips. J., dissenting in relevant part, joined by Winter & Murnaghan, JJ.).

The Seventh and Eleventh Circuits have imposed similar requirements—rejecting challenges under *Duren*'s third prong because a defendant did not point to facially discriminatory jury-selection criteria or other potential manipulation by government officials. *See, e.g.*, *United States v. Phillips*, 239 F.3d 829, 842 (7th Cir. 2001) (holding that the Sixth Amendment "forbids racial discrimination in the selection of jurors" and rejecting challenge under *Duren*'s third prong where the defendant "failed to provide a factual basis for a finding of improper methods of jury selection"); *Hester*, 205 F. App'x at 715 (rejecting *Duren* challenge because defendants "acknowledged in the district court that they could not show bad will in the process as a whole").

This view has been echoed in several state courts of last resort. *See, e.g.*, *State v. Thomas*, 637 N.W.2d 632, 652 (Neb. 2002) ("[P]ermissible racially neutral selection criteria and procedures were used which produced the monochromatic result .... [T]he venire panel...was selected on a random basis without reference to race or the race of the defendant being tried."); *James v. State*, 613 N.E.2d 15, 29 (Ind. 1993) (holding, citing *Duren*, that a defendant must establish "purposeful discrimination against [a] racial group" and "[a]bsent such purposeful discrimination and systematic exclusion, defendants' claims relating to the racial composition of jury panels have not been recognized."); *see also State v. Dangcil*, 248 N.J. 114, 141 (2021). Uniting all these courts is a belief—derived from the Equal Protection context—that is not enough to show that a jury-selection system regularly but inadvertently excluded a distinctive group; instead, a defendant must point to intentional discrimination or other misconduct in bringing about that underrepresentation.

II. The question presented is extremely important and frequently recurs.

For at least two reasons, it is critical that this Court resolve the conflict now.

1. This issue frequently recurs in courts around the country.

Defendants regularly mount challenges to the composition of venires, and those challenges often turn on whether the defendant has made a showing of "systematic exclusion" under *Duren*'s third prong. Indeed, one scholar found that most *Duren* claims "were denied solely or in part on the basis of the defendant's failure to show that any underrepresentation was due to 'systematic exclusion.'" Chernoff, *Wrong About the Right, supra,* at 200 n.93. Thus, what *Duren*'s third prong requires—whether it can be satisfied by a longstanding disparity alone, or instead requires a defendant to prove the precise cause of the disparity—is not an academic question: A defendant's vindication of her Sixth Amendment rights turns on it.

2. The issue is also unusually important.

a. The fair cross-section requirement is a central pillar of the American justice system. For starters, the Sixth Amendment jury trial right guarantees a defendant "the commonsense judgment of the community." *Taylor*, 419 U.S. at 530. The Founders chose a jury of one's peers in lieu of the "professional or perhaps overconditioned or biased response of a judge," and to serve "as a hedge against the overzealous or mistaken prosecutor." *Id.* This "prophylactic" purpose is not fulfilled "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Id.* And this Court "has unambiguously declared that the American concept of the jury trial

contemplates a jury drawn from a fair cross section of the community." *Id.* at 527; *see also Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury … necessarily contemplates an impartial jury drawn from a cross-section of the community.").

The fair cross-section requirement is not only essential to a fair trial; it is crucial for a jury to fulfill its role as an "'instrument[] of public justice.'" *Taylor*, 419 U.S. at 527 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). Without venires fairly drawn from "every stratum of society," *Ballard v. United States*, 329 U.S. 187, 193 (1946), the public inevitably loses confidence in the judicial system. *See Taylor*, 419 U.S. at 530 ("Community participation [is] ... critical to public confidence in the fairness of the criminal justice system."). Ultimately, systematic exclusion from jury service is "at war with our basic concepts of a democratic society and a representative government." *Smith*, 311 U.S. at 130.

b. Given the importance of community participation in jury service, this Court has repeatedly granted review in *Batson* cases since the case came down in 1986, "vigorously enforc[ing] and reinforc[ing] the decision, and guard[ing] against any backsliding." *Flowers v. Mississippi*, 588 U.S. 284, 301 (2019) (citing *Foster v. Chatman*, 578 U.S. 488, 491 (2016), *Snyder v. Louisiana*, 552 U.S. 472 (2008), and *Miller-El v. Dretke*, 545 U.S. 231 (2005); *see also J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127,

129 (1994); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991)). In reaffirming *Batson*, the Court has not just recognized the blight of intentional discrimination; it has also acknowledged that, "other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers*, 588 U.S. at 293.

