

No. 17-6674

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IN THE SUPREME COURT OF THE UNITED STATES

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STUART T. SEUGASALA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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# QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner was not denied his right under the Sixth Amendment to a grand jury drawn from a fair cross-section of the community.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is not published in the Federal Reporter but is reprinted at 702 Fed. Appx. 572. The opinion of the district court (Pet. App. A11-A17) is not published in the Federal Supplement but is available at 2015 WL 1781969.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2017. A petition for rehearing was denied on September 11, 2017 (Pet. App. A7-A8). The petition for a writ of certiorari was filed

on November 1, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

Following a jury trial in the United States District Court for the District of Alaska, petitioner was convicted on one count of conspiring to distribute and possess with intent to distribute heroin, cocaine, crack cocaine, and 500 grams or more of methamphetamine, in violation of 21 U.S.C. 846, 841(a)(1), 841(b)(1)(A), and 841(b)(1)(C); two counts of kidnapping, in violation of 18 U.S.C. 1201(a)(1); one count of possessing and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i) and (ii); one count of possessing and brandishing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) and (ii); and two counts of aiding and abetting the disclosure of health information without authorization and for personal gain or malicious harm, in violation of 42 U.S.C. 1320d-6(a)(3) and (b)(3) and 18 U.S.C. 2. Amended Judgment 1; Amended First Superseding Indictment 1-9. Petitioner was sentenced to life imprisonment. Amended Judgment 2. The court of appeals affirmed. Pet. App. A1-A6.

1. While on supervised release for prior federal drug-trafficking convictions entered in the United States District Court for the District of Hawaii, petitioner resumed his

involvement in drug trafficking, first in Washington and then in Alaska. See Gov't C.A. Br. 3-4. In particular, between 2010 and 2013, petitioner participated in a conspiracy to obtain and distribute controlled substances. See id. at 3-28. Among other things, petitioner organized armed invasions of homes of other drug traffickers in and around Anchorage, Alaska, in order to acquire drugs for distribution or drug-trafficking proceeds. Id. at 9-11. Petitioner also sought to obtain distribution quantities of methamphetamine from California. Id. at 11-12. Petitioner and his co-conspirators perpetrated violent crimes in furtherance of their drug trafficking, including the kidnapping and sexual assault of two individuals using a hot curling iron. Id. at 12-17. After the two victims were hospitalized, petitioner conspired with a hospital employee to investigate whether the victims were cooperating with law enforcement and to obtain and disclose confidential information about the victims' injuries and treatments. Id. at 20-21.

2. a. In 2014, a federal grand jury in the District of Alaska returned an amended first superseding indictment charging petitioner with one count of conspiring to distribute and possess with intent to distribute heroin, cocaine, crack cocaine, and 500 grams or more of methamphetamine, in violation of 21 U.S.C. 846, 841(a)(1), 841(b)(1)(A), and 841(b)(1)(C); two counts of kidnapping, in violation of 18 U.S.C. 1201(a)(1); one count of

possessing and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i) and (ii); one count of possessing and brandishing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) and (ii); and two counts of aiding and abetting the disclosure of health information without authorization and for personal gain or malicious harm, in violation of 42 U.S.C. 1320d-6(a)(3) and (b)(3) and 18 U.S.C. 2. Amended First Superseding Indictment 1-9.

b. Before trial, petitioner moved to dismiss the indictment based on the assertion that Pacific Islanders were underrepresented in the grand jury pool and that the pool was therefore not drawn from a fair cross-section of the community, in violation of the Sixth Amendment and the Jury Selection and Service Act of 1968 (JSSA), 28 U.S.C. 1861 et seq. The district court denied that motion without prejudice to renewal after trial. Pet. App. A9-A10. At trial, the jury found petitioner guilty on all charges. See Gov't C.A. Br. 29.

c. After trial, petitioner renewed his motion, which the district court again denied. Pet. App. A11-A17.

