No. 13-330

IN THE
Supreme Court of the United States

AVIS BUDGET GROUP, INC.,
F/K/A CENDANT CORPORATION, AND
AVIS BUDGET CAR RENTAL, LLC,
F/K/A CENDANT CAR RENTAL GROUP, LLC,
F/K/A CENDANT CAR RENTAL GROUP, INC.,

Petitioners,

v.

ALASKA RENT-A-CAR, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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October 29, 2013

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INTRODUCTION

Respondents acknowledge, as they must, that this Court has long held that the erroneous deprivation of a peremptory challenge in federal court requires reversal of the judgment. *See* Opp. 11 & n.17 (citing *Harrison v. United States*, 163 U.S. 140, 142 (1896); *Gulf, Colorado & Santa Fe Ry. v. Shane*, 157 U.S. 348, 351 (1895); *Lewis v. United States*, 146 U.S. 370, 376 (1892); *Mutual Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 294 (1892)). Respondents deride those holdings, however, as "ancient" and "obsolete." *Id*. at 12. According to respondents, these "historic" holdings "are not viable precedent after the development of modern harmless-error doctrine." *Id.* at 17. Respondents thereby err both procedurally and substantively.

With respect to procedure, it is not up to the lower courts to overrule this Court's precedents; rather, only this Court may do so. Contrary to respondents' suggestion, this Court has never overruled any of the precedents cited above. Respondents may believe that they have good reason to urge this Court to do so, but that is an argument directed to the merits, not the antecedent question whether this Court should grant review. Unless and until this Court overrules those precedents, they remain good law, and the lower courts are constrained to follow them.

With respect to substance, the traditional rule is entirely consistent with modern harmless-error doctrine. That doctrine requires a court to analyze whether an error affected the outcome of a jury trial. *See, e.g., O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 637-38

(1993); *cf. Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991) (majority opinion of Rehnquist, C.J.). Such analysis is impossible where, as here, a juror who should have been stricken actually sat on the jury—there is simply no way to determine that juror's effect, if any, on the jury's deliberations. Thus, as Judge Kozinski has noted, the only real choice here is between "two all-or-nothing rules: the error is *always* harmless or it is *never* harmless." *United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (*en banc*) (Kozinski, J., dissenting) (emphasis in original).

This Court should not adopt a rule that the erroneous deprivation of a peremptory challenge in federal court is always harmless. Such a rule would essentially nullify the venerable statutory right to peremptory challenges, and give trial courts every incentive to sustain even the most outlandish *Batson* challenges (like the one presented here). And, more to the point, this Court should not by default allow the lower courts to adopt such a rule. Accordingly, this Court should grant the petition to address this important and recurring question of federal law.

REASON FOR GRANTING THE WRIT

The Erroneous Deprivation Of A Peremptory Challenge In Federal Court, Which Allows A Prospective Juror Who Should Have Been Stricken To Sit On The Jury, Is Not Subject To Harmless-Error Review.

The brief in opposition starts from the premise that "[t]his Court in fact has not held that reversal is automatically required if a trial court incorrectly disallows a peremptory challenge under *Batson*." Opp. 9 (emphasis in original). That statement is

true, if at all, only in the most hyper-technical sense that this Court has not revisited this issue since deciding *Batson v. Kentucky*, 476 U.S. 79 (1986). But, as respondents acknowledge, this Court has long held that the erroneous deprivation of a peremptory challenge in federal court requires reversal of the judgment. *See* Opp. 11 & n.17. Respondents identify no reason in law or logic to suppose that this traditional rule applies with any less force to an erroneous deprivation based on *Batson* than to an erroneous deprivation based on any other ground.

Not surprisingly, thus, respondents do not seriously contend that the traditional rule does not apply to *Batson* cases. Rather, respondents argue that the traditional rule is "obsolete" because it "predat[es] … the advent of harmless-error review." *Id.* at 10, 12. But that is nothing more than an argument that *this* Court should overrule the traditional rule, not an argument that the *lower* courts are entitled to ignore that rule. Respondents do not, and cannot, deny that "this Court" alone has "the prerogative of overruling its own decisions," even if arguably inconsistent with subsequent jurisprudence. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989); *see also United States v. O'Brien*, 130 S. Ct. 2169, 2174 (2010); *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005); *United States v. Hatter*, 532 U.S. 557, 567 (2001); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Respondents are thus reduced to arguing that this Court already *has* overruled the traditional line of cases. In particular, they assert that "[t]hirteen

years ago, in *Martinez-Salazar*, this Court disavowed these ancient cases as precedent for how to analyze an error regarding peremptory challenges in modern times." Opp. 12 (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 317 n.4 (2000)).

