***** CAPITAL CASE *****

No. 21-6484

In the Supreme Court of the United States

THOMAS LEE BATTLE,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This case presents an important and recurring question concerning the application of *Batson v. Kentucky*, 476 U.S. 79 (1986) (*Batson*) that deeply divides the lower courts: can reviewing and trial courts speculate concerning hypothetical justifications for excusing prospective jurors—never actually voiced by prosecutors—to defeat the prima facie case? The California Supreme Court's affirmative answer to this question has ended enforcement of *Batson*'s prima facie requirement in that court: it has never found a prima facie violation since the rule was first adopted several decades ago. More importantly, how to properly assess *Batson* claims at step one is an issue that arises with enormous frequency in the lower courts, and indeed divides the California Supreme Court and the Ninth Circuit Court of Appeals—the very federal court tasked with reviewing countless habeas petitions raising *Batson* claims from that state. This Court should not permit the stark split of authority between lower courts to fester any longer. Certiorari is warranted.

I. THE CIRCUIT SPLIT CONCERNING THE PROPRIETY OF RELYING UPON HYPOTHETICAL JUSTIFICATIONS AT *BATSON* STEP 1 IS CLEAR AND DEEP

This Court made plain nearly two decades ago that the purpose of the *Batson* framework is to avoid "needless and imperfect

speculation" and obtain "actual answers" when suspicions and inferences arise. *Johnson v. California,* 545 U.S. 162, 172 (2005) (*Johnson*). Notwithstanding *Johnson*, California—along with the Seventh and First Circuits—has adopted a practice of hypothesizing justifications never tendered by prosecutors to defeat inferences that would otherwise establish a prima facie case. Petition for Writ of Certiorari ("Pet.") at 18-19. According to these jurisdictions, combing the record for hypothetical justifications a prosecutor *might* have relied upon in order to defeat the prima facie case is perfectly acceptable so long as the reviewing court believes these justifications are "apparent" from the record. *United States v. Stephens*, 421 F.3d 503, 515-516 (7th Cir. 2005); *Aspen v. Bissonnette*, 480 F.3d 571, 577 (1st Cir. 2007); *Sanchez v. Roden*, 753 F.3d 279, 302 (1st Cir. 2014); *People v. Sanchez*, 63 Cal.4th 411, 434 (2016). Respondent acknowledges the approach of the First and Seventh Circuits, and California in this case. Brief in Opposition (BIO) at 13-14.

Respondent, however, claims that the *other* half of the split of authority demonstrated in the petition does not exist. Not so. The approach adopted by the Third, Ninth, and Tenth Circuits is manifest: these jurisdictions forbid consideration of potential justifications for a strike in order to decide whether or not to ask for the *actual*

justifications. *Currie v. McDowell*, 825 F.3d 603, 610 (9th Cir. 2016) (*Currie*) ("courts cannot excuse a potential *Batson* violation [at the prima facie stage] based on hypothetical justifications on which a prosecutor could have premised a challenge"); *Bronshtein v. Horn*, 404 F.3d 700, 723 (2005) (*Bronshtein*) (state court "clearly misinterpreted *Batson* insofar as it rejected Bronshtein's claim on the ground that the record suggested legitimate reasons that *could* have motivated the prosecutor to exercise the contested peremptory challenge") (emphasis in original); *Johnson v. Martin*, 3 F.4th 1210, 1225 (10th Cir. 2021) (the Oklahoma Court's "reliance on the trial court's sua sponte speculation about the prosecutor's reasons was an unreasonable application of *Batson*").

According to respondent, there is no split because these cases are in fact "authorities involving the second or third step of *Batson*." BIO at 11. Again, this is incorrect. These circuit court decisions cited by petitioner—and all others, including this Court's decision in *Johnson*—concern *Batson*'s first step, or the conflation of the first and second steps, (i.e., courts assuming the State's role of providing *actual* justifications (step 2) by hypothesizing *potential* justifications as part of the prima facie inquiry (step 1).) Notwithstanding respondent's

attempts to deny the existence of a split of authority, the conflict is clear. This Court should step in to resolve the issue once and for all.

II. THE THIRD, NINTH, AND TENTH CIRCUITS FORBID SPECULATION AT *BATSON* STEP ONE

Reviewing the federal caselaw demonstrates that several circuits disagree with the approach adopted by the First and Seventh Circuit Court of Appeals allowing consideration of hypothetical justifications at the prima facie stage.