But the fair cross-section right vindicated in *Duren*—another foundational case ensuring representative community participation in the jury process—has received scant attention from this Court. In the 45 years since *Duren* was decided, only one Supreme Court case has discussed *Duren*'s third factor in any detail—and only in the AEDPA context, where the "clearly established federal law" requirement foreclosed any real opportunity to clarify the meaning of "systematic exclusion." *Berghuis*, 559 U.S. at 332.[4] The result is that, while this Court has developed robust caselaw on peremptory challenges in the Equal Protection context, it has

[4] Some courts—including the district court below—have cited *Berghuis* for the proposition that "a defendant cannot make out a prima facie case merely by pointing to a host of factors that, individually or in combination, might contribute to a group's underrepresentation." Pet. App. 55a. But the Court held only that it has never *clearly decided* whether listing potential causes would be sufficient—not that a defendant must precisely identify the specific cause of the disparity.

done little to address the confusion in the lower courts over fair cross-section challenges in the Sixth Amendment context.

III. This case is an excellent vehicle.

This case provides an ideal opportunity to resolve the split on this important issue.

1. The question dividing the courts is cleanly presented for this Court's review. Petitioner timely moved to dismiss the indictment under the Sixth Amendment and the JSSA. And the district court held that (1) petitioner had satisfied *Duren*'s first prong; and (2) assumed he had satisfied *Duren*'s second prong; meaning that its decision on *Duren*'s third prong—that petitioner could not show "systematic exclusion" even if he demonstrated a significant disparity persisting over time—was dispositive.

2. The issue was similarly dispositive in the Second Circuit. The Second Circuit held that, even if the defendant presents compelling evidence that a distinctive group has been significantly underrepresented over a long period, he or she has failed to make out a prima facie case of "systematic exclusion." Thus, if this Court grants review and decides that a persistent pattern of significant underrepresentation can suffice to establish "systematic exclusion," petitioner would be entitled to a remand for the Second Circuit to reconsider its ruling under the proper legal

standard. Hence, this case is not burdened by alternative holdings (or factual disputes) that could complicate this Court's review.

3. The nature and procedural posture of this case also presents this Court with an excellent vehicle to decide the *Duren* issue. This case is a direct federal appeal from a criminal conviction, rather than a collateral attack or a state case—meaning that this matter is free of AEDPA issues, or independent state-law grounds, that could muddy the waters.

4. Nor are there any other vehicle problems that counsel against review. While the government initially moved to dismiss the appeal as moot on the ground that petitioner has been removed from the United States, the Second Circuit held that the appeal is not moot, as petitioner is still subject to the special assessment fee and a term of supervised release. Pet. App. 10a n.5. Thus, under this Court's precedent, petitioner plainly possesses a concrete stake in his appeal. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (noting that, in the habeas context, a petitioner released from prison must establish "some concrete and continuing injury other than the now-ended incarceration or parole—some 'collateral consequence' of the conviction"); *Rutledge v. United States*, 517 U.S. 292, 302-03 (1996) (concluding that a $50 special assessment required by a conviction is a "collateral consequence" and amounts to punishment).

5. No further "percolation" is necessary. *Duren* has spawned a widespread three-way split among the lower courts that shows no sign of abating. Courts in Group Three—requiring proof of discriminatory or malicious intent—have persisted in their views for decades, even though judges in the Fourth Circuit have explained that "*Duren* … undermines the critical assumption made by this court … that exclusion of distinctive groups from jury lists is only "systematic" if it results from intentional discrimination." *Cecil*, 836 F.2d at 1464 (Phillips. J., dissenting in relevant part, joined by Winter & Murnaghan, JJ.).

