
No. 17-6674

IN THE
SUPREME COURT OF THE UNITED STATES

STUART SEUGASALA, PETITIONER,
vs.
UNITED STATES, RESPONDENT.

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

REPLY BRIEF

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REPLY BRIEF

I.

ARGUMENT

A. THE GOVERNMENT IS MISTAKEN IN ARGUING THAT THERE IS NOT A SPLIT IN THE LOWER COURTS ON WHETHER A COURT MAY RELY SOLELY ON ABSOLUTE DISPARITY IN APPLYING THE SECOND PRONG OF THE FAIR CROSS-SECTION TEST AND ARGUING THAT THIS CASE IS NOT A GOOD VEHICLE FOR RESOLVING THAT SPLIT.

Initially, the government is mistaken in suggesting there is not a split in the lower courts on the question of whether a court may rely solely on absolute disparity in applying the second prong of the fair cross-section test. The government's argument that there is no real split because of dicta that the absolute disparity test can be supplemented with other tests, *see* Brief in Opposition, at 16, suffers from at least two infirmities. First, the government cites opinions – *United States v. Jackman*, 46 F.3d 1240 (2d Cir. 1995), and *United States v. Rodriguez*, 776 F.2d 1509 (11th Cir. 1985) – from only two of the four circuits which have taken the position that only absolute disparity may be considered.¹ *Compare*

¹ The source of *Mosley v. Dretke*, 370 F.3d 467 (5th Cir. 2004) – the Fifth Circuit – has not taken the position that absolute disparity may never be considered. In an opinion denying a petition for rehearing en banc in the

Petition, at 10-11 (citing opinions from First, Second, Eighth, and Eleventh Circuits). Second, those opinions do not truly suggest what the government argues. The dicta in *Rodriguez* is more than 30 years old; that dicta predates the Eleventh Circuit opinion which is cited in the petition in the present case, *United States v. Carmichael*, 560 F.3d 1270 (11th Cir. 2009), *cited in* Petition, at 10; and that dicta has never been applied, or even repeated. The Second Circuit dicta in *Jackman* was strictly limited in a later opinion to circumstances where “(1) the underrepresentation did not arise from a ‘benign’ voter registration list; and (2) because some important data was missing, there were no effective means of review.” *United States v. Rioux*, 97 F.3d 648, 656 (2d Cir. 1986). *See also United States v. Barlow*, 732 F. Supp. 2d 1, 32-33 (E.D.N.Y. 2010) (citing *Rioux* for same proposition), *aff’d*, 479 Fed. Appx. 372 (2d Cir. 2012).

The government is also mistaken in suggesting that even the opinions on the other side of the split – the Ninth Circuit’s opinion in *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1163 (9th Cir. 2014) (en banc), and the Sixth Circuit’s opinion in *Garcia-Dorantes v. Warren*, 801 F.3d 584 (6th Cir. 2015) – allow courts to consider absolute disparity alone. Those opinions actually require consideration of something other than absolute disparity in the case of groups too

original case cited by the government – *United States v. Butler*, 611 F.2d 1066 (5th Cir. 1980), *cited in* Brief in Opposition, at 16 – the Fifth Circuit clarified:

We did not wish to imply that the absolute disparity method is the sole means of establishing unlawful jury discrimination. However, given the small absolute disparities proven *and the fact that a “less-than-10 percent minority” was not at issue*, we did not feel consideration of other statistical methods was necessary *in this case*.

United States v. Butler, 615 F.2d 685, 686 (5th Cir. 1980) (denial of petition for rehearing en banc) (emphasis added).

small for that test to ever be satisfied. *Hernandez-Estrada* (1) stated that “it is appropriate to abandon the absolute disparity approach,” *id.*, 749 F.3d at 1164; (2) stated that “the appropriate test or tests to employ will largely depend on the particular circumstances of the case,” *id.* at 1165; and (3) stated these things after recognizing that the absolute disparity test could *never* be satisfied – and, ipso facto, must not be “appropriate” – when a minority group’s representation is less than the 7.7 percent threshold for absolute disparity that the Ninth Circuit has implicitly adopted, *see id.* at 1161.² *Garcia-Dorantes* stated that the comparative disparity test is “the more appropriate measure of underrepresentation” where the distinctive group alleged to have been underrepresented is small, *id.*, 801 F.3d 584, 601 (6th Cir. 2015) (quoting *Smith v. Berghuis*, 543 F.3d 326, 338 (6th Cir. 2008), *rev’d on other grounds*, 559 U.S. 314 (2010)), and that it would be “unwise” to apply the absolute disparity test when the underrepresented group is so small, *Garcia-Dorantes*, 801 F.3d at 602.

Petitioner is not alone in reading the lower court opinions as showing disagreement, moreover. Courts and commentators recognize it as well. The Ninth Circuit noted in *Hernandez-Estrada* that “[a] survey of our sister circuits demonstrates the inconsistency of approaches.” *Id.*, 749 F.3d at 1164. Professor LaFave and his colleagues in their treatise on criminal procedure speak of the “reasonable representation” requirement “about which there continues to be disagreement.” 6 Wayne R. LaFave, et al., *Criminal Procedure* 73 (4th ed. 2015). Finally, a law review commentator has expressed concern about “unpredictable

² The unpublished Ninth Circuit opinion in the present case is inconsistent with this, but, as an unpublished opinion, it is non-precedential and therefore cannot control interpretation of *Hernandez-Estrada*.

outcomes, . . . [i]n large part . . . due to the lack of a clear directive from the Supreme Court on how to gauge underrepresentation.” Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 Yale L.J. 1913, 1918 (1994).