That assertion is simply untrue. *Martinez-Salazar* did not remotely purport to overrule the traditional rule regarding the remedy for the erroneous deprivation of a peremptory challenge in federal court; indeed, *Martinez-Salazar* did not even *involve* the erroneous deprivation of a peremptory challenge in federal court. Rather, *Martinez-Salazar* involved the remedy for an erroneous deprivation of a *for-cause* challenge, where the affected litigant went on to use a peremptory strike against the challenged juror. *See* 528 U.S. at 314-17. Under these circumstances, the Court explained, the litigant "did not lose a peremptory challenge," but rather "used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." *Id.* at 315-16; *see also id.* at 317 ("A [litigant's] exercise of peremptory challenges … is not denied or impaired when [the litigant] chooses to use a peremptory challenge to remove a juror who should have been excused for cause.").

Indeed, the very footnote in *Martinez-Salazar* cited by respondents specifically *declined* to address the precise issue that respondents now claim that case resolved. "Because we find no impairment [of the right to a certain number of peremptory challenges], we *do not decide* in this case what the appropriate remedy for a substantial impairment should be." *Id.* at 317 n.4 (emphasis added).

Needless to say, this Court did not thereby overrule the traditional line of cases regarding the appropriate remedy for the erroneous deprivation of a peremptory challenge in federal court.

Rather, that footnote (in *dictum*) disavowed some language in *Swain v. Alabama*, 380 U.S. 202, 219 (1965), as *dictum*. *See Martinez-Salazar*, 528 U.S. at 317 n.4 ("[T]he oft-quoted language in *Swain* was … unnecessary to the decision in that case—because *Swain* did not address any claim that a defendant had been denied a peremptory challenge."). In addition, the *Martinez-Salazar* footnote observed that the relevant language from *Swain* "was founded on a series of our early cases decided long before the adoption of harmless-error review," *id.*, without analyzing whether those cases nonetheless comport with modern harmless-error review. Certainly, *Martinez-Salazar* did not resolve—indeed, as noted above, it expressly *declined* to resolve—the issue presented here.

Nothing in the opposition brief thus responds to the point that "[w]hether this Court's precedents applying the traditional rule survived the advent of harmless-error review is a question for *this* Court, not the lower courts, to decide." Pet. 18 (emphasis in original). Indeed, the opposition brief only confirms that this Court's review is warranted to decide whether "the historic cases" cited in the petition remain "viable precedent after the development of modern harmless-error doctrine," Opp. 17—an issue that, notwithstanding respondents' protestations to the contrary—this Court has never decided. If anything, *Batson* only highlights the need for definitive resolution of that issue. *Batson* for the

first time imposed substantial substantive limitations on the exercise of peremptory strikes, thereby presenting a heightened risk that (as in this case) a trial court will deprive a litigant of its statutory right to a certain number of peremptory strikes by erroneously upholding a *Batson* challenge.

Putting aside the fact that this is an issue for the merits stage, not the certiorari stage, the traditional rule is entirely consistent with modern harmless-error doctrine. That doctrine focuses on whether an alleged error had "'substantial influence'" on the jury. *O'Neal*, 513 U.S. at 438 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); *see also id.* ("'The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error.'") (quoting *Kotteakos*, 328 U.S. at 765).

Respondents never explain how, as a practical matter, harmless-error review could possibly work in this context. Because "[j]ury decision-making is designed to be a black box," *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008), there is no way to assess the effect, if any, of a particular juror's participation on the jury's deliberations, *see, e.g.*, *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998); *Annigoni*, 96 F.3d at 1144-45.

