No. 24-0211

IN THE

United States Court of Appeals
For the Ames Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

HENRIK KAREN,
Defendant-Appellant.

ON APPEAL FROM A FINAL JUDGEMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES

BRIEF FOR DEFENDANT-APPELLANT

The Honorable Judge
J. Skelly Wright Memorial Team

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Oral Argument

MARCH 10, 2025
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QUESTIONS PRESENTED

I. Under the Fourth Amendment, government officials may not conduct certain highly intrusive searches at the border, absent reasonable suspicion. Here, Customs & Border Protection randomly conducted an hourlong forensic search of Mr. Karen's cellphone, extracting his photos, videos, and metadata. Did the district court err in denying Mr. Karen's motion to suppress?

II. Under *Batson* and its progeny, the Supreme Court has held that peremptory strikes based on race or gender violate the Equal Protection Clause. Religion, like race and gender, is a suspect classification. Here, the district court permitted the government to exercise a peremptory strike of a religious juror on account of his religious beliefs. Did the district court err in denying Mr. Karen's *Batson* challenge?

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OPINIONS AND ORDERS

The order of the United States District Court for the District of Ames denying Defendant-Appellant Henrik Karen's motion to suppress may be found on page 7 of the Joint Appendix. The procedural order from this Court certifying Mr. Karen's appeal may be found on page 9 of the Joint Appendix (JA).

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to hear Henrik Karen's appeal of a final decision of the United States District Court for the District of Ames. Pursuant to 18 U.S.C. § 3231, the district court had subject matter jurisdiction because Mr. Karen was charged with a federal criminal offense: 18 U.S.C. § 2251(a).

RELEVANT PROVISIONS

This case involves the First Amendment, Fourth Amendment, and Fourteenth Amendment of the United States Constitution; and 18 U.S.C. § 2251(a).

STATEMENT OF THE CASE

The Constitution sets meaningful limits on government power in order to safeguard citizens' rights to privacy and equal treatment under the law. In Mr. Karen's case, the government circumvented these constitutional limits. Customs officials—without any suspicion—conducted an extensive forensic search of Mr. Karen's cellphone. Moreover, during the jury selection for Mr. Karen's trial, the prosecutor struck a religious juror on account of his religious beliefs. To curb the government's abuse of power, this Court must reverse and remand.

Search and Arrest

At the Ames City International Airport, Customs and Border Protection ("CBP") Agent Roderick St. John targeted arriving traveler Henrik Karen—a U.S. citizen—for a "routine" search at customs. JA–2. Agent St. John "had no reason to suspect" Mr. Karen of any wrongdoing. JA–11. Mr. Karen was simply one of "every dozen or so passengers" pulled out of line to be searched for contraband. JA–10. He "cooperat[ed]" fully with Agent St. John, JA–11, who conducted manual searches of Mr. Karen's personal effects by rifling through his suitcase and scrolling through the photographs on his phone. JA–2, 3. The searches "did not reveal anything of note" in Mr. Karen's bags, nor did his phone contain "anything unusual or noteworthy." JA–10.

Though the agent "didn't suspect any wrongdoing" at any point "'throughout the entire process," JA–11, Agent St. John escorted Mr.

Karen to a private room to conduct an additional, more "extensive" screening for contraband. JA–3. Agent St. John stated that this "enhanced" search was also "random." JA–11. The search included "a K-9 search of the luggage" and a "forensic" examination of Mr. Karen's cellphone. JA–11. Using a data extraction technology called "Document and Media Exploitation" (DOMEX), Agent St. John and other CBP agents "download[ed] a copy" of the "electronic files" in Mr. Karen's cellphone. *Id.* These files included photos, videos, and other information that would "not have been apparent from a quick manual search of a phone." JA–11. After an hourlong search, the CBP agents found child sexual abuse material (CSAM) on the device and "seized" Mr. Karen's phone. JA–11.

The CBP released Mr. Karen, but the Department of Homeland Security "extracted the metadata from the electronic files that were taken from the DOMEX search." JA–3. They found that the CSAM images were taken at Mr. Karen's "home residence in Ames City." JA–3. Mr. Karen was subsequently arrested and charged with violating 18 U.S.C. § 2251(a). JA–3.

Proceedings Below

During *voir dire* for Mr. Karen's trial, the government zeroed in on the religious background of a member of the venire—Juror 17. JA–12. The government directly asked Juror 17 whether he "go[es] to church," and he answered affirmatively, saying that he identifies as "a devout Christian" and is "married to a church pastor." JA–12. The government then further questioned whether the juror's "religious views or . . . religious identity as a Christian" would impact his judgement of the case. JA–12. The juror stated that his religion teaches "that pornography of all kinds is sinful" but also teaches him to be "charitable and forgiving of sins and sinners." JA–12. Juror 17 affirmed that he "could be fair because this defendant has rights, just like other people do." JA–12. He emphasized that he "might dislike the sin, but that's as far as it goes." JA–12.

The government sought to strike Juror 17 for cause, but the court credited Juror 17's assurances of impartiality and denied the government's request. JA–12. The government immediately responded by exercising a peremptory strike to dismiss Juror 17. JA–13. Mr. Karen made a *Batson* challenge, asserting that the government may not justify a peremptory strike "on the basis of [a juror's] religion." JA–13. When the court asked the government to justify its strike, the government claimed that it struck Juror 17 because the juror's "religious beliefs"

about "sin" would prevent him from being "fair and impartial." JA–13. The judge disagreed, reiterating that he had found that Juror 17's beliefs would not impact his ability to be "fair or impartial." JA–13.

Nevertheless, the judge ultimately dismissed Juror 17, concluding that "this was [the government's] peremptory challenge, and on that basis, I will exclude this juror from the venire." JA–13. The judge stated that he did not "think there's any evidence of a pattern of discrimination" and indicated that the defendant had not "established a *prima facie* case of discrimination." JA–13. The court further expressed uncertainty about whether "religion can form the basis for a *Batson* objection in any event." JA–13. Mr. Karen asked to "preserve [his] objection for an appeal." JA–13.

Additionally, Mr. Karen moved to suppress "the evidence seized as a result . . . of the forensic search of his cellphone," arguing that the search violated the Fourth Amendment because "there was no reasonable suspicion." JA–6. The district court denied this motion, holding that "no reasonable suspicion is required" for "forensic electronics searches at the border." JA–7.

Mr. Karen timely appeals both the denial of his motion to suppress and the denial of his *Batson* objection. JA–8.

SUMMARY OF THE ARGUMENT

First, the district court erred in denying Mr. Karen's motion to suppress the evidence seized during CBP's unlawful forensic cellphone search. This unreasonable search violated Mr. Karen's Fourth Amendment rights. Though the border exception permits officers to conduct certain "routine" searches without suspicion, the Supreme Court has required officers to have reasonable suspicion before conducting "highly intrusive" searches that compromise "dignity and privacy interests." *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). In light of recent Supreme Court decisions recognizing how deeply cellphone searches can intrude on individual privacy, *see Riley v. California*, 573 U.S. 373 (2014), this Court should join the Fourth and Ninth Circuits in holding that officers must have reasonable suspicion to conduct forensic cellphone searches at the border. Forensic searches of electronic devices are highly invasive because they expose extensive personal data. *Id.* at 394–96. These searches also do not meaningfully prevent digital contraband from entering the country since it may easily cross borders via the Internet. *See United States v. Vergara*, 884 F.3d 1309, 1317 (11th Cir. 2018) (J. Pryor, J., dissenting). Forensic searches are thus untethered from the border exception's underlying justification of interdicting contraband and "bear[] little resemblance to" Founding

Era policies. *See United States v. Smith*, 673 F. Supp, 3d 381, 387 (S.D.N.Y. 2023).

