No. 24–5953

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

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Respondent does not dispute the exceptional importance of the question presented. Nor could it: Most *Duren* challenges turn on the "systematic exclusion" prong, meaning that a defendant's Sixth Amendment right to "the commonsense judgment of the community" often hinges on what that prong requires. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). And respondent spends only a few lines arguing that this case is a poor vehicle for clarifying this crucial issue—concerns that are easily refuted. *See* Point III, *infra*.

Respondent devotes most of its brief to denying the existence of a split and insisting that the decision below is correct. But respondent is wrong on both counts: the Second Circuit itself, in ruling against petitioner, recognized "several cases from other circuits concluding that significant disparities over a sustained period of time may prove systematic exclusion." Pet. App. 24a–25a. Those cases are correct, and they conflict directly with those (like the Second Circuit's decision below) holding that significant, longstanding disparities are insufficient to establish systematic exclusion—to say nothing of the decisions that erroneously demand proof of intentional discrimination. *See* Point I, *infra*. Nor can respondent square the Second Circuit's position with the Sixth Amendment, as construed in *Duren* itself. *See* Point II, *infra*.

For far too long, courts across the country, federal and state, have contradicted *Duren*—and each other—in deciding fair cross-section challenges. This Court should therefore grant review to protect the Sixth Amendment, clarify *Duren,* and end the widespread confusion. Without this Court's intervention, the lower courts will remain hopelessly divided.

ARGUMENT

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

Respondent cannot wish away the 4-2-4 split over the question presented: whether 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 (a) prove which specific procedures cause the disparity, (b) prove discrimination underlying those procedures, or both.

A. Four circuits hold that significant disparities over a long period can establish "systematic exclusion."

Four circuits—the First, Third, Sixth, and Tenth—have rejected the position adopted by the Second and Eighth Circuits, and several states. *See* Pet. 14–18. In those four circuits, a defendant need not establish which specific procedures cause a given disparity. Instead, "[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 v. Ponte*, 772 F.2d 982, 989 (1st Cir. 1985); *see also United States v. Weaver*, 267 F.3d 231, 244 (3d Cir. 2001) ("'[S]ystematic exclusion' can be shown by a large discrepancy repeated over time such that the system must be said to bring about the underrepresentation."); *United States v. Johnson*, 95 F.4th 404, 413 (6th Cir. 2024); *United States v. Test*, 550 F.2d 577, 586 (10th Cir. 1976).

None of these circuits have retreated from these holdings. Of course, as respondent notes, the Third Circuit has said that "such evidence might satisfy *Duren*'s third requirement only 'under some circumstances,'" BIO 14 (quoting *Weaver*, 267 F.3d at 245): the discrepancy must be more than just "sizeable," but "sufficiently large" and "repeated over time" such that it can be said to be "systematic." *Weaver*, 267 F.3d at 244.[1] Petitioner never contended otherwise. And his case meets this test: The Second

[1] Similarly, respondent erroneously suggests that in *United States v. Savage*, 970 F.3d 217 (3d Cir. 2020), the court "treated the persistence of disparities as one of many factors bearing on the systematic-exclusion inquiry." BIO 14. In fact, *Savage*—like *Weaver*—recognized that a jury-selection system would "run afoul of the third prong if it produced underrepresentation 'over time'—enough time to deem the underrepresentation 'persistent.'" *Savage*, 970 F.3d at 260 (quoting *Weaver*, 267 F.3d at 244–45).

Circuit itself acknowledged persistent and "troubling" Black and Hispanic underrepresentation in S.D.N.Y. venires going as far back as 1996 and worsening over time. Pet. App. 53a–54a. This means that, if petitioner had been prosecuted in New Jersey instead of New York, his proof would have satisfied *Duren*'s third prong.

The same is true in the First Circuit. *Barber*, 772 F.2d at 989. Respondent claims that the *Barber* holding on systematic exclusion was "reverse[d]" by the First Circuit en banc—but it overlooks that the reversal was based on *Duren*'s *first* prong (distinctive group), not on *Duren*'s third prong at issue here (systematic exclusion). *See id.* at 996 (en banc) (overruling a prior decision holding "that 'young adults' (ages 18–34) constitute a sufficiently cohesive group to be cognizable in determining whether they are adequately represented within the jury venires for sixth amendment purposes"). Nor did the First Circuit's opinion in *United States v. Pion*, 25 F.3d 18, 24 (1st Cir. 1994), overturn the circuit's earlier holding that "[a] large discrepancy occurring over a sustained period of time" can prove systematic exclusion. *Barber*, 772 F.2d at 989. That's because *Pion* involved no large, sustained disparity at all: It involved a small, one-time discrepancy, so the court concluded that "the relatively small Hispanic underrepresentation" cannot be deemed

"attributable to anything other than the randomness of the draw." *Pion*, 25 F.3d at 24.