The district court noted that, under a plan adopted pursuant to the JSSA, "[e]very two years, the District Court obtains a list of registered voters from the State of Alaska for the most recent election." Pet. App. A11-A12. "From that list, a pool of potential jurors is selected at random and these individuals

comprise the District's jury wheel." Id. at A12. "Each new grand jury is selected from a smaller group of potential jurors drawn from the jury wheel and serves for a term of 18 months." Ibid. The court stated that the plan "follows the mandate of the [JSSA] by using the registered voters list," inasmuch as the plan's authors had determined that "'the list of registered voters for the last local, state or national election represents a fair cross-section of the community in the District of Alaska.'" Id. at A11; see 28 U.S.C. 1863(b)(2) (requiring jury-selection plans to be based on "voter registration lists or the lists of actual voters \* \* \* within the district or division," and supplemented only "where necessary to foster the policy and protect the rights secured by" the JSSA).

Quoting this Court's decision in Duren v. Missouri, 439 U.S. 357 (1979), the district court explained that, under the Sixth Amendment and the JSSA, a defendant alleging a violation of the "fair-cross-section requirement" must make three showings: "(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." Pet. App. A13 (quoting Duren, 439 U.S. at 364). The court found that, although

Pacific Islanders qualified as a distinctive group under the first prong of Duren, petitioner failed to satisfy Duren's other two prongs. See id. at A13-A17.

First, the district court found that petitioner had failed to satisfy the second Duren prong because he did not show that "the representation of Pacific Islanders in the jury wheel was [not] fair and reasonable in relation to the community population." Pet. App. A16 (emphasis omitted). The court identified two tests -- the "absolute disparity" test and the "comparative disparity" test -- that courts have used in assessing the fairness of a group's representation in a jury pool. Id. at A14-A15 & n.9. "'Absolute disparity'" is "determined by subtracting the percentage of [the group] in the jury pool \* \* \* from the percentage of [the group] in the local, jury-eligible population." Berghuis v. Smith, 559 U.S. 314, 323 (2010). "'Comparative disparity,'" in turn, is "determined by dividing the absolute disparity \* \* \* by the group's representation in the jury-eligible population." Ibid.<sup>1</sup>

The district court observed that, following the Ninth Circuit's en banc decision in United States v. Hernandez-Estrada, 749 F.3d 1154, cert. denied, 135 S. Ct. 709 (2014), circuit

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<sup>1</sup> For example, if a group makes up 5 percent of the jury-eligible population but only 3 percent of the jury pool, the absolute disparity for that group would be 2 percent, and the comparative disparity would be 40 percent.

precedent "no longer mandate[d] exclusive reliance on [the] absolute disparity [test]." Pet. App. A15. The court determined, however, that the circumstances here warranted application of the absolute-disparity test because the court "[wa]s not persuaded that the present case warrant[ed] departure" from that test, "particularly" because the comparative-disparity test "'can overstate the underrepresentation of a group that has a small population percentage.'" Ibid. (quoting Hernandez-Estrada, 749 F.3d at 1161-1162).

Applying the absolute-disparity test, the district court found that Pacific Islanders made up one percent of the entire population of Alaska and one-half of one percent of the District's jury wheel, resulting in an "absolute disparity of just .5%". Pet. App. A15. The court determined that "[g]iven the facts and circumstances of this case," and "especially given how very low the disparity is," there was "no reason to deviate" from past cases that had "'declined to find underrepresentation of a distinctive group where the absolute disparity was 7.7% or lower.'" Id. at A15-A16 (quoting Hernandez-Estrada, 749 F.3d at 1161).

Second, the district court found that petitioner had not satisfied the third Duren prong because he did not show "that any underrepresentation [was] the result of a systematic exclusion of Pacific Islanders in the jury-selection process." Pet. App. A17 (emphasis omitted). Petitioner "speculate[d]" that "Pacific

Islanders are less likely to register as voters because of their poverty and/or mobility” and therefore posited that reliance on voter lists would lead to systematic underrepresentation of Pacific Islanders in the jury pool. Id. at A16. But the court explained that petitioner had provided “no empirical evidence” that Pacific Islanders “register to vote at a lower rate than the general population,” and also failed to show that “other methods of juror selection \* \* \* would substantially increase the representation of Pacific Islanders in the jury pool.” Ibid.