The evidence uncovered by the unconstitutional search of Mr. Karen's cellphone should have been suppressed at trial. Because Agent St. John "had no reason to suspect" Mr. Karen of "wrongdoing," JA–11, the exclusionary rule bars admission of the fruits of the forensic search. *Segura v. United States*, 468 U.S. 796, 804 (1984). The government cannot invoke the good faith exception to this rule because it cannot demonstrate its agents acted in reasonable reliance on legal authority. *See Davis v. United States*, 564 U.S. 229, 232 (2011).

Second, the district court erred in denying Mr. Karen's *Batson* objection to the government's peremptory strike of a religious juror. Peremptory strikes based solely on a juror's religious affiliation or beliefs violate the equal protection principles that the Supreme Court has previously invoked to prohibit strikes because of a juror's race or gender. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (prohibiting race-based strikes); *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (prohibiting gender-based strikes). The state-sanctioned exclusion of jurors because of religious stereotypes exacerbates discriminatory stigma, taints the judicial process, and is insufficiently tailored to the government's interest in assembling fair juries.

By properly applying the existing procedural framework for *Batson* objections, courts can adjudicate whether discriminatory intent motivated a peremptory strike of a juror. However, during *voir dire* for Mr. Karen's trial, the district court wavered on whether religious-based peremptory strikes were permissible and then misapplied *Batson*'s three-step framework, ultimately allowing a strike that targeted a juror because of his "religious beliefs." JA–13. The court committed reversible errors at each step of *Batson*'s framework: (1) the court erred in denying Mr. Karen's *Batson* objection on the basis of his *prima facie* case of discrimination; (2) the court erred in denying Mr. Karen's *Batson* objection notwithstanding the government's discriminatory explanation for its peremptory strike; and (3) the court erred by failing to assess the totality of the circumstances bearing on whether discriminatory intent motivated the strike. The discriminatory removal of a juror undermines the integrity of a judicial proceeding.

Accordingly, this Court should reverse the lower court's judgement, vacate Mr. Karen's sentence, and remand for additional proceedings.

STANDARD OF REVIEW

This Court should review *de novo* the "question of whether a warrantless search was reasonable under the Fourth Amendment."

United States v. Cotterman, 709 F.3d 952, 959–60 (9th Cir. 2013) (reviewing denial of a motion to suppress).

Moreover, this Court should consider the "district court's determination of a *Batson* challenge with 'great deference,' under a clearly erroneous standard." *United States v. Copeland*, 321 F.3d 582, 599 (6th Cir. 2003) (quoting *United States v. Buchanan*, 213 F.3d 302, 308–09 (6th Cir. 2000)). However, "a mistake of law" in adjudicating a *Batson* challenge "generally satisfies clear-error, de-novo or . . . abuse-of-discretion review." *United States v. Kimbrel*, 532 F.3d 461, 465–66 (6th Cir. 2008).

ARGUMENT

I. The district court erred in denying Mr. Karen's motion to suppress.

The Fourth Amendment protects "persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Amendment's "basic purpose" is to safeguard "the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). Without a warrant and probable cause, searches are "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Under the border search exception, customs officers may conduct "[r]outine searches of the persons and

effects of entrants" without "reasonable suspicion, probable cause, or warrant." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (treating international airport like border).

Border searches, however, are still subject to the Fourth Amendment's "constitutional requirement of reasonableness," which entails balancing "the interests of the Government and the privacy right of the individual." *See id*. at 540–41. Courts have acknowledged that the government has a sovereign interest in regulating "who and what may enter the country," *United States v. Ramsey*, 431 U.S. 606, 620 (1977), and that a traveler's "expectation of privacy" is lower "at the border than it is in the interior." *Flores-Montano*, 541 U.S. at 154 (2004). But even at the border, certain "highly intrusive searches" require particularized suspicion. *See id*.

This Court now encounters an issue of first impression: whether border officials may—without any suspicion—confiscate a citizen's cellphone, connect it to "extraction technology," and conduct an "extensive" hourlong "forensic examination" of the "cellphone's photos[,] videos, and other electronic files." JA–3, 11. Though the Supreme Court has never applied the border search exception to a search of cellphones, the Court's reasoning in *Riley v. California* "provided guidance as to how to think about the problem." *See United States v. Smith*, 673 F. Supp. 3d 381, 391 (S.D.N.Y. 2023). In *Riley*, the Court declined to extend the

search incident to arrest exception to cellphones because these searches "implicate privacy concerns far beyond those" of other tangible items and were neither sufficiently necessary "for the promotion of legitimate government interests" nor justified by "guidance from the founding era." 573 U.S. at 385–86, 393–94. Invoking *Riley*, two of the three circuits to address forensic cellphone searches conducted at the border have held that they are unreasonable without suspicion. *See United States v. Kolsuz*, 890 F.3d 133, 146 (4th Cir. 2018); *United States v. Cano*, 934 F.3d 1002, 1020 (9th Cir. 2019). *But see United States v. Touset*, 890 F.3d 1227, 1231 (11th Cir. 2018) (not requiring reasonable suspicion).

This Court should follow the Fourth and Ninth Circuits and require—at minimum—reasonable suspicion for all forensic cellphone searches conducted at the border because these searches violate individual privacy without sufficiently advancing the government's interest in interdicting contraband. In Mr. Karen's case, CBP conducted a suspicionless forensic cellphone search, and the government cannot demonstrate that its agents acted in good faith. *See Davis*, 564 U.S. at 245. Accordingly, this Court should reverse the district court's denial of Mr. Karen's motion to suppress and remand for additional proceedings.

A. This Court should require reasonable suspicion for forensic cellphone searches conducted at the border.

The border is not a "Fourth Amendment-free zone." *Smith*, 673 F. Supp. 3d at 390. Indeed, "[t]he Supreme Court has never endorsed the

proposition that the goal of deterring illegal contraband at the border suffices to justify any manner of intrusive search." *Cotterman*, 709 F.3d at 967. Rather, any government search is "measured against the Fourth Amendment's reasonableness requirement, which considers the nature and scope of the search." *Id*. at 963. Forensic cellphone searches conducted without suspicion are unreasonable because they: (1) deeply invade individual privacy; (2) do not meaningfully advance the government's interest in interdicting contraband; and (3) do not accord with historical tradition.

1. Forensic searches invade individual privacy.

Forensic cellphone searches expose an individual's private life and personal history to substantial government invasion. Allowing these searches to proceed at the border without suspicion jeopardizes the Fourth Amendment interests protected by the Supreme Court's border search precedent and *Riley*'s privacy safeguards for digital technology.