As detailed in the petition, the Court of Appeals for the Third Circuit forbids speculation regarding a prosecutor's justifications at *Batson*'s first step. Pet. at 16. That court held that trial courts are not permitted to take into account hypothetical reasons in declining to require prosecutors to provide explanations for their strikes. *See Bronshtein v. Horn*, 404 F.3d 700, 723 (2005) (*Bronshtein*) ("[T]he Pennsylvania Supreme Court clearly misinterpreted *Batson* insofar as it rejected Bronshtein's claim on the ground that the record suggested legitimate reasons that *could* have motivated the prosecutor to exercise the contested peremptory challenge") (emphasis in original). Indeed, not only did the Third Circuit find the state court misapplied the law, under the AEDPA it held that the state court's process was contrary to and an objectively unreasonable application of clearly established precedent of this Court. *Id.* at 724.

Nor is there a shred of support for respondent's suggestion that the Third Circuit's decision in *Bronshtein* was anything other than a case forbidding reliance on hypothetical reasons at stage one. BIO at 11. Review of the Pennsylvania Supreme Court decision at issue in *Bronshtein* reveals plainly that the state court adopted precisely the same *step one* approach—and indeed even the same hypothesized reasons (potential death penalty reservations)—applied by the California high court in this case. *Com. v. Bronshtein* 547 Pa. 460, 477 (1997).

The fact that the *Bronshtein* opinion rests on a step one analysis is obvious from the face of the opinion. The Third Circuit, after finding that the state court erroneously relied upon hypothetical justifications at step one, conducted its own *first step* analysis, free from the analytical error of relying on hypothetical justifications. *Bronshtein*, 404 F.3d at 724-725. Although respondent seems to suggests that *Bronshtein*'s ultimate finding of no prima facia case on its *own* review somehow supports its position that there is no circuit split, BIO at 12, the Third Circuit's independent finding is beside the point. The Third Circuit conduct a de novo review of the prima facie case precisely *because* the state court had violated this Court's precedent, which forbids reliance on hypothetical answers at step one. *Bronshtein*, 404

F.3d at 724-725; see also *Johnson*, 545 U.S. at 173 (prima facie inquiry is intended to avoid the "imprecision of relying on judicial speculation to resolve plausible claims of discrimination").

In fact, *Bronshtein* is not the only Third Circuit case recognizing that courts cannot consider hypothetical reasons and *Batson* step 1. *Hardcastle v. Horn,* 368 F.3d 246 (3d Cir. 2004) (*Hardcastle*) addresses an identical analytic error. As the opinion explains, the state court improperly "conflated steps one and two of the *Batson* analysis in the sense that it *identified and then analyzed potential justifications for the challenged strikes* - something that should not occur until step two - *in its step one analysis of whether Hardcastle had successfully established a prima facie case.*" *Id.* at 256 (emphasis added). This methodological error was so obvious that it was later recognized by the Pennsylvania Supreme Court in subsequent proceedings in the same case, thus adding Pennsylvania to the ledger of jurisdictions which forbid this practice. *Id.*

The Tenth Circuit relied upon the reasoning of *Hardcastle* in *Johnson v. Martin*, 3 F.4th 1210 (10th Cir. 2021), cited in the petition. Pet.at 15-16. According to respondent, however, *Johnson v. Martin* fails to demonstrate a split, because the court in that case framed its discussion as setting forth "'[t]he second step of *Batson* specifically

requires.'" BIO at 12, n.3. It is true that the Tenth Circuit framed this flaw as a problem in step two, as respondent contends. *Johnson v. Martin*, 3 F.4th at 1222. But this difference in framing is semantic. The error was the *conflation* of step one with step two and relying on hypothetical justifications instead of actual answers.[1] Thus, the opinion in *Johnson v. Martin* relied on the Third Circuit's language in *Hardcastle* cited above to explain the Oklahoma court's error. *Johnson v. Martin*, 3 F.4th at 1225, citing *Hardcastle v. Horn*, 368 F.3d at 256 (error of Oklahoma court was in "conflat[ing]" step one and step two.) Later in the opinion, the Tenth Circuit again explained specifically that the error lay in the fact that the trial court had evidence that was sufficient to "require a trial court to proceed to step two of the *Batson* procedure" but the trial court "did not do so, relying instead on its own speculation as to what might have been the prosecutor's reasons." *Johnson v. Martin,* 3 F.4th at 1227. That procedure—rejected by the