And the Eighth Circuit has similarly resisted joining the Group One courts even though its own members have called for en banc review, arguing that "statistics establish, at a minimum, a prima facie case that [groups] are being systematically excluded from jury service," and that their contrary precedent "warrants reconsideration." *Rogers*, 73 F.3d at 777.

The Second Circuit's opinion only deepens this longstanding split. With confusion abounding, and no side budging, it is time for this Court to authoritatively say what *Duren* means, and thus resolve the conflict over the meaning of the fair cross-section right. After all, it is the Court's "responsibility and authority to ensure the uniformity of federal law."

Danforth v. Minnesota, 552 U.S. 264, 292 (2008) (Roberts, C.J., dissenting).

IV. The Second Circuit's position is wrong and inconsistent with *Duren*.

The entrenched and important conflict over *Duren*'s meaning provides ample reason to grant certiorari regardless of which courts have the better view. But review is particularly appropriate because the Second Circuit's interpretation of *Duren* is at odds with this Court's precedent and with common sense.

1. The Second Circuit held that the long period of substantial Black and Hispanic underrepresentation in S.D.N.Y.'s jury-selection process, while "troubling," cannot suffice to show "systematic exclusion." This ruling is inconsistent with *Duren* itself. There, this Court held that the consistent underrepresentation of women for "nearly a year" was sufficient to establish "systematic exclusion":

> [I]n order to establish a prima facie case, it was necessary for petitioner to show that the underrepresentation of women, generally and on his venire, was due to their systematic exclusion in the jury-selection process. *Petitioner's proof met this requirement. His undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized.*

439 U.S. at 366 (emphasis added). Thus, *Duren* makes clear that "systematic exclusion" can be shown "by identifying a large discrepancy over time such that the system must be said to bring about the underrepresentation." *United States v. Savage,* 970 F.3d 217, 259 (3d Cir. 2020) (citations omitted). "What *Duren* did not say was that a defendant needed to show with particularity how the jury-selection procedure caused the underrepresentation in order to make out a prima facie case for a fair cross section violation." David M. Coriell, *An (Un)fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 475 (2015).

Despite *Duren*'s unequivocal language, the Second Circuit believed that "in *Duren* it was the presence of disparities over time *and* several practices that effectively excluded 39.5% of eligible women from jury service that, together, demonstrated systematic exclusion." Pet. App. 24a (citing 439 U.S. at 365-67). But while the petitioner in *Duren* posited that the disparity was due to various state policies and practices allowing women to opt out of jury service, this Court did not demand that the petitioner *prove* which specific policy was causing the disparity to make out a prima facie case. *See Duren*, 439 U.S. at 367 (noting that the disparity could have been produced by Missouri's "automatic exemption for women or other statutory exemptions"). *Duren* even acknowledged

that, as the Missouri Supreme Court suggested, the disparity may have been due to the private choices of women in claiming exemptions from jury service. *Id.* at 368. But whether or not those private choices produced the disparities was deemed irrelevant to the petitioner's prima facie case: The petitioner had already established, through the long-term discrepancy between women eligible and women serving as jurors, that women's exclusion from Missouri juries was "systematic." *Id.* at 366, 368. If the state believed that private choices relating to exemptions could "justify" its failure to "attain[] [a] fair cross section," that was a question going to whether the prima facie violation was *justified*—a question on which the government bears the burden of proof—not to whether the petitioner had made out a prima facie case in the first instance. *Id.* at 368-69.

2. Holding that a defendant satisfies his burden of proving "systematic exclusion" by pointing to a longstanding disparity also accords with plain English and with the structure and purpose of the Sixth Amendment.

a. The word "systematic" means something "characterized by 'regularity' and by its 'methodical' nature." *People v. Bell*, 49 Cal. 3d 502, 568 (1989) (Broussard, J., dissenting) (quoting *American Heritage Dict. of the English Language* (1981) p. 1306, col. 2). "All it means is that the exclusion is the result of a *system* of jury selection, and that it occurs

regularly, in contrast to exclusion which is the result of chance or random factors and consequently occurs infrequently or sporadically." *Id.*