The Fourth Amendment prevents border officials from conducting "highly intrusive searches" absent reasonable suspicion. *See United States v. Aigbekaen*, 943 F.3d 713, 720 (4th Cir. 2019) (quoting *Flores-Montano*, 541 U.S. at 152). In *United States v. Montoya de Hernandez*, the Supreme Court held that officers may not detain a traveler and subject her to medical examinations unless they "reasonably suspect"

she is "smuggling contraband" inside her body. 473 U.S. at 536, 541. By contrast, in *United States v. Flores-Montano*, the Court held that officers could "remove, disassemble, and reassemble a vehicle's fuel tank" without suspicion because the driver had negligible "privacy interest[s] in his fuel tank." 541 U.S. at 154–55. Though the government's interest in interdicting concealed drugs was significant in both cases, the Court only permitted the suspicionless search that did not implicate "dignity and privacy interests." *See id.* at 152.

In light of the Court's conclusion in *Riley* that cellphone searches intrude on fundamental privacy interests, 573 U.S. at 392–93, the Fourth and Ninth Circuits have applied *Montoya de Hernandez* and *Flores-Montano* in holding that forensic cellphone searches at the border require reasonable suspicion. *See Kolsuz*, 890 F.3d at 141, 146; *Cano*, 934 F.3d at 1012, 1020. As *Riley* recognized, both the "immense storage capacity" and amount of sensitive personal information on cellphones raise significant privacy concerns because cellphones contain call records, appointment calendars, family photos and videos, prescription information, credit card statements, dating apps, GPS records, and more. 573 U.S. at 393, 394–97. And in the ten years since the *Riley* decision, phone storage capacity—and associated privacy concerns—have only grown. *Compare id.* at 394 ("top-selling smartphone" had 16GB storage), *with* Apple, *iPhone 16*, https://www.apple.com/iphone-

16/specs (last visited February 17, 2025) (iPhone has up to 512GB). Today, searching an electronic device can uncover as much information as is stored in "five floors of a typical academic library." *See Cotterman*, 709 F.3d at 964 (calculating for laptop with similar storage capacity). These searches are especially problematic because travelers cannot "practically speaking . . . mitigate the intrusion" by leaving their phones at home. *Kolsuz*, 890 F.3d at 145.

Given the privacy interests at stake, this Court should not equate cellphones to other property that can be searched at the border without suspicion. *See United States v. Kim*, 103 F. Supp. 3d 32, 49–50 (D.D.C. 2015) ("[O]ne cannot treat an electronic device like a handbag simply because you can put things in it and then carry it onto a plane"); *cf. Riley*, 573 U.S. at 393 (likening the argument that cellphones are "materially indistinguishable" from other "physical items" to "saying a ride on horseback is materially indistinguishable from a flight to the moon"). The Eleventh Circuit maintains that border precedent requires reasonable suspicion only for certain "searches of a person's body" but not for property, contending that "electronic devices should not receive special treatment." *Touset*, 890 F.3d at 1233. But this argument overlooks that the "uniquely sensitive nature of data" on digital devices implicates precisely the "dignity and privacy interests" that courts seek to protect. *See Cotterman*, 709 F.3d at 966. While the search of the gas

tank in *Flores-Montano* at most revealed any physical items that a driver crammed inside, "it is difficult to conceive of a property search more invasive or intrusive than a forensic [] search—it essentially is a body cavity search" of a cellphone. *See United States v. Saboonchi*, 990 F. Supp. 2d 536, 561 (D. Md. 2014). Indeed, forensic cellphone searches are the "best approximation government officials have for mindreading." *See United States v. Sultanov*, 742 F. Supp. 3d 258, 286 (E.D.N.Y. 2024).

A forensic search's "ability to plumb the depths of a traveler's data differs not only in degree, but in kind, from conventional searches." *Saboonchi*, 990 F. Supp. 2d at 569 (D. Md. 2014). Forensic search software can "unlock[] password-protected files, restor[e] deleted material, and retriev[e] images viewed on websites." *Cotterman*, 709 F.3d at 957. These forensic searches can also reach the phone's metadata files, which log the owner's creation and use of other files—data that the owner might not even know exist. *See* Blake A. Klinkner, M*etadata What Is It? How Can It Get Me into Trouble? What Can I Do About It?*, Wyo. Law., April 2014, at 18, 19. Moreover, officers can capture the "suspect's browsing history, including the particular websites visited, the number of times visited, . . . and any downloading activity." Ty E. Howard, *Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files*, 19 Berkeley Tech. L.J. 1227, 1236 (2004). By allowing officials to access

metadata, password-protected files, and deleted content, forensic searches "expose[] an entirely different body of data [unavailable through] any conventional search." *Saboonchi*, 990 F. Supp. 2d at 566; *cf. Kyllo v. United States*, 533 U.S. 27, 34, 36–38 (2001) (noting "privacy" concerns associated with technology that allowed officers to collect "intimate details" that "could not otherwise have been obtained").

The "thorough and detailed search" made possible via forensic search technology reveals "the most intimate details of one's life," substantially "intru[ding] upon personal privacy and dignity." *Cotterman*, 709 F.3d at 968. Though a traveler's expectation of privacy may be "diminished" at the border because they are on notice that they might be searched, *see Touset*, 890 F.3d at 1235, a forensic search's intrusion on privacy extends well beyond the border. Such searches facilitate domestic surveillance by providing access to digital information from before the traveler "le[ft] the country" and enabling continuous searching of the downloaded material "long after the device itself has been returned to its owner." *Saboonchi*, 990 F. Supp. 2d at 564; *cf. Carpenter v. United States*, 585 U.S. 296, 312 (2018) (observing that historic cellphone location information allows the government to "travel back in time" and risks "tireless and absolute surveillance"). While government interests in interdicting contraband may justify cursory

searches of physical items, forensic searches are simply too deep and too broad to permit without reasonable suspicion.

2. Forensic searches do not adequately advance government border interests when conducted without suspicion.

The Supreme Court has cautioned against "uncritically extend[ing] existing [Fourth Amendment] precedents" when faced with "seismic shifts in digital technology." *Carpenter*, 585 U.S. at 313, 318 (declining to extend the Fourth Amendment's third-party doctrine to cellphone location data). In *Riley*, the Court accordingly "decline[d] to extend" the search incident to arrest exception to cellphone searches because gathering the data stored on cellphones would be "untether[ed]" from the exception's two underlying aims: preventing the "destruction of evidence" and "harm to officers." 573 U.S. at 386. The government also had other means to achieve these aims. *Id.* at 390. Similarly here, suspicionless forensic cellphone searches do not meaningfully serve the border exception's underlying rationale of preventing the entry of contraband, and the government can achieve its interests through less intrusive means.