[1] The trial court's flawed reasoning is set forth in the *Johnson v. Martin* opinion, and involves the trial court—in finding no prima facie case—speculating reasons why the prosecutor might have stricken some of the juror's at issue. *Johnson v. Martin*, 3 F.4th at 1222 (trial court: "Well, I don't think that this establishes a pattern. Again, in terms of—Ms. Martinez, I won't state their reasons for them, but Ms. Martinez was patently—she was hardly involved in the process. Ms. Carranza has indicated she has difficulty with English, Ms. Aramburo de Wassom told us the same. So I do not see a pattern here.")

Tenth Circuit—is precisely the method adopted by California, the First Circuit, and the Seventh Circuit. BIO at 13-14; Pet. at 18-19.

Respondent claims that the Tenth Circuit "assumed without deciding that it could 'consider . . . allegedly obvious reasons'" in assessing the prima facie case. (BIO at 12, n.3.) But what the Tenth Circuit stated unambiguously was that "even if we can consider such allegedly obvious [hypothetical] reasons" it would not change the outcome of the case. *Johnson v. Martin*, 3 F.4th at 1226. The reason it made this *alternative* finding was that the court had explicitly rejected—prior in the opinion—reliance on speculative, hypothetical justifications. *Johnson v. Martin*, 3 F.4th at 1225 (the Oklahoma Court's "reliance on the trial court's sua sponte speculation about the prosecutor's reasons was an unreasonable application of *Batson*"); see also *id.* at 1223 ("the trial court provided its *own* reasons for the strikes, speculating as to what the prosecutor's reasons might have been").

Respondent argues that the Ninth Circuit cases in fact *confirm* the approach adopted by the First and Seventh Circuits—that reviewing courts may speculate regarding hypothetical justifications to dispel an otherwise established prima facie case. BIO at 14-15 (citing *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004) (*Paulino*) and *Wade v.*

Terhune, 202 F.3d 1190, 1198 (9th Cir. 2000) (*Wade*). Specifically, respondent's argument cites *Paulino* for the proposition that the Ninth Circuit believes courts "may consider whether 'the record contains entirely plausible reasons, independent of race, why' a prosecutor may have exercised peremptories"—and emphasizes that, "[i]f there are such reasons in the record, . . . it's difficult to say that defendant has raised an inference of bias." BIO at 14 (citing *Paulino* 371 F.3d at 1091-92). But respondent's elision of the reasoning contained in cited paragraph of *Paulino* is highly misleading.

The full paragraph in *Paulino* explains how courts may sometimes consider potential reasons for a strike in cases in which only one juror was stricken. *Id.* at 1092. In such cases, the Ninth Circuit explained there must be "more" than the jurors' race to establish a prima facie case and "and the *absence of plausible reasons* for the strike could be the 'more' that gives rise to an inference of bias. If there are such reasons in the record, however, then it's difficult to say that defendant has raised an inference of bias." *Ibid.* (emphasis added) Considering the *absence of any reason* to strike a perfectly good juror as the type of evidence that would support a prima facie case when only one juror is stricken is a far cry from the issue in this case: whether courts are permitted to form their *own* reasons on *behalf of*

the prosecutor to dispel what would otherwise amount to a prima facie case. *See People v. Battle*, 11 Cal.5th 749, 782 (2021) (existence of hypothetical justifications that *could* have been relied upon by a prosecutor "dispel[] whatever inference of discrimination might otherwise be thought to arise from the . . . challenged strike[.]") *Paulino* (which explained *Wade*), thus does not support respondent's position that there exist no split of authority.

But even if there existed ambiguity in the meaning of these cases, it has since been unequivocally resolved by the Ninth Circuit. Both *Wade* and *Paulino* preceded this Court's decision in *Johnson*, which renounced "judicial speculation to resolve plausible claims of discrimination" at the prima facie stage. *Johnson*, 545 U.S. at 173. The Ninth Circuit, citing this Court's decision in *Johnson*, has since repeatedly and clearly disclaimed any reliance on hypothetical justifications to defeat the prima facie case at *Batson* step one—the very question at issue in this petition.