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. A1-A6. As relevant here, the court determined that the district court “properly denied [petitioner’s] motion to dismiss his indictment on the ground that it violated his right to a grand jury drawn from a fair cross-section of the community.” Id. at A3. The court of appeals observed that the absolute disparity between Pacific Islanders in the overall population and in the grand jury pool “was only approximately 0.5%,” which the court found was “a gap too small to ‘substantially affect the representation of the group in the actual jury pool.’” Id. at A3-A4 (quoting Hernandez-Estrada, 749 F.3d at 1165). The court also concluded that petitioner “failed to marshal sufficient empirical evidence demonstrating that the underrepresentation of Pacific Islanders was due to systematic exclusion of the group.” Id. at A4.

The court of appeals denied a petition for rehearing, with no judge requesting a vote. Pet. App. A7-A8.

#### ARGUMENT

Petitioner renews his contention (Pet. 10-22) that the grand jury pool failed to represent a fair cross-section of the community because it included insufficient participation by Pacific Islanders. The court of appeals correctly rejected that contention on multiple grounds, and its unpublished decision does not conflict with any decision of this Court or of another court of appeals or state court of last resort. Although federal and state courts have not adopted one uniform statistical approach in evaluating fair-cross-section claims, no court has adopted petitioner's favored rule, and petitioner cannot show that any federal court of appeals or state court of last resort would find a violation on these facts. Further review is not warranted.

1. The Sixth Amendment's guarantee of an "impartial jury" in a criminal case encompasses a right to have the jury selected from a jury venire representing a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 526 (1975); see id. at 526-531. That Sixth Amendment right has been applied to grand jury selection. See, e.g., United States v. Torres-Hernandez, 447 F.3d 699, 703-704 (9th Cir.), cert. denied, 549 U.S. 1066 (2006); Murphy v. Johnson, 205 F.3d 809, 817-818 (5th Cir.), cert. denied, 531 U.S. 957 (2000).

Within the federal judicial system, the JSSA codifies and implements the Sixth Amendment's "fair cross section" guarantee. 28 U.S.C. 1861. The JSSA requires the creation and operation of a random jury-selection plan for each federal judicial district, 28 U.S.C. 1863(a), and provides a procedural mechanism through which a criminal defendant may contest any "substantial failure to comply with" the Act, 28 U.S.C. 1867(a). Courts of appeals have interpreted the JSSA to impose the same requirement as the Sixth Amendment. See, e.g., United States v. Hernandez-Estrada, 749 F.3d 1154, 1158 (9th Cir.) (en banc) ("[T]he same analysis determines whether the jury selection procedures meet the fair cross-section requirement under either the Jury Selection Act or the Sixth Amendment."), cert. denied, 135 S. Ct. 709 (2014); United States v. Rodriguez, 581 F.3d 775, 790 (8th Cir. 2009) (collecting cases), cert. denied, 562 U.S. 981 (2010).

In order to prove a violation of the Sixth Amendment's fair-cross-section guarantee, the defendant must first establish a prima facie case by demonstrating (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 v. Missouri, 439 U.S. 357, 364

(1979). If a defendant establishes a prima facie case, the burden shifts to the government to show that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process \* \* \* that result in the disproportionate exclusion of a distinctive group." Id. at 367-368.

In Duren, this Court found that the defendant had established a violation of the Sixth Amendment under circumstances where a jury-selection system allowed women, but not men, to claim an automatic exemption from jury service. 439 U.S. at 358-360. The defendant showed that, although women formed 54 percent of the jury-eligible population, they formed only 15 percent of the jury pool. Id. at 364-366 & n.23. The Court found that "[t]he resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the system by which juries were selected," namely "the operation of [the State's] exemption criteria." Id. at 367. Similarly, in Taylor, this Court found a Sixth Amendment violation where women made up 53 percent of the jury-eligible population, but formed no more than 10 percent of the jury pool, because women were only called for jury service if they affirmatively volunteered. 419 U.S. at 524-526.