Because digital files can and do cross borders via the Internet without physical transport, forensic searches are "ill suited to prevent" the entry of contraband. *Vergara*, 884 F.3d at 1317 (J. Pryor, J., dissenting); *see also Smith*, 673 F. Supp. 3d at 394. Confiscating physical contraband at the border stops its entry, but forensic searches for digital

contraband like CSAM are "far less likely to actually prevent anything unwanted from entering" because copies often "already exist[] *outside* the phone" in "cloud storage," backed up on an unknown number of devices, or on "computer servers potentially located within the country." *Smith*, 673 F. Supp. 3d at 387, 394 (emphasis in original); *see also Sultanov*, 742 F. Supp. 3d at 286 (E.D.N.Y. 2024) ("The very notion of geographic boundaries has little meaning in the context of electronic data"). In *Riley*, the Court dismissed the government's argument that cellphone searches were necessary to prevent the destruction of digital evidence, recognizing that searching a phone would not "make much of a difference" in resolving that concern. 573 U.S. at 390. Similarly, this Court should decline to extend the border exception to forensic cellphone searches that would not make much of a difference in preventing CSAM from entering the country.

Though identifying individuals who possess or produce CSAM could serve the government's interest in enforcing domestic child pornography laws, *see, e.g.*, 18 U.S.C. § 2251(a), the government may not justify its border searches by invoking its "generalized interest in law enforcement and combating crime." *Kolsuz*, 890 F.3d at 143; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000). The government's important interest in obtaining evidence of child abuse is present "whether at the border or elsewhere." *Smith*, 673 F. Supp. 3d at 396–97.

Much like the government's general interest in crime control "cannot support . . . a warrantless search of a person's house," the government may not use the border exception to circumvent procedural safeguards imposed on domestic law enforcement. *Id.* Extending the border exception to forensic cellphone searches based on their general evidence-collection capabilities would thus untether the exception from its justifications.

In addition, the government's legitimate interest in interdicting digital contraband can be satisfied through less intrusive means. Appellate courts agree that without suspicion, officers may conduct manual cellphone searches where they briefly scroll through a phone's contents. *See United States v. Castillo*, 70 F.4th 894, 897–98 (5th Cir. 2023). The government can still conduct "forensic examinations where their suspicions are aroused by what they find" during a manual search or through other investigatory methods. *Cotterman*, 709 F.3d at 967. The "modest requirement" of reasonable suspicion "leaves ample room" for the government to achieve its goals. *Id.* at 967–68.

In fact, CBP's own policy demonstrates that a reasonable suspicion requirement can work—CBP policy has required reasonable suspicion for forensic cellphone searches since 2018. *Kolsuz*, 890 F.3d at 146 (citing U.S. Customs and Border Prot., CBP Directive No. 3340–049A, *Border Search of Electronic Devices* (2018)). While the Eleventh

Circuit suggests that Congress should decide whether to require suspicion for forensic searches, *see Touset*, 890 F.3d at 1237, this approach rings hollow. Fourth Amendment protections are constitutional rights that courts enforce, not policy preferences subject to the whims of the political branches.

Weighing the "relatively weak governmental interest" in forensically searching cellphones at the border against the "magnitude of the privacy invasion caused by such searches," *Smith*, 673 F. Supp. 3d at 394–95, this Court should require reasonable suspicion for all forensic cellphone searches. *See Kolsuz*, 890 F.3d at 144; *Cano*, 934 F.3d at 1020.

3. Forensic searches are incompatible with Founding Era practices.

The Court considers "Founding-era understandings . . . when applying the Fourth Amendment to innovations in surveillance tools." *Carpenter*, 585 U.S. at 305; *see also Riley*, 573 U.S. at 385. Cellphones contain "the same kind of highly sensitive data one would have in their 'papers' at home." *Cotterman*, 709 F.3d at 965. An individual's personal "papers" merited special protection in the eyes of the Founding generation. Brief for the Constitutional Accountability Center as Amicus Curiae in Support of Defendant-Appellant at 6–9, *United States v. Smith*, No. 24-1680 (Nov. 27, 2024), [hereafter *Smith* Amicus Brief]. Courts at English common law recognized that "[p]apers are the owner's

. . . dearest property" and "they will hardly bear an inspection." *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765); *see also Smith* Amicus Brief at 8. The early law of the United States incorporated these cases, and the Fourth Amendment "singl[ed] out" papers in its text. *Smith* Amicus Brief at 9, 11.

Though the Eleventh Circuit suggests that the First Congress's enactment of the Act of 1789 demonstrates a Founding Era endorsement of suspicionless border searches, *Touset*, 890 F.3d at 1232 (citing Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (1789)), this interpretation overreads the Act in two ways. While the Act gave customs officials wide-ranging authority to search seafaring vessels, it specified that a border officer may search vessels "in which he may have a *reasonable cause* to suspect there is merchandise which was imported contrary to law." Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (1789) (emphasis added). Furthermore, the Act allowed only the seizure of "goods, wares or merchandise"—*not* of papers. *Id*; *Smith* Amicus Brief at 12.

Indeed, forensic cellphone searches "bear[] little resemblance to traditional physical border searches historically permitted." *Smith*, 673 F. Supp. 2d at 387. Forensic searches allow the government to access "reams of information that differ quantitatively and qualitatively from the sorts of information a person could ever have carried with him" at the Founding. *See id.* This Court should require reasonable suspicion for

forensic searches at the border so as not to leave travelers "at the mercy of advancing technology." *Kyllo*, 533 U.S. at 35. After all, where a search "becomes too 'attenuated' from [an exception's] historic rationales, it 'no longer [will] fall under' the exception." *Aigbekaen*, 943 F.3d at 721 (quoting *Kolsuz,* 890 F.3d at 143).

The advent of forensic search technology has provided the government "[s]ubtler and more far-reaching means of invading privacy." *See Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting). Extending the border exception to digital forensic searches would be tantamount to saying that "the fact of a border crossing somehow entitled the Government to search that traveler's home, car, and office." *Smith*, 673 F. Supp. 2d at 387. "The border search exception does not extend so far." *Id.*

B. This Court should reverse because the district court should have excluded the evidence from CBP's suspicionless search.

Under the exclusionary rule, "evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion," *Segura*, 468 U.S. at 804, unless the good faith exception is applied, *Davis*, 564 U.S. at 232. In Mr. Karen's case, officers used "forensic data extraction technology" to "download a copy of the cellphone's photos[,] videos, [and] electronic files that would not have been apparent" during CBP's manual cellphone search. JA–3. This "extensive, 'forensic' examination" of the phone, JA–3, required reasonable suspicion, *supra*

Section I.A. Because Agent St. John "had no reason to suspect [Mr. Karen] of any wrongdoing," JA–11, and did not act in good faith, the district court erred in denying Mr. Karen's motion to suppress.

1. CBP officers lacked reasonable suspicion.

"Reasonable suspicion" requires more than an "inchoate and unparticularized suspicion or 'hunch.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Under this standard, before a search, officers must have "a particularized and objective basis for suspecting the person searched of criminal activity." *Cotterman*, 709 F.3d at 968 (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)). This suspicion may result from indicators like "excessive nervousness," "evasive or contradictory answers," "an informant's tip," or "discovery of incriminating matter during routine searches." *United States v. Asbury*, 586 F.2d 973, 976–77 (2d Cir. 1978).

Here, Agent St. John did not have even an inchoate hunch, let alone reasonable suspicion. Mr. Karen was selected for screening—then for subsequent, more invasive searches—at "random." JA–10, 11. Agent St. John's initial manual search, where he scrolled through the images on Mr. Karen's phone, revealed nothing "unusual or noteworthy." JA–10. Indeed, Agent St. John testified that he "had no reason to suspect . . . any wrongdoing": Mr. Karen did not "appear nervous" and was "very cooperative." JA–11. The government can point to no facts

which provided "a particularized and objective basis for suspecting" Mr. Karen. *See Cotterman*, 709 F.3d at 968.