When a defendant proves that a disparity persists over time—here, over a period of at least 10 years—he has made a prima facie showing that the disparity is not simply due to chance or factors "external" to the system (such as a hurricane) but, instead, is inherent to the system of jury selection itself, as *Duren* demands. Nothing about the phrase "systematic exclusion" requires a defendant to point to the precise *moment* in the system—let alone the precise mechanism—that causes the disparity; it just requires the defendant to establish that the disparity is not "random" or "sporadic." As *Duren* made clear, a state's belief that private choices may ultimately bear responsibility for the disparities is not irrelevant; it just goes to whether the state can "justify" its failure to "*attain*[] [a] fair cross section," not to whether there was a fair cross-section in the first place.

b. The natural import of the Second Circuit's ruling is that, under the Sixth Amendment, it is not enough for a defendant to establish that the underrepresentation is more likely than not due to the jury-selection system overall (something that a longstanding disparity easily establishes); he must, at the prima facie stage, rule out all possible external explanations for the underrepresentation. *See* Pet. App. 29a-30a

(faulting petitioner for failing to rule out the possibility that juror behavior was partially responsible for the underrepresentation). But the Sixth Amendment does not require a petitioner to rule out all ways in which personal decisions might interact with a system to cause underrepresentation. Indeed, the Sixth Amendment is the rare constitutional amendment that imposes affirmative obligations on the government: the obligation to provide a lawyer, to ensure a speedy trial, and—as relevant here—to provide an impartial jury reflecting a fair cross-section of the community. *See* Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 156 (2019). That is, unlike the Equal Protection Clause and other constitutional amendments that guarantee freedom from government-sponsored discrimination—meaning any challenged activity must be attributable to the government alone—"the Sixth Amendment gives the defendant a right to a particular *outcome*: a representative jury pool." *Id.* at 155-56. As such, "[t]he Sixth Amendment asks only whether the defendant has been provided with a representative jury pool, and is not concerned with the particular combination of state and private decisions that produced that pool." *Id.* at 156.

3. Allowing a challenger to establish a prima facie case through persistent disparities alone—rather than establishing the precise mechanisms responsible for the disparities—also aligns with "the general rule that burdens shift to those with peculiar knowledge of the relevant facts." *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 257 n.4 (2002). Defendants are not experts in designing jury-selection procedures, and they rarely have access to the internal policies that guide a district's jury-selection systems—let alone to the computer programs that run them. And defendants cannot pinpoint a problem with the system without access to those policies and systems. Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1734 (2016) detailing extensive problems with a district's jury-selection system—such as a computer error that was excluding all potential jurors with misdemeanor convictions, even though they were legally eligible for service— that only court-mandated discovery revealed). Placing the burden on the state to justify its failure to achieve a fair cross-section by pointing to the mechanisms responsible for the disparity—and to explain why they cannot be remedied—ensures that a defendant is not burdened

with establishing facts "peculiarly within the knowledge of his adversary." *Campbell v. United States*, 365 U.S. 85, 96 (1961).[5]

4. Nor would allowing a defendant to establish "systematic exclusion" through longstanding underrepresentation improperly collapse prongs 2 and 3 of the *Duren* test. "Significant underrepresentation"—what a defendant is required to prove at prong 2 of the *Duren* test—asks a defendant to show significant underrepresentation *at a specific snapshot in time*. That is, a defendant can generally establish prong 2 by proving, typically through statistical analysis, that the venire from which the defendant's grand jury was chosen significantly underrepresented a distinctive group in the community. In *Duren*, for instance, the Court decided the second prong based solely on statistical evidence from venires assembled during the period in which the petitioner's jury was chosen and when the petitioner's trial began. *See* 439 U.S. at 362-63.