Most recently, in Berghuis v. Smith, 559 U.S. 314 (2010), this Court observed that "neither Duren nor any other decision of this Court specifies the method or test courts must use to measure

the representation of distinctive groups in jury pools.” Id. at 329. The Court explained that courts and litigants have identified “three methods” for measuring the significance of an observed disparity: “absolute disparity, comparative disparity, and standard deviation.” Ibid.<sup>2</sup> But the Court observed that “[e]ach test is imperfect,” particularly when members of the relevant group “compose only a small percentage of those eligible for jury service.” Ibid. (brackets and citation omitted). The Court reasoned that it had “no cause to take sides today on the method or methods by which underrepresentation is appropriately measured,” because the court of appeals in that case had failed to properly apply the standard of review applicable to state habeas claims under 28 U.S.C. 2254(d). Berghuis, 559 U.S. at 329-330; see id. at 330-333. The Court reaffirmed, however, that “the fair-cross-section principle must have much leeway in application.” Id. at 321 (quoting Taylor, 419 U.S. at 537-538).

2. The court of appeals properly affirmed the district court’s determination that petitioner failed to satisfy the second prong of Duren, and no review is warranted of that holding. Pet. App. A3-A4.

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<sup>2</sup> The absolute-disparity and comparative-disparity tests are described at p. 6 & n.1, supra. The “[s]tandard deviation” test measures “the probability that the disparity between a group’s jury-eligible population and the group’s percentage in the qualified jury pool is attributable to random chance.” Berghuis, 559 U.S. at 324 n.1.

a. The court of appeals correctly determined that petitioner failed to show that the representation of Pacific Islanders in the grand jury pool was not fair and reasonable in relation to their share of the jury-eligible population. Pet. App. A3-A4. As the court explained, the absolute disparity between the share of Pacific Islanders in Alaska's overall population and their share in the grand jury pool "was only approximately 0.5%," which the court reasonably found was "a gap too small to 'substantially affect the representation of the group in the actual jury pool.'" Ibid. (citation omitted).<sup>3</sup> Even if the representation of Pacific Islanders in the jury pool were increased so as to precisely mirror their share of the overall population, it would result in only one additional Pacific Islander on every eight grand juries. See Gov't C.A. Br. 58; cf. Hernandez-Estrada, 749 F.3d at 1171 n.2 (M. Smith, J., concurring in the judgment) (reasoning that "correcting an absolute disparity \* \* \* [that] will, on average, result in the addition of less than one group member on a grand jury of 23" would not have a "substantial" effect and "cannot be said to affect the fairness of defendant's trial") (citation omitted). The court of

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<sup>3</sup> This Court has described the absolute-disparity test as requiring a comparison to the group's representation in "the jury-eligible population," Berghuis, 559 U.S. at 323 (emphasis added), not to its share of the overall population (which includes those ineligible to serve as jurors, such as minors and non-citizens). Petitioner here, however, provided evidence only of the share of Pacific Islanders in the "entire population," Pet. App. A15, and not evidence of their share of the jury-eligible population.

appeals reasonably found that such a marginal difference would not "den[y] [petitioner] his right \* \* \* to a [grand] jury selected from a fair cross section of the community," Duren, 439 U.S. at 359; see Pet. App. A3-A4, particularly given this Court's emphasis that "the fair-cross-section principle must have much leeway in application," Berghuis, 559 U.S. at 321 (brackets omitted) (quoting Taylor, 419 U.S. at 537-538).

Petitioner asserts (Pet. 15-16) that, assuming the absolute-disparity test is only violated when the disparity crosses a "threshold \* \* \* in the area of 10%," there could "never be a fair cross-section challenge based on absolute disparity" when the underrepresented group's share of the jury-eligible population is "less than the threshold." See also Pet. App. A55 (arguing that "[u]sing the 10% standard \* \* \* would mean there is no remedy for complete exclusion of distinct groups" whose population "falls below the 10% threshold"). But the court of appeals did not hold that the exclusion of Pacific Islanders from the District of Alaska grand jury pool would categorically be permitted simply because Pacific Islanders form less than ten percent of the population. Rather, the court concluded only that the particular disparity at issue here -- a one-half-of-one-percent absolute disparity for a group that makes up one percent of the overall population -- was "too small to substantially affect the representation of the group in the actual jury pool." Id. at A3-A4 (citation omitted). The

court thus had no occasion to opine on whether or how to apply the absolute-disparity test in circumstances where, for example, a distinct group is completely excluded from the venire.

b. Contrary to petitioner's suggestion, the court of appeals' decision does not conflict with the decisions of any other court of appeals or state court of last resort. Petitioner asserts (Pet. 10) that "the lower federal courts and state courts are all over the map on the question" whether a court "can consider just absolute disparity" in applying Duren's second prong. But no clear conflict exists on that question, as no court has expressly adopted petitioner's theory (Pet. 19) that "courts must be required to consider more than absolute disparity" whenever "the underrepresented group is a small population group." More generally, although there has been some variation among the lower courts in their approach to evaluating statistical evidence relevant to Duren's second prong, that variation is not as widespread as petitioner suggests, nor does it bear on the outcome of this case.