2. CBP officers did not act in good faith.

The good faith exception may prevent application of the exclusionary rule when law enforcement "act[s] with an objectively reasonable good-faith belief that their conduct is lawful." *See, e.g.*, *Davis*, 564 U.S. at 238 (acting in accordance with "binding judicial precedent"); *Herring v. United States*, 555 U.S. 135, 142 (2009) (searching pursuant to an invalid but properly issued warrant). As the Ninth Circuit noted, courts do not deploy the good faith exception simply because officers "might have thought that their actions were reasonable." *Cano*, 934 F.3d at 1022.

CBP cannot demonstrate its officers relied in good faith on apparent legal authority. The government can only claim good faith reliance on legal precedent where "'binding appellate precedent . . . "specifically authorizes" the police's search,'" *Cano*, 934 F.3d at 1021; *see also United States v. Katzin*, 769 F.3d 163, 176 (3d Cir. 2014). If precedent is "unclear" or merely demonstrates that the government's actions were "plausibly permissible," the good faith exception does not apply. *Cano*, 934 F.3d at 1021 (quoting *United States v. Lara*, 815 F.3d 605, 613 (9th Cir. 2016)). Neither the Ames Circuit "nor the Supreme Court has announced whether forensic digital border searches require

individualized suspicion." *United States v. Aguilar*, 973 F.3d 445, 449 (5th Cir. 2020). Even at the border, binding precedent does not allow all highly intrusive searches without suspicion. *See Montoya de Hernandez*, 473 U.S. at 541. And the Court's decision in *Riley* further indicated that the government should treat cell phone searches differently from searches of standard property. *See* 573 U.S. at 393. In this "rapidly developing" area of law, the government can point to no binding precedent authorizing its suspicionless search. *See Cano*, 934 F.3d at 1022.

Further, the government cannot demonstrate that any contrary belief was "objectively reasonable" because Agent St. John's search directly violated CBP's promulgated guidelines. In 2018, CBP issued a directive requiring officers to have "reasonable suspicion" in order to conduct "advanced" searches, including forensic searches. *See* CBP Directive No. 3340-049A, Border Search of Electronic Devices (Jan. 4, 2018). If the random forensic searching was "routine" practice at the Ames City International Airport as Agent St. John asserts, JA–3, application of the exclusionary rule is appropriate to deter "recurring or systemic negligence" ingrained in law enforcement organizations. *Herring*, 555 U.S. 135, 144 (2009).

Forensic cellphone searches, like the one at issue in this case, compromise important privacy interests without furthering valid

government aims at the border. When conducted without suspicion, these searches allow the government to invade the privacy of any traveler and access substantial volumes of his personal information simply because he crossed the border. Indeed, Mr. Karen was subject to extensive search despite providing customs officials with no reason to suspect him of carrying contraband. For the foregoing reasons, this Court should reverse the denial of Mr. Karen's motion to suppress.

II. The district court erred in denying Mr. Karen's *Batson* objection to the peremptory strike of a religious juror.

"[T]he honor and privilege of jury duty" is one of the "most significant opportunit[ies] to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). In *Batson v. Kentucky*, the Supreme Court held that the use of peremptory strikes to exclude jurors based on their race violated the "core guarantee of equal protection." 476 U.S. at 97. The Court in *J.E.B. v. Alabama* extended *Batson* to prohibit gender-based peremptory strikes, emphasizing that jurors had an "equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." 511 U.S. at 141–42; *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (extending *Batson* and *J.E.B.* to prohibit strikes based on sexual orientation).

Applying the equal protection principles of *Batson* and *J.E.B.*, this Court should also bar peremptory strikes rooted in stereotypes

about a venireperson's religious affiliation or beliefs. While the Supreme Court has yet to decide whether *Batson* extends to strikes based on religion, several Justices have underscored that there is "no principled reason" to allow religion-based strikes, given that religion—like race and sex—is a suspect classification "accorded heightened scrutiny under the Equal Protection Clause." *Davis v. Minnesota*, 511 U.S. 1115, 1117 (1994) (Thomas, J., dissenting from denial of certiorari); *see also Mo. Dep't. of Corr. v. Finney*, 218 L. Ed. 2d 69, 69 (2024) (Alito, J., statement respecting the denial of certiorari) (reaching similar conclusion); *Miller-El v. Dretke*, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) (noting that peremptory strikes that "express stereotypical judgments about race, gender, religion, or national origin . . . betray the jury's democratic origins and undermine its representative function"). Numerous jurisdictions already disallow peremptory strikes based on religious affiliation, *see United States v. Brown*, 352 F.3d 654, 666–67 (2d Cir. 2003) (collecting federal and state caselaw), though some courts have allowed strikes based on religious beliefs, *see, e.g.*, *United States v. DeJesus*, 347 F.3d 500, 511 (3d Cir. 2003), or declined to extend *Batson* to religion altogether, *see, e.g., State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993).

In Mr. Karen's case, the government's religious discrimination during *voir dire* demonstrates the need to prohibit peremptory strikes

rooted in suspicions about a juror's faith. The government asked Juror 17 targeted questions about his church attendance and whether his "religious views" or "identity as a Christian" would affect his judgment. JA–12. When the government subsequently sought to strike the juror for cause, the judge denied the government's request because the juror stated "he could be fair and impartial." JA–12. The government then renewed its attempt to exclude Juror 17, exercising a peremptory challenge because of the juror's "religious beliefs" about "sin." JA–13. Though Mr. Karen made a *Batson* objection, the judge expressed uncertainty about whether *Batson* applied to religion, and he deviated from *Batson*'s three-step framework for deciding whether discriminatory intent motivates a peremptory strike. *See* JA–13. The judge ultimately allowed the government's discriminatory strike to stand. JA–12.

This Court should prohibit strikes that single out and discriminate against venirepersons because of their religion. Moreover, because the district court clearly erred in its application of *Batson* during the jury selection for Mr. Karen's trial, this Court should reverse the district court's judgment and remand for further proceedings. *See SmithKline*, 740 F.3d at 489.