Immediately after *Johnson* was decided, the Ninth Circuit announced that "refutation of the inference requires more than a determination that the record *could* have supported race-neutral reasons." *Williams v. Runnels,* 432 F.3d 1102, 1110 (9th Cir. 2006) 432 F.3d 1102, 1110 (emphasis added). It has maintained this position—

refusing to consider hypothetical justifications to defeat the prima facie case—in every case since. In *Johnson v. Finn*, 665 F.3d 1063 (9th Cir. 2011), the Ninth Circuit explained that "the existence of grounds upon which a prosecutor *could* reasonably have premised a challenge does not suffice to defeat an inference of racial bias at the first step of the Batson framework." *Id.* at 1069 (emphasis added).

In *Shirley v. Yates*, 807 F.3d 1090 (9th Cir. 2015) (*Shirley*), the district court, and in turn the Ninth Circuit, concluded that the state court had acted contrary to clearly established Supreme Court precedent by finding no prima facie case "on the basis of speculation about possible race-neutral reasons for exercising the challenged strikes." *Id.* at 1097. Similarly, in *Currie v. McDowell*, 825 F.3d 603 (9th Cir. 2016) (*Currie*) the Ninth Circuit reaffirmed that, in light of *Johnson*: "courts cannot excuse a potential *Batson* violation [at the prima facie stage] based on hypothetical justifications on which a prosecutor could have premised a challenge." *Id.* at 610.

Respondent does nothing to address the unequivocal description of this Court's precedent by the Ninth Circuit in *Currie*. However, respondent claims that *Shirley*, like California, relies upon "readily apparent" hypothetical justifications in assessing the prima facie case. BIO at 15-16. The cited language in *Shirley* has nothing to do with

inventing hypothetical justifications to defeat the prima facie case. Instead, the quoted passage in *Shirley* discusses comparative juror analysis between two jurors, and how comparative analysis *supports* the prima facie case. *Shirley*, 807 F.3d at1102 ("Shirley's prima facie case is supported by a comparison" between jurors). In *Shirley*, the absence of a "readily apparent reason to strike [prospective juror] R.O." was merely evidence that this Black juror was similarly situated to another seated White juror for purposes of comparative juror analysis. *Ibid*. Comparative analysis has nothing to do with the issue in this case and the citation does nothing to undermine the open split of authority regarding the propriety of hypothesizing reasons for a strike to defeat a prima facie case.

III. CALIFORNIA'S RULE FLATLY CONTRADICTS THE BURDENSHIFTING RULES OF TITLE VII, THE DOCTRINE GOVERNING THE *BATSON* FRAMEWORK—RESPONDENT'S CLAIM THAT THIS POINT WAS NOT PRESENTED TO THE CALIFORNIA SUPREME COURT IS INCORRECT

The petition for certiorari began and concluded with an argument that the approach embraced by the California court flatly contradicts Title VII, the doctrine from which *Batson* originated and which this Court has held governs the prima facie case. Pet. at ii [Question Presented]; 20-24 [discussion of Title VII and *Batson* cases, and the former's prohibition of hypothetical justifications].)

Respondent claims in a footnote that petitioner "did not make that argument below." BIO at 17 n.5 Respondent's counsel (who substituted into this case after the multiple rounds of voluminous briefing and argument of the case were completed) is simply mistaken. In supplemental briefing that respondent overlooks, petitioner presented his theories—regarding the impropriety of using hypoethetical justifications generally, and specifically regarding the conflict between Title VII and California's interpretation of *Batson*—to the California Supreme Court. *See* SAOB[2] at 51-66; SARB[3] at 29-31. Petitioner even made Title VII law a focus of his oral argument. *People v. Battle*, No. S119296, Oral Argument before the California Supreme Court (5:40:30-5:42:00) *available at* https://www.courts.ca.gov/35333.htm. Although the California Supreme Court chose not to address these arguments in its opinion, it was fairly presented to the state court.

The conflict between the approach of California, the First and Seventh Circuits not only contradicts the approach of the Third, Ninth, and Tenth Circuits, but also the uniform rules governing the prima facie case adopted by *all* circuits in the Title VII context. Pet. at 20-23.

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[2] Supplemental Appellant's Opening Brief.
[3] Supplental Appellant's Reply Brief.

This conflict presents further evidence that California's approach is unsupported and yet another reason to grant certiorari.

CONCLUSION

Wherefore, petitioner prays that this Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of California.

Dated: February 15, 2022

Respectfully submitted,

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