At least before this Court's decision in Berghuis, some courts faced with Sixth Amendment fair-cross-section claims relied on the absolute-disparity test as the exclusive method for determining whether an observed underrepresentation of a particular group in jury pools rises to the level of a Sixth Amendment violation. See, e.g., United States v. Carmichael, 560 F.3d 1270, 1279-1281 (11th

Cir. 2009), cert. denied, 558 U.S. 1128 (2010); United States v. Royal, 174 F.3d 1, 6-11 (1st Cir. 1999); United States v. Rioux, 97 F.3d 648, 655-656 (2d Cir. 1996); United States v. Ashley, 54 F.3d 311, 314 (7th Cir.), cert. denied, 516 U.S. 888 (1995); United States v. Clifford, 640 F.2d 150, 154-156 (8th Cir. 1981); United States v. Butler, 611 F.2d 1066, 1069-1070 (5th Cir.), cert. denied, 449 U.S. 830 (1980). Several of those courts of appeals have suggested in dicta, however, that courts might permissibly supplement the absolute-disparity test with other tests in limited circumstances. See Mosley v. Dretke, 370 F.3d 467, 479 n.5 (5th Cir. 2004) ("We leave open the possibility that if the distinctive group at issue makes up less than 10% of the population, comparative disparity may be used."), cert. denied, 543 U.S. 1154 (2005); United States v. Jackman, 46 F.3d 1240, 1247 (2d Cir. 1995) (stating that the "absolute numbers approach is of questionable validity when applied to an underrepresented group that is a small percentage of the total population"); United States v. Rodriguez, 776 F.2d 1509, 1511 n.4 (11th Cir. 1985) (suggesting that the "absolute disparity method is not the sole means of establishing unlawful jury discrimination" in cases involving a small minority group).

Both before and after Berghuis, other courts of appeals -- including the court below in this case -- have held that courts need not rely exclusively on the absolute-disparity test, but "may

use one or more of a variety of statistical methods to respond to the evidence presented" on underrepresentation. Hernandez-Estrada, 749 F.3d at 1165; see also Garcia-Dorantes v. Warren, 801 F.3d 584, 600-604 (6th Cir. 2015) (relying on both absolute-disparity and comparative-disparity approaches), cert. denied, 136 S. Ct. 1823 (2016); United States v. Orange, 447 F.3d 792, 798 (10th Cir. 2006) (explaining that "[a]bsolute disparity is the starting point for all other methods of comparison in this circuit," but allowing consideration of comparative disparity); United States v. Weaver, 267 F.3d 231, 241-242 (3d Cir. 2001) (identifying absolute disparity as "the preferred method of analysis in most cases," but stating that "[o]ur precedent does not dictate that one method of statistical analysis should be used rather than another"), cert. denied, 534 U.S. 1152 (2002); State v. Plain, 898 N.W.2d 801, 826 & n.11 (Iowa 2017) (following Hernandez-Estrada in "permitting multiple analyses to be used that are appropriate to the circumstances of each case," and collecting cases).

Given that many lower courts have not addressed the issue after Berghuis, which noted that any approach is "imperfect," 559 U.S. at 329, any review of any differences in courts' approaches would be unwarranted. In any event, no court of appeals has embraced petitioner's particular argument (Pet. 16) that a court "can[not] ever limit itself to considering just absolute

disparity.” Tellingly, one of the two courts petitioner asserts to have such a rule is the court that decided his own case. But as the decision below in this case illustrates, the Ninth Circuit does not read its own precedent in the same manner that petitioner does. Petitioner mistakenly asserts (Pet. 11) that the Ninth Circuit in Hernandez-Estrada “expressly rejected reliance on absolute disparity alone.” But that decision “decline[d] to confine district courts to a particular analytical method,” instead recognizing that the proper test “will largely depend on the particular circumstances of each case.” Hernandez-Estrada, 749 F.3d at 1164-1165. Thus, the Ninth Circuit permits, but does not require, other statistical methods besides the absolute-disparity test to be used.

