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Public Comment on Proposed Amendments to Jury Qualification Form and Rules §§6-1002, 6-1003, and 6-1004

Submitted by Iowa-Nebraska NAACP
Concurred in by Douglas County Public Defender,
ACLU of Nebraska, and Nebraska Appleseed

Although Further Revisions Are Needed, the Proposed Amendments to the Nebraska Juror Qualification Form Are Positive First Steps Toward Securing for Defendants Access to the Jury Data Needed to Determine Whether There Is a Viable Fair Cross-Section Challenge. However, the Proposed Amendments to the Jury Qualification Form Should Be Revised (1) to Require Prospective Jurors to Provide Their Race and Ethnicity in Responding, (2) to Explain the Reasons for Seeking Such Demographic Information, and (3) to Disclose That No Names or Personally Identifying Information Will Be Revealed but That Aggregate Racial and Ethnic Data Will Be Compiled, Maintained, and Provided to Defendants *Pretrial and Without Precondition Upon the Request of a Defendant or the Defendant's Legal Counsel. The Good Cause-Necessity Threshold Showing Required by State v. Sanders, 269 Neb. 895, 697 N.W.2d 657 (NE 2005), for a Defendant to Obtain Jury Data,* Must Be Overruled or Disavowed Because It Conflicts with the Impartial Jury Guarantee and Fair Cross-Section Purpose of the Sixth Amendment[1] and with the Nebraska Jury Selection Act ("JSA").[2]

This Public Comment is jointly filed by the Iowa-Nebraska NAACP ("NAACP"), Nebraska Appleseed, the ACLU of Nebraska, and the Douglas