A. Peremptory strikes based on religion violate the equal protection principles of *Batson* and *J.E.B.*

Government actions that "single out the religious for disfavored treatment" are subject to the "most exacting scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460, 462 (2017). Individuals' religious communities and creeds are often foundational to their social identities, but religious groups have also been targeted for persecution. Appropriately, the Supreme Court has indicated that religion is a suspect classification under the Equal Protection Clause. U.S. Const. amend XIV, sec. 1; *see Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (*in dicta*); *see also United States v. Carolene Products Co*., 304 U.S. 144, 152 n.4 (1938) (suggesting the need to scrutinize laws "directed at particular religious […] minorities"). The Court has also drawn on equal protection principles when evaluating cases of state-sponsored religious discrimination under the Free Exercise Clause. U.S. const. amend. I; *see, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) (invoking the "fundamental nonpersecution principle of the First Amendment" to strike down a law that intentionally treated religious adherents unequally). Religious discrimination is unconstitutional whether rooted in religious affiliation or belief. *See id.*; *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 619 (2018) (barring government actions that "pass[] judgment upon or presuppose[] the illegitimacy of religious

beliefs"). Together, the Constitution's provisions "speak with one voice" and make clear that "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

Peremptory strikes that exclude jurors simply because they are religious contravene equal protection principles. Such strikes fail to satisfy either the "most exacting scrutiny" typically applied in religious discrimination cases, *see Trinity Lutheran*, 582 U.S. at 462, or the intermediate scrutiny applied in *J.E.B*, 511 U.S. at 137. The Court in *J.E.B.* held that gender-based peremptory strikes failed intermediate scrutiny because: (1) the "perpetuation of invidious group stereotypes" during *voir dire* exacerbates discriminatory stigma and taints the judicial process, *id.* at 140; (2) peremptory strikes "based on gender stereotypes" are insufficiently tailored to advancing the state's interest in a "fair and impartial trial," *id.* at 136–37; and (3) courts have the administrative competence to adjudicate gender-based *Batson* challenges, *id.* at 144. Each of these reasons similarly counsels in favor of prohibiting peremptory strikes based on religious stereotypes.

1. Peremptory strikes of religious jurors perpetuate discriminatory stereotypes and taint the judicial system.

Peremptory strikes rooted in group stereotypes deprive the venireperson of the "equal opportunity to participate in the fair

administration of justice." *J.E.B*, 511 U.S. at 145. Excluding religious citizens from the jury box violates the anti-discrimination mandate of the Equal Protection Clause and "condition[s] the right to free exercise of religion upon a relinquishment of the right to jury service." *See State v. Purcell*, 199 Ariz. 319, 327 (Ariz. Ct. App. 2001); *see also Brown*, 352 F.3d at 669.

Moreover, religious-based peremptory strikes convey the stigmatizing message that certain citizens—simply because of their religious affiliation or beliefs—are "presumed unqualified by state actors to decide important questions." *Cf. J.E.B.*, 511 U.S. at 142 (making similar point about gender-based strikes). Courts have declared it "offensive" and impermissibly discriminatory to strike a juror for their faith without any individualized appraisal of whether the juror can conduct their civic duty fairly. *United States v. Somerstein*, 959 F. Supp. 592, 595 (E.D.N.Y. 1997); *see also State v. Hodge*, 248 Conn. 207, 245 (Conn. 1999). A venireperson's faith should not serve as "a badge of second-class citizenship." *Thorson v. State*, 721 So. 2d 590, 595 (Miss. 1998) (applying state constitutional law to prohibit strikes based on religious affiliation).

Peremptory strikes based on stereotypes about one's religious identity or beliefs also "reinforce patterns of historical discrimination." *Cf. J.E.B.*, 511 U.S. at 141–42 (describing our country's sordid history of

excluding women and Black people from the jury box and civic life). Religious discrimination has pervaded American history. During the nineteenth century, states excluded disfavored religious groups from voting and serving as witnesses and jurors. *See* Daniel Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 Buff. Crim. L. Rev. 139, 160–64 (2005). During the twentieth century, litigators singled out religious venirepersons with peremptory strikes. *See* Clarence Darrow, *Attorney for the Defense*, Esquire Magazine, 36, 211 (May 1936) (proclaiming defense attorneys should "get rid" of Presbyterian venirepersons before they "contaminate[] the others" with views about "eternal punishment"); *see also* Brief for the Commonwealth of Virginia and 12 Other States as Amicus Curiae in Support of Petitioner at 13, *Mo. Dep't. of Corr. v. Finney,* No. 23–203 (Oct. 5, 2023) (discussing jury selection manuals that employed religious stereotypes). Even in the twenty-first century, attorneys still openly exclude religious jurors based on presumptions that they cannot be trusted to participate neutrally in criminal adjudication. *See* Anna Offit, *Religious Convictions*, 101 N.C. L. Rev. 271, 291–92, 295–96 (2023) (summarizing interviews with prosecutors, defense counsel, and judges). Though religious-based strikes target both historically dominant and marginalized groups, these strikes share an underlying animus that highlights why all religious discrimination is

scrutinized. *Cf. J.E.B.*, 511 U.S. at 141 (indicating that the Equal Protection Clause applies to all group-based discrimination and applying *Batson*'s framework to strikes of male venirepersons).

"State-sanctioned discrimination in the courtroom" also undermines public "confidence in our judicial system." *Id.* at 140. Additionally, this discrimination hurts litigants by creating "the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings."[1] *Id.* Peremptory strikes based solely on a juror's faith thus undermine public trust in our judicial process.

2. Peremptory strikes based on religious affiliation or belief are insufficiently tailored to the goal of fair juries.

While the Court in *J.E.B.* acknowledged that the state had a "legitimate interest in achieving a fair and impartial trial," the Court concluded that peremptory strikes "based on gender stereotypes" failed intermediate scrutiny because these strikes did not "substantially furthe[r]" that interest. 511 U.S. at 136–37. Stressing that gender was a flawed "proxy" for "juror competence and impartiality," *id.* at 129, the Court underscored that strikes rooted in gender stereotypes are

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[1] The "defendant in a criminal case can raise the third-party equal protection claims of jurors excluded" by peremptory strikes "whether or not the defendant and the excluded jurors share the same" group identity. *See Powers*, 499 U.S. at 402, 415 (applying this rule in the context of race).

unsuitable "even when some statistical support can be conjured up for the generalization," *id.* at 139 n.11. Absent any individualized connection between a juror's faith and the specific case, peremptory strikes based on stereotypes about either a venireperson's religious affiliation or their beliefs are likewise an inapt means to empanel fair juries.

First, a juror's religious affiliation is a poor proxy for potential bias. Courts that permit peremptory strikes based on religious affiliation contend that one's religion reveals a juror's underlying beliefs that could affect impartiality. *See Casarez v. State*, 913 S.W.2d 468, 495 (Tex. Crim. App. 1995). However, this claim sweeps too broadly because religious people of the same affiliation hold a wide range of beliefs. Benjamin H. Barton, Note, *Religion-Based Peremptory Challenges After* Batson v. Kentucky *and* J.E.B. v. Alabama*: An Equal Protection and First Amendment Analysis*, 94 Mich. L. Rev. 191, 210 (1995). Moreover, strikes based on affiliation are often rooted in unreliable stereotypes: attorneys either presume that jurors who attend church will desire to punish wrongdoing, or alternatively, will be merciful. *See* Offit, *Religious Convictions*, *supra*, at 291–92.

Second, while some courts assert that peremptory strikes based on religious beliefs are permissible, *see DeJesus*, 347 F.3d at 510–11, these strikes may also sweep too broadly. On the one hand, some beliefs

could closely bear on a juror's competence or impartiality, such as when a juror expresses that his religious beliefs "would prevent [him] from basing his decision on the evidence and instructions." *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998). On the other hand, some religious beliefs are simply irrelevant in determining juror competence: a Mormon's belief in eternal marriage, a Muslim's belief in the rules of *Halal*, or a Hindu's belief in sacred animals would not impact how each of these jurors would decide almost any case.