The Sixth Circuit’s decision in Garcia-Dorantes similarly does not endorse the rule petitioner proposes. There, the court of appeals noted that this Court has “not mandated the proper statistical measure to determine whether a minority is underrepresented for purposes of [Duren’s] second prong,” 801 F.3d at 601, and observed that “courts typically use either -- or both -- the ‘absolute disparity’ or the ‘comparative disparity’ test to measure the distinctive group’s underrepresentation,” id. at 600. Although the court suggested that comparative disparity “was the most accurate measure of the underrepresentation” in circumstances where the group in question “comprised a small

percentage of the population,” id. at 602, the Sixth Circuit did not expressly hold that a district court must use the comparative-disparity test in all such circumstances.

c. Because Ninth Circuit precedent already holds that “courts may use one or more of a variety of statistical methods to respond to the evidence presented,” Hernandez-Estrada, 749 F.3d at 1165, this case would be a particularly poor vehicle for addressing petitioner’s argument. The district court here expressly recognized that “precedent in this circuit no longer mandates exclusive reliance on absolute disparity,” Pet. App. A15, and it declined to apply a different methodology only because it understood the comparative-disparity test urged by petitioner to have similar flaws and because “there exist[ed] no obvious indication that the current system is unfair to Defendant,” ibid. To the extent that petitioner suggests that the court of appeals or district court erred in applying circuit precedent, that assertion would not provide a basis for this Court’s review. Cf. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) (“It is primarily the task of a Court of Appeals to reconcile its internal difficulties.”).

In any event, review is unwarranted for the additional reason that application of the approach that petitioner advocates would make no difference to the outcome of this case. Petitioner argues (Pet. 19) that the district court was required to supplement its

absolute-disparity analysis with another test, such as “comparative disparity” or “standard deviation.” But petitioner fails to show that courts applying those approaches would find a constitutional violation on these facts. Rather, the weight of authority in other circuits suggests that a comparative disparity of 50 percent for a group that forms only 1 percent of the population is not sufficient to satisfy the second prong of Duren.<sup>4</sup> As this Court recognized in Berghuis, a group that comprises such a small percentage of the population may not generate illuminating results under any form of numerical analysis. See 559 U.S. at 329. Moreover, because the court of appeals’ decision may be affirmed in any event based on petitioner’s failure to satisfy the

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<sup>4</sup> See, e.g., Orange, 447 F.3d at 796, 798-799 (finding no violation where groups with absolute disparities of 2.62, 1.55, 0.80, and 1.66 percent had comparative disparities of 35.41, 36.82, 54.41, and 54.97 percent, respectively); Weaver, 267 F.3d at 243 (no violation where one group had absolute disparity of 1.23 percent and comparative disparity of 40.01 percent, and another group had absolute disparity of 0.71 percent and comparative disparity of 72.98 percent); United States v. Chanthadara, 230 F.3d 1237, 1256-1257 (10th Cir. 2000) (no violation where one group had absolute disparity of 3.23 percent and comparative disparity of 40.89 percent, and another group had absolute disparity of 1.60 percent and comparative disparity of 58.39 percent), cert. denied, 534 U.S. 992 (2001); United States v. Shinault, 147 F.3d 1266, 1273 (10th Cir. 1998) (no violation where groups with absolute disparities of 0.76, 2.56, and 1.42 percent had comparative disparities of 59.84, 50.09, and 48.63 percent, respectively); United States v. Clifford, 640 F.2d 150, 155-156 (8th Cir. 1981) (no violation where group had absolute disparity of 7.2 percent and comparative disparity of 46 percent). But cf. Garcia-Dorantes, 801 F.3d at 600-602 (finding absolute disparity of 3.45 percent and comparative disparity of 42 percent, “taken together,” were “sufficient to satisfy Duren’s second prong”).

third prong of Duren (see pp. 21-24, infra), petitioner would not be entitled to relief even if he could show a legally significant disparity under Duren's second prong.