"Systematic exclusion," in contrast, requires something more. The defendant must show that the significant underrepresentation was not a

[5] Remarkably, some courts—the D.C. Circuit, for example—even require defendants to show how specific solutions would *fix* disparities in the jury system. *See, e.g., United States v. Smith*, 108 F.4th 872, 878 (D.C. Cir. 2024) (finding no "systematic exclusion" because the defendant did not "explain why Black residents respond [to summonses] at lower rates, why subsequent action by [jury officials] would ameliorate (rather than cement) the disparity, or how many additional steps the [jury officials] should be required to take to satisfy the Sixth Amendment").

one-time occurrence but persisted over a substantial period—thus giving rise to a reasonable inference that the exclusion is attributable to choices made and practices adopted by the government officials who design and administer the jury-selection process itself, rather than to a random factor. The "systematic exclusion" prong unlike the second prong, has a temporal element. It can be shown by proof of a "substantial under-representation over a significant period of time." *Ramseur v. Beyer*, 983 F.2d 1215, 1234 (3d Cir. 1992). And it mandates that the "discrepancy occurred not just occasionally" but repeatedly for some period. *Duren*, 439 U.S. at 366; *see also Weaver*, 267 F.3d at 241 ("Following *Duren*'s approach, the strength of the evidence should be considered under the second prong, while the nature of the process and the length of time of underrepresentation should be considered under the third.").

Thus, inferring "systematic exclusion" from a long period of significant underrepresentation does not conflate prongs 2 and 3 of the *Duren* test, as they each require proof the other does not. A defendant who shows systematic exclusion by establishing underrepresentation over a long period has not necessarily satisfied prong 2 of *Duren*; he or she must still show significant underrepresentation in his specific venire. Conversely, a defendant who meets prong 2 by showing "substantial underrepresentation" does not necessarily establish prong 3; he or she

must still show that the underrepresentation is "systematic," rather than a random, one-time occurrence. Accordingly, a defendant who shows significant underrepresentation over a long period, including in his own case, has not conflated prongs 2 and 3 of the *Duren* test—he has *satisfied* them.

Under the proper test, petitioner made out a prima facie violation of his fair cross-section right. In S.D.N.Y. jury pools, as the Second Circuit recognized, the underrepresentation of Black and Hispanic people is significant and has grown worse over time—a fact that the Second Circuit deemed "troubling." Pet. App. 22a. This consistent and increasing discrepancy over many years "manifestly indicates that the cause of the underrepresentation [is] systematic[.]"*Duren*, 439 U.S. at 366.

The systematic nature of this exclusion is reinforced by the fact that courts began recognizing the disparities at issue as early as 1996. In *United States v. Reyes*, for example, a judge analyzed S.D.N.Y.'s jury-selection system in addressing the defendant's claim that Black and Hispanic people were unconstitutionally underrepresented in the pool from which the grand jury was drawn. 934 F. Supp. 553 (S.D.N.Y. 1996) (Scheindlin, J.). At that time, the numbers revealed (depending on the methodology employed) a range from 2.17% disparity for Black people and 1.93% disparity for Hispanic people to 4.03% disparity for Black people

and 3.42% disparity for Hispanic people. *Id.* at 565-66. The court held that these absolute disparities, which are much lower than the disparities at issue here, did not violate the Sixth Amendment. *Id.* at 566. But the court cautioned that "a finding that the above disparities are not unconstitutional is not the same as an endorsement of such discrepancies." *Id.* Moreover, the court stated that "serious consideration should be given to amending the jury selection procedures in the Southern District of New York." *Id.* Yet, in 2023, the discrepancies have only worsened. *See* Pet. App. 19a-20a.

This failure to correct a system that has been known, since at least 1996, to produce underrepresentation, is important. It refutes the notion that the underrepresentation is random—or caused by external events akin to a hurricane—and supports instead a ruling that the disparity is a product of some feature inherent in the jury-selection process itself. *See, e.g.*, *United States v. Jackman*, 46 F.3d 1240, 1247 (2d Cir. 1995) (holding that the facts there were "far less than benign" given that the underrepresentation in the qualified jury wheel "continued for more than a year after disclosure of constitutional infirmities in the selection process"). Indeed, as the Second Circuit acknowledged (Pet. App. 5a n.2), federal districts around the country have taken steps to address the very flaws in their jury plans that also plague the S.D.N.Y. system at issue

here—demonstrating that they are not due to forces beyond the control of the jury-selection process, but the product of "systematic" choices made by governmental actors responsible for identifying and summoning jurors.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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