Respondent concedes that in the Sixth Circuit, unlike the Second Circuit, "'a large routine discrepancy' could show systematic exclusion in certain instances." BIO 14 (quoting *Johnson*, 95 F.4th at 412). But it notes that defendants in the Sixth Circuit regularly fail to demonstrate a "long and routine discrepancy." BIO 14–15. That point, however, does not undermine the split. If anything, it establishes that petitioner's proposed rule is not a windfall for defendants; instead, it allows claims to prevail only when, as here, the disparities are truly longstanding (here, persisting more than two decades), significant, and "troubling." Pet. App. 22a–23a; *see also, e.g.*, *Ford v. Seabold*, 841 F.2d 677, 685 (6th Cir. 1988) (en banc) (rejecting a *Duren* challenge because "the alleged claim of underrepresentation in this case is supported only by the results of two samples," whereas "[i]n *Duren*, the underrepresentation was evident in every weekly venire for a period of nearly a year.").

Finally, respondent denies that the Tenth Circuit's position conflicts with the Second Circuit's—even though *Test* declared 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." 550 F.2d at 577. Contrary to respondent's contention, the court in *Test* did not reject the defendant's claim because he pointed to "statistical disparity alone"; it did so because the defendant did not point to a disparity *large* enough. *See id.* (rejecting claim because "the maximum disparity demonstrated by defendants" was "approximately 4%"). And *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir. 1987), did not overturn *Test* after *Duren*: the court merely suggested that something similar to "the statutory exemption criteria in *Duren*" would be *sufficient* to prove systematic exclusion, not that such a feature is *necessary* to prove systematic exclusion. *Id.* at 610–11.

B. Four circuits require intentional discrimination or other misconduct.

In sharp contrast, at least four other circuits hold that a defendant cannot establish "systematic exclusion" even when she identifies longstanding, significant statistical disparities and points to specific jury-selection procedures causing those disparities. Instead, a defendant must prove intentional discrimination or other affirmative misconduct in the jury-selection process. *See 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).

Respondent argues, quoting *Truesdale v. Moore*, 142 F.3d 749, 755–56 (4th Cir. 1998), that these circuits only require proof that a "jury-selection plan operate[d] in a 'discriminatory manner'—not that government officials crafted or implemented a plan with 'discriminatory purpose.'" BIO 16. But that reading of *Truesdale* only confirms the split, because other courts, including the Second Circuit and various state courts of last resort, don't require proof of discrimination in jury selection *at all*. In the Fourth Circuit, however, "the fair cross-section requirement only protects against intentional discrimination in the jury selection process." *Cecil*, 836 F.2d at 1464 (Phillips. J., dissenting in relevant part, joined by Winter & Murnaghan, JJ.).

Nor have the Fifth, Seventh, or Eleventh Circuits repudiated their insistence on proof of intentional discrimination. *United States v. Snarr*, 704 F.3d 368, 385 (5th Cir. 2013), simply held that *Duren* requires evidence that jurors were "underrepresented due to procedures in the jury selection process that work to exclude class members"; courts continue to cite the Fifth Circuit's prior decision in *Steen* in rejecting fair cross-section claims. *See, e.g.*, *Matthews v. Stephens*, No. 2:11-CV-0164, 2014 WL 1567369, at *4 (N.D. Tex. Apr. 18, 2014). *United States v. Moreland*, 703

F.3d 976, 982 (7th Cir. 2012), similarly said that defendants must provide "some evidence of systematic exclusion of some definable element of society"; it did not explain what proof of systematic exclusion requires, let alone abandon Seventh Circuit precedent requiring proof of intentional discrimination. And *Berryhill v. Zant*, 858 F.2d 633 (11th Cir. 1988), only discussed *Duren*'s second prong, not its third. *Id.* at 638 (focusing on whether the defendant "establish[ed] that the group's underrepresentation was unfair and unreasonable").

Quite simply, then, respondent has failed to rebut petitioner's showing that the circuits (and state courts of last resort) are deeply divided over what *Duren*'s "systematic exclusion" prong means and requires.