More nuanced situations arise when a juror's religious belief lies "in between" these two poles and may—or may not—bear on impartiality depending on the specific case. *See Stafford*, 136 F.3d at 1114. Applying the standard equal protection framework for identifying when animus motivates state-sponsored unequal treatment, courts should prohibit strikes based on religious beliefs that occur "because" they are religious but permit strikes that occur "in spite of" the belief's religious nature. *Cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 258 (1979). For example, singling out and striking a Jewish juror solely *because* he believes in *tzedakah* (charity), while not taking issue with other jurors' analogous secular beliefs, would be grounds for a *Batson* objection. By contrast, if the government struck both a secular charity worker and a Jewish juror who believed in *tzedakah*, the strike of the Jewish juror could be permissible since it occurred "in spite" of the

religious nature of the juror's beliefs. *Cf. Brown*, 352 F.3d at 669–70 (making a similar point). Courts could ascertain discriminatory intent through factors already used in applying *Batson*, such as non-neutral explanations for the peremptory strike, "disparate questioning" of religious and secular jurors, or "other relevant circumstances." *See Flowers v. Mississippi*, 588 U.S. 284, 302 (2019).

Strikes based on religious affiliation or beliefs can often be rooted in harmful and unreliable stereotypes that do not actually predict juror bias. *See Finney*, 218 L. Ed. 2d at 69 (Alito, J., statement respecting the denial of certiorari) (emphasizing the discriminatory harm caused by religious-based strikes). Permitting *Batson* objections for peremptory strikes based on a juror's faith would ensure that attorneys do not abuse the blanket discretion implicit in the peremptory strike system to exclude religious jurors.

3. Courts have the administrative competence to apply *Batson*'s framework to prevent religious discrimination.

In both *Batson* and *J.E.B*, the Court rejected claims that scrutinizing peremptory strikes for discriminatory animus would undermine the peremptory strike system and pose excessive "administrative difficulties" during *voir dire*. *Batson*, 476 U.S at 99; *see also J.E.B*, 476 U.S at 144. This Court should reject three similar counterarguments about extending *Batson* to religion.

First, allowing religion-based challenges "does not imply the elimination of all peremptory challenges." *Cf. J.E.B.*, 476 U.S. at 143. Just as before, parties could still use peremptory strikes based on any classification not subject to heightened scrutiny. *See id.*

Second, the fact that religion is often less visible than sex or race does not make applying the *Batson* framework impracticable. *But see State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (arguing otherwise). The government may argue that because religion is not self-evident, courts will be unable to adjudicate *Batson* objections by comparing a party's treatment of religious jurors to its treatment of secular jurors. *See United States v. Girouard*, 521 F.3d 110, 116 (1st Cir. 2008). However, a juror's religion may become visible when counsel asks targeted and intrusive questions about faith, as happened during jury selection for Mr. Karen's trial. *See* JA–12. Questioning that discriminates on the basis of religion will be especially apparent given that many courts dissuade litigators from asking about religion during *voir dire*. *See, e.g.*, *United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979) (emphasizing that jury selection is "not designed to subject prospective jurors to a catechism of their tenets of faith").

Third, *Batson*'s framework will enable courts to adjudicate between impermissible discriminatory strikes and those with a neutral explanation. *Contra Davis*, 504 N.W.2d at 771. Courts already have

experience distinguishing between identity itself and experiences or beliefs linked to an identity that could impact a juror's bias. For example, in *Tolbert v. Gomez*, the Ninth Circuit upheld a peremptory challenge against a Black juror, as it found the strike was based on the juror's own self-professed biases based on his experiences as a Black man, rather than simply on the "basis of his race." 190 F.3d 985, 987, 989 (9th Cir. 1999). The explanations that prosecutors provide in response to a *Batson* objection will help reveal whether discriminatory intent motivated a strike of a religious juror. *Cf. Kesser v. Cambra*, 465 F.3d 351, 357 (9th Cir. 2006) (finding that a prosecutor offered discriminatory justifications for striking a Native American juror).

Any administrative concerns about adjudicating religious-based *Batson* objections do not trump the clear constitutional command against discriminatory juror selection. In fact, since religion, gender, and race are all "overlapping categories," proscribing religious-based strikes would supplement ongoing efforts to stop other discriminatory peremptory challenges. *See J.E.B.* 511 U.S. at 145 (using a similar rationale to justify proscribing gender-based strikes); *see also* Christie Stancil Matthews, *Missing Faith in* Batson: *Continued Discrimination Against African Americans Through Religion-Based Peremptory Challenges*, 23 Temp. Pol. & Civ. Rts. L. Rev. 45, 48 (2013) (chronicling cases in which Black jurors were struck because of their religion); *see*

also Petition for Writ of Certiorari at 31, *Mo. Dep't. of Corr. v. Finney* (2023) (No. 23–203) (making a similar argument). Overall, this Court should extend *Batson* to prohibit strikes based on crude stereotypes about a juror's religious affiliation or beliefs.

B. The district court made three reversible errors in assessing Mr. Karen's *Batson* challenge.

"[T]rial judges possess the primary responsibility to enforce *Batson*" and stop "discrimination from seeping into the jury selection process." *Flowers*, 588 U.S. at 302. Under *Batson*, courts evaluate whether discrimination motivated a peremptory strike by administering a three-step framework: (1) the opponent of the strike must establish a "*prima facie* showing" of discrimination; (2) the striking party must then "come forward with a neutral explanation" for the strike; and (3) finally, if a neutral explanation is provided, the court must "determine if the [opponent of the strike] has established purposeful discrimination." *Dretke*, 545 U.S. at 239 (citing *Batson*, 476 U.S. at 96–98). When a lower court clearly errs in applying *Batson* and allows the discriminatory exclusion of a juror, the reviewing court must reverse and remand. *See Flowers*, 588 U.S. at 316.

Here, in response to Mr. Karen's *Batson* objection, the district court attempted to move through *Batson*'s framework while simultaneously vacillating about whether *Batson* extended to religious discrimination at all. *See* JA–13. The indecisive approach led the court

to commit clear errors in applying each step of *Batson*'s framework, resulting in the exclusion of Juror 17 solely because of his faith. Each of these three errors independently warrants reversal.

1. The court erred in its ruling on Mr. Karen's *prima facie* case of discrimination.

At *Batson*'s first step, the party opposing a peremptory strike bears the burden of establishing a *prima facie* case of discrimination, but it is a "burden of production" not "persuasion." *SmithKline*, 740 F.3d at 476; *see also Johnson v. California*, 545 U.S. 162, 170 (2005) (emphasizing the burden is not "so onerous"). The objecting party need only demonstrate that the struck juror was a "member of a cognizable group" and that "the totality of the circumstances raises an inference" of discrimination. *SmithKline*, 740 F.3d at 476 (internal citation omitted).

Here, Juror 17's "devout Christian" identity and "frequent[]" church attendance, JA–12–13, places him in a cognizable group. *See State v. Fuller*, 182 N.J. 174, 201 (2004) (stating that "adherents of religions that encourage or require . . . certain religion-based activities" are "members of a cognizable group" for the purposes of a *Batson* objection).