It is no response to argue, as respondents do, that any error is necessarily harmless insofar as there is no evidence that the challenged juror was "biased or unqualified." Opp. 1; *see also id.* at i, 3, 7, 29, 30. That is the standard for exercising a *for-cause* challenge, not a *peremptory* challenge. The whole point of peremptory challenges is to allow litigants to remove a certain number of prospective jurors who

are *not* subject to for-cause challenges. If there were evidence that a particular juror was "biased or unqualified," then that juror should have been removed for cause. While there may be no deprivation of the constitutional right to due process of law or trial by jury as long as no biased or unqualified juror sat on the jury, *see, e.g.*, *Rivera v. Illinois*, 556 U.S. 148, 157 (2009); *Martinez-Salazar*, 528 U.S. at 316-17; *Ross v. Oklahoma*, 487 U.S. 81, 85-91 (1988), that does not mean that there is no deprivation of the statutory right to a certain number of peremptory challenges, or that any such deprivation was harmless.

Respondents thus miss the point by arguing that "[i]n *Ross*, *Martinez-Salazar*, and *Rivera*, this Court concluded and reaffirmed that harmless-error analysis is appropriate and possible and that courts can and should examine harmlessness by considering whether the jury consisted entirely of qualified and unbiased jurors." Opp. 30. None of those cases involved the erroneous deprivation of a peremptory challenge in federal court. Neither *Ross* nor *Martinez-Salazar* involved the erroneous deprivation of a peremptory challenge at all; rather, each of those cases involved the erroneous deprivation of a for-cause challenge, after which the affected litigant used a peremptory strike against the challenged juror. *See Martinez-Salazar*, 528 U.S. at 314-17; *Ross*, 487 U.S. at 83. And *Rivera* involved the erroneous deprivation of a peremptory challenge in *state* court; this Court simply held that "[t]he mistaken denial of a *state-provided* peremptory challenge" does not, without more, implicate any provision of federal law. 556 U.S. at 158, 161 (emphasis added). None of these cases in any way

held or suggested that the erroneous deprivation of a peremptory challenge in federal court is subject to harmless-error review, or that such a deprivation is harmless unless the challenged juror was "biased or unqualified." Indeed, *Ross* affirmatively cited *Swain* for the proposition that, in federal court, "'[t]he denial or impairment of the right [to a certain number of peremptory challenges] is reversible error without a showing of prejudice,'" *id.* at 89 (quoting 380 U.S. at 219)—thereby rendering inexplicable respondents' assertion that "[n]otably, *Ross* did not cite *Swain* for its dictum concerning automatic reversal if a peremptory challenge is lost due to trial court error," Opp. 13-14 (emphasis in original).

And precisely because *Ross*, *Martinez-Salazar*, and *Rivera* did not resolve the question presented here, the lower courts have erred to the extent they have relied on those decisions to justify departure from binding precedent. *See*, *e.g.*, *United States v. Williams*, No. 12-15313, __ F.3d __, 2013 WL 5461846, at *10-13 (11th Cir. Oct. 2, 2013); *Avichail ex rel. T.A. v. St. John's Mercy Health Sys.*, 686 F.3d 548, 552-53 (8th Cir. 2012); *United States v. Lindsey*, 634 F.3d 541, 549-50 (9th Cir. 2011); *United States v. Gonzalez-Melendez*, 594 F.3d 28, 33-34 (1st Cir. 2010); *United States v. Patterson*, 215 F.3d 776, 779-82 (7th Cir. 2000). Regardless of whether these cases were entitled to depart from the binding precedent of their *own* courts applying the traditional rule, they unquestionably were not entitled to depart from the binding precedent of *this* Court establishing that rule in the first place.

Finally, respondents do not deny that this case presents an appropriate vehicle for resolving the

important and recurring question presented. Although respondents dispute whether the district court erred by upholding their *Batson* challenge to Prospective Juror 15 in the first place, they acknowledge, as they must, that "[t]he Ninth Circuit's final opinion in this case does not decide whether the district court ruled correctly or erroneously in disallowing ABG's strike of Prospective Juror No. 15." Opp. 27; *see also id.* ("[T]he correctness of the district court's *Batson* ruling is not an issue before this Court."); *id.* at 29 ("Because the Ninth Circuit's final decision omits any analysis of whether the district court erred, the only reviewable holding is that any error was harmless."). In light of the Ninth Circuit's "holding … that any error was harmless," *id.*, this case squarely presents the question whether such errors are "subject to harmless-error review" at all, Pet. i.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant review.

Respectfully submitted,

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