II. The decision below is wrong.

In insisting the Second Circuit's position is correct, respondent first claims—echoing the court below—that systematic exclusion requires "evidence linking a jury-selection plan to a group's underrepresentation." BIO 10. But no such requirement was imposed in *Duren* itself. Indeed, while the petitioner in *Duren* posited that the disparity between men and women serving on juries was due to various state policies and practices allowing women to opt out of jury service, this Court did not demand that the petitioner establish—let alone prove with "evidence"—*which* specific

policy was causing the disparity. *See Duren v. Missouri*, 439 U.S. 357, 367 (1979). *Duren* even acknowledged that the disparity may have been caused by 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 "met" his burden of proving systematic exclusion by showing "that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year." *Id.* at 366. That evidence, this Court held, "manifestly indicate[d] that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." *Id.*

Nor does respondent explain how imposing such a high burden on a defendant at the prima facie stage accords with the Sixth Amendment. Just as the Sixth Amendment imposes affirmative obligations on the government to provide a speedy trial to the accused, and a lawyer to the indigent, the fair cross-section requirement "gives the defendant a right to a particular *outcome*: a representative jury pool." Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 155–56 (2019). Evidence that disparities are caused, in part, by private choices may be relevant to whether a prima facie violation of the Sixth Amendment is *justified*—a question on which the

government bears the burden of proof—not to whether the petitioner has made out a prima facie case in the first instance. *Duren*, 439 U.S. at 368–69.

Respondent insists that "defendants have various ways to make the required factual showing under *Duren*" and that courts provide for "appropriate access" to jury-selection plans and data. BIO 11–13. Of course, even if defendants *did* have equal access to jury-selection data or ample ways to make their prima facie case, that wouldn't justify imposing a burden that the Sixth Amendment and *Duren* do not demand. But, in fact, defendants do *not* have the means to make out a prima facie case under respondent's flawed understanding of *Duren*. After all, defendants are not experts in designing or implementing constitutionally adequate jury-selection methods. That is the government's job. And the government—including the officials charged with creating and administering jury plans—is much better equipped than defendants to determine why particular racial groups are not being fairly represented.

Put simply, the defendant's burden under *Duren* is to show that the jury-selection process has regularly and significantly underrepresented a distinctive group—a burden petitioner has met. The job of identifying—and fixing—the specific flaws that perpetuate the disparities falls on the government, not the defendant.

III. This case is an excellent vehicle.

Finally, this case is an excellent vehicle for clarifying the meaning of *Duren*'s third prong. Indeed, it is far better than the handful of other petitions respondent cites (BIO 6), all of which were (at best) plagued with alternate holdings or other issues that would complicate review. *See, e.g.*, *United States v. Seugasala*, 702 F. App'x 572, 574 (9th Cir. 2017) (concluding that the defendant's challenge failed on *Duren's* Prong Two *and* Prong Three, and not addressing whether a persistent, longstanding disparity would have satisfied Prong Three); *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1166 (9th Cir. 2014) (same); *United States v. Pritt*, 458 F. App'x 795, 798 n.4 (11th Cir. 2012) (rejecting claim under Prong Two and deeming it "unnecessary" to even address Prong Three).

The vehicle problems cited by respondent are illusory. Respondent first argues that, even if petitioner were to prevail under *Duren*'s third prong, his appeal would ultimately fail on *Duren*'s second prong, as "numerous courts have noted that an absolute disparity below 10% generally will not reflect unfair and unreasonable representation." BIO 17 (quotation marks omitted). But the Second Circuit has already declined the government's invitation to adopt an inflexible 10% floor, as has this Court. *Berghuis v. Smith*, 559 U.S. 314, 330 n.4 (2010) (noting that a 10% floor would mean that "the Sixth Amendment offers no remedy for

complete exclusion of distinct groups in communities where the population of the distinct group falls below the 10 percent threshold"). Instead, the Second Circuit correctly assumed, contrary to respondent's position, that petitioner's proof of persistent and "troubling" disparities satisfied the second prong. Pet. App. 22a.

In any event, respondent's speculation that petitioner's claim will ultimately founder on *Duren* Prong Two is not a basis for denying review, because this petition exclusively concerns *Prong Three*. And this Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand. *See, e.g., McFadden v. United States*, 576 U.S. 186, 197 (2015); *Rosemond v. United States*, 572 U.S. 65, 83 (2014); *Neder v. United States*, 527 U.S. 1, 25 (1999).

Respondent also says the question presented is a "matter of diminishing importance," as the Southern District of New York recently amended its procedures to reduce the interval for refilling the master jury wheels from four to two years. BIO 17–18. Respondent is wrong. Even if this change reduces future disparities in the S.D.N.Y.—and there is no proof it will—the circuit split will persist over the meaning of *Duren*'s third prong. And that important and recurring legal issue affects criminal

defendants across the country, not just in the Southern District of New York.

Nor does it matter that petitioner has been deported. Respondent doesn't claim this case is moot—it's not, as the Second Circuit held—meaning he maintains a concrete stake in the appeal. Pet. App. 10 n.5. Indeed, if this Court grants review and petitioner ultimately prevails under *Duren*, his federal criminal conviction would have to be vacated. *See* 28 U.S.C. § 1867(d).

In sum, this Court should grant review—not just for petitioner, but for the legions of other defendants who raise fair cross-section challenges every year.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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