3. The court of appeals' independent holding that petitioner failed to satisfy the third prong of Duren, see Pet. App. A4, also does not warrant this Court's review.

a. The court of appeals correctly determined that petitioner failed to "marshal sufficient empirical evidence" showing that any "underrepresentation of Pacific Islanders was due to systematic exclusion of the group." Pet. App. A4; see Duren, 439 U.S. at 366 (noting that "systematic" exclusion is exclusion "inherent in the particular jury-selection process utilized"). Petitioner's argument rested only on "speculat[ion]" that Pacific Islanders were "less likely to register as voters because of their poverty and/or mobility," which in turn rested on "data from the 1980s" suggesting, as a general matter, that poor or itinerant persons are less likely to vote. Pet. App. A16. The district court found that petitioner had provided "no empirical evidence" that Pacific Islanders in Alaska "register to vote at a lower rate than the general population." Ibid. And petitioner also did not show that "other methods of juror selection" aside from use of voter lists would "substantially increase the representation of Pacific Islanders in the [District's] jury pool." Ibid. Petitioner thus failed to show that "the system by which juries

were selected” in the District of Alaska had caused the “systematic exclusion” of Pacific Islanders. Duren, 439 U.S. at 366-367.

b. Petitioner seeks (Pet. 20-22) this Court’s review of “whether the impact of social and economic factors can support a fair-cross-section claim,” a question left open in Berghuis. 559 U.S. at 333 n.6. That question does not warrant review.

As petitioner himself acknowledges (Pet. 21), “most courts have rejected” the notion that socioeconomic factors resulting in lower rates of voter registration by particular groups would be sufficient to demonstrate “systematic exclusion” under Duren’s third prong. The courts of appeals have uniformly determined that the use of voter-registration lists as a source of jury members generally does not constitute systematic exclusion under Duren’s third prong. See, e.g., Carmichael, 560 F.3d at 1279 (“The circuits are in complete agreement that neither the [JSSA] nor the Constitution requires that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population.”) (brackets and internal quotation marks omitted); United States v. Rodriguez, 581 F.3d 775, 790 (8th Cir. 2009), cert. denied, 562 U.S. 981 (2010); United States v. Odeneal, 517 F.3d 406, 412 (6th Cir. 2008); United States v. Gonzalez-Velez, 466 F.3d 27, 39 (1st Cir. 2006); Weaver, 267 F.3d at 255; United States v. Smallwood, 188 F.3d 905, 914-915 (7th Cir. 1999), cert. denied, 528 U.S. 1129

(2000); United States v. Miller, 116 F.3d 641, 658-659 (2d Cir. 1997), cert. denied, 524 U.S. 905 (1998); United States v. Cecil, 836 F.2d 1431, 1446 (4th Cir.) (en banc), cert. denied, 487 U.S. 1205 (1988).

Petitioner asserts (Pet. 21-22) that the California Supreme Court reached a contrary conclusion, citing People v. Harris, 679 P.2d 433 (1984). Harris held that a defendant made a prima facie showing under Duren's third prong where the jury pool was "based on random selection from a list derived solely from a voter registration list." Id. at 51; see id. at 58-59. But the California Supreme Court has since clarified that "the failure of a particular group to register to vote in proportion to its share of the population cannot constitute improper exclusion attributable to the state." People v. Cunningham, 352 P.3d 318, 352 (Cal. 2015) (quoting People v. Ochoa, 28 P.3d 78, 91 (Cal. 2001)). That court has also held that "speculation as to the source of the disparity" in voter-registration rates, such as a suggestion that the distinct group was more "residentially mobile" than other groups, was "insufficient to show systematic exclusion." Ibid. (brackets and citation omitted). Petitioner therefore has identified neither any conflict nor any court in which his claim would prevail.

In any event, this case would present a poor vehicle to address the question that petitioner raises under Duren's third

prong. Petitioner has supplied no evidence to support his speculation that Pacific Islanders in Alaska do not register to vote at the same rate as the general population or that such a registration rate may be due to economic disadvantage or to the mobility of the population. See Pet. App. A16; Gov't C.A. Br. 60-61. This Court thus would have no suitable basis here to consider "whether the impact of social and economic factors can support a fair-cross-section claim." Berghuis, 559 U.S. at 333 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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