Moreover, the government's targeted questions about whether Juror 17 "go[es] to church" and whether his "religious views or religious identity as a Christian" would impact his views on the case raise an inference of discrimination. *See* JA–12. As *Batson* indicates, a

"prosecutor's questions and statements during *voir dire* . . . may support . . . an inference of discriminatory purpose." 476 U.S. at 97; *see also Splunge v. Clark*, 960 F.2d 705, 707–08 (7th Cir. 1992) (finding that a prosecutor's "questions and statements" about the race of two jurors helped give rise to "an inference" of discrimination). Though the district court here suggested that a "pattern of discrimination" is necessary to prove a *prima facie* case, *see* JA–13, courts have made clear that a *prima facie* case does "not need to show that the prosecution had engaged in a pattern of discriminatory strikes," *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers*, 588 U.S. at 311.

Furthermore, regardless of the strength of Mr. Karen's *prima facie* case, the district court erred in rejecting the *Batson* objection solely on that basis. Once the government responded to Mr. Karen's *Batson* objection by "attempt[ing] to explain [its] peremptory challenge," the district court should have "look[ed] to the entire record to determine if intentional discrimination [was] present." *United States v. Clemmons*, 892 F.2d 1153, 1156 (3d Cir. 1989). Here, the government's explanation, which singled out the juror's "religious beliefs," *see* JA–13, suggested that the strike was discriminatory, *see infra* Section II.B.2. When a party's explanation of its strike "raises more concern than it puts to

rest," the district court cannot "effectively close [its] eyes" to potential discrimination by "deciding that the defendant has not made out a *prima facie* case." *Clemmons*, 892 F.2d at 1156; *see also Durant v. Strack*, 151 F.Supp.2d 226, 238 (E.D.N.Y. 2001).

2. The court disregarded the government's discriminatory explanation for its peremptory strike.

At *Batson*'s second step, the striking party must proffer an identity-neutral explanation for dismissing the venireperson. *See Flowers*, 588 U.S. at 298. Although the explanation need not be "persuasive, or even plausible," *Purkett v. Elem*, 514 U.S 765, 768 (1995), the reasoning must be "clear and reasonably specific" and cannot demonstrate discriminatory intent. *Dretke*, 545 U.S. at 239, 252 (quoting *Batson*, 476 U.S. at 98 n.20). A party may exhibit discriminatory intent when it justifies a peremptory strike by relying on an unsupported assumption about a venireperson's bias related to their identity and then disregards the venireperson's express statements of impartiality. *See Porter v. Coyne-Fague*, 35 F.4th 68, 80–81 (1st Cir. 2022); *see also* Petition for Writ of Certiorari at 17, *Mo. Dep't. of Corr. v. Finney* (2023) (No. 23–203) (making similar argument).

Here, the government's explanation for its strike resembles the explanation that the First Circuit in *Porter v. Coyne-Fague* found non-neutral. *See* 35 F.4th at 82. In *Porter*, the prosecutor explained its peremptory strike by emphasizing a Black venireperson's stated fear of

"blow-back" and workplace retaliation if the Black defendant were convicted. *See id.* at 80. Because the venireperson also disclaimed that this fear would impact his impartiality, the First Circuit found that the prosecutor's explanation misrepresented the juror's prior statements and was pretext for a race-based strike. *Id.* at 80–81. Much like the juror in *Porter*, Juror 17 indicated that "he could be fair," and the district court recognized the juror's impartiality when denying the government's for-cause challenge. JA–12. Yet just as in *Porter*, the government disregarded that assurance and misconstrued the juror's "religious beliefs" about "sin" as inherently disqualifying. JA–13. While the *Porter* prosecutor attempted to disguise his pretextual race-based assumptions, *see* 35 F.4th at 80–81, the government here *openly* relied on flawed stereotypes about a juror's faith. JA–13.

During *voir dire* for Mr. Karen's trial, the government conflated Juror 17's general religious beliefs with bias, without any individualized assessment of how these beliefs might impact his judgment. Courts have distinguished between impermissible strikes justified through unsupported stereotypes and permissible strikes rooted in concrete, case-specific concerns. *Compare Kesser*, 465 F.3d at 357 (finding an explanation non-neutral because it presumed a Native American juror's cultural background would affect her impartiality) *with United States v. Alvarado*, 951 F.2d 22, 24, 26 (2d Cir. 1991) (noting *in dicta* that a strike

was non-discriminatory where the prosecutor explained that a minority venireperson's limited English proficiency would hinder understanding of key evidence). Sanctioning the strike of Juror 17 would authorize the government to strike religious jurors based on unsupported assumptions about their general beliefs in sin and forgiveness, effectively barring religious citizens from the jury box.

3. The court failed to assess the totality of the circumstances bearing on the issue of religious discrimination.

At *Batson*'s final step, even if a party offers a neutral explanation for its strike, courts must weigh this explanation "in light of all of the relevant facts and circumstances." *Flowers*, 588 U.S. at 302; *see also Foster v. Chatman*, 578 U.S. 488, 501 (2016). Reviewing courts have remanded when lower courts conduct cursory analyses that "fail[] to consider all of the evidence" weighing on the issue of discrimination. *Hardcastle v. Horn,* 368 F.3d 246, 259, 262 (3d Cir. 2004); *see also United States v. McAllister*, 693 F.3d 572, 581 (6th Cir. 2012) (holding that a *Batson* analysis is deficient when there is no record that the district court evaluated the government's explanation for the strike). Moreover, after a party explains the basis for its strike, courts often solicit a response from the party opposing the strike to evaluate the *Batson* objection. *See United States v. Moore*, 651 F.3d 30, 41 (D.C. Cir. 2011); *see also McAllister*, 693 F.3d at 581.

In issuing its ruling on Mr. Karen's *Batson* objection, the district court erred by not weighing the totality of the circumstances. Rather, the court largely premised its denial of the objection on its self-admitted uncertainty about whether "religion can form the basis for a *Batson* objection." JA–13. Furthermore, the court accepted the government's strike at face value: "[T]his is your peremptory challenge, and *on that basis*, I will excuse this juror from the venire." JA–13 (emphasis added). The court did not assess the government's targeted interrogation of Juror 17, the government's explanation for its strike, the government's disregard for the juror's professed impartiality, or the government's questioning of secular jurors. *See id.*; *see also Flowers*, 588 U.S. at 302 (listing similar factors for evaluating a peremptory strike). Nor did it even offer Mr. Karen's counsel any opportunity to respond to the government's rationale. JA–13.

Here, the government struck Juror 17 because of his religion and the district court failed to assess the issue. The discriminatory exclusion of a juror undermines the "fairness, integrity, [and] public reputation" of the judicial process and warrants reversal. *Brown*, 352 F.3d at 664 (internal citation omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the order and judgment of the district court, vacate Mr. Karen's sentence, and remand for further proceedings.

February 17, 2025 Respectfully submitted,

The Honorable Judge J. Skelly Wright Memorial Team

/s/ Daibik Chakraborty

/s/ Justin Curtis

/s/ Sara Holston

/s/ Noah Kest

/s/ Sydney Malin

/s/ Justin Xu

Counsel for Defendant-Appellant

APPENDIX

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Act of July 31, 1789, ch. 5 § 24

> *And be it further enacted,* That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any

ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.

18 U.S.C. § 2251(a)

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has

actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.