The government’s suggestion that this Court’s opinion in *Berghuis v. Smith*, 559 U.S. 314 (2010), has helped or might help to resolve this uncertainty, see Brief in Opposition, at 17, lacks merit. The *Hernandez-Estrada* opinion recognizing the division in the lower courts was issued five years after *Berghuis*. Professor LaFave’s commentary also postdates *Berghuis* by five years. Many, if not most, of the opinions holding only absolute disparity may be considered have been reaffirmed after *Berghuis*. See, e.g., *United States v. Davis*, 854 F.3d 1276, 1295 (11th Cir. 2017) (citing, inter alia, pre-*Berghuis* opinion of *Carmichael*); *United States v. Weekes*, 611 F.3d 68, 70 (1st Cir. 2010) (citing, inter alia, pre-*Berghuis* opinion of *United States v. Royal*, 174 F.3d 1 (1st Cir. 1999)); *Ellington v. State*, 735 S.E.2d 736, 750 (Ga. 2012) (citing, inter alia, pre-*Berghuis* opinion of *Humphries v. State*, 694 S.E.2d 316, 325 (Ga. 2010)).

Finally, the government errs in asserting the comparative disparity in the present case is too small in any event because “the weight of authority in other circuits suggests that the comparative disparity of 50 percent for a group that forms only 1 percent of the population is not sufficient.” Brief in Opposition, at 20. The cases the government cites in support of this assertion are not Ninth Circuit and Sixth Circuit cases applying the most accepting view of comparative disparity but are cases from the Third, Eighth, and Tenth Circuits which characterized absolute disparity as “the preferred method in most cases,” *United States v. Weaver*, 267 F.3d 231, 242 (3d Cir. 2001); characterized absolute

disparity as “the starting point for all other methods of comparison,” *United States v. Orange*, 447 F.3d 792, 798 (10th Cir. 2006) (citing *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000), and *United States v. Shinault*, 147 F.3d 1266, 1273 (10th Cir. 1998)); or considered comparative disparity only in the alternative after stating that “[t]his court has not seen fit to adopt the comparative disparity concept as a better means of calculating underrepresentation,” *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981). The Sixth Circuit, where consideration of the comparative disparity approach is not so limited, has found disparities of less than 50 percent sufficient. *See Garcia-Dorantes*, 801 F.3d at 601-02 (finding 42% and 27.64% comparative disparities in case at bar sufficient, noting 34% comparative disparity found sufficient in *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), *rev’d on other grounds*, 559 U.S. 314 (2010), and noting with apparent approval view of Eighth Circuit panel in *United States v. Rogers*, 73 F.3d 774 (8th Cir. 1996), that 30% comparative disparity sufficient).

B. RESOLVING THE QUESTION LEFT OPEN IN *BERGHUIS* OF WHETHER THE EFFECT OF SOCIOECONOMIC FACTORS ALONE CAN ESTABLISH THE “SYSTEMATIC EXCLUSION” REQUIREMENT FOR A FAIR CROSS-SECTION CHALLENGE IS AN ADDITIONAL REASON TO GRANT THE PETITION.

This Court clearly recognized in *Berghuis* that there is an issue about whether the effect of socioeconomic factors alone can establish the “systematic exclusion” requirement for a fair cross-section challenge, and the same precedent

which the government cites here existed then. *See* Brief in Opposition, at 22-23 (citing cases from 1988, 1997, 1999, 2006, 2008, and 2009). There is at least some disagreement on the question, as evidenced by the California Supreme Court's opinion in *People v. Harris*, 679 P.2d 433 (Cal. 1984), and a law review commentator's discussion of the question, *see* Paula Hannaford-Agor, Note, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 767-68 (2011). The question of whether voter registration lists may be used alone when socioeconomic factors make them unrepresentative was not before the California Supreme Court in the later opinions cited by the government because the state trial courts – perhaps in response to the *Harris* opinion – had modified their procedures to use both voter registration lists and Department of Motor Vehicles records. *See People v. Cunningham*, 352 P.3d 318, 352 (Cal. 2015); *People v. Ochoa*, 28 P.3d 78, 91 (Cal. 2001). These later California cases are also inapposite because it was not “speculation as to the source of the disparity,” Brief in Opposition, at 23 (quoting *Cunningham*, 352 P.3d at 352), which Petitioner offered in the present case. It was a trio of rigorous sociological studies published in peer-reviewed journals. *See* Petition, at 6.

It is not just this question in isolation which is presented in this petition, moreover. The question is presented in conjunction with the preceding question of whether a court may rely solely on absolute disparity in applying the second prong of the fair cross-section test. The second question of whether systematic exclusion may be established by the effect of socioeconomic factors is not the only reason to grant review, but is simply an additional one.

II.
CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

DATED: March 13, 2018

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CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 13th day of March, 2018, a copy of the Reply Brief was mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

March 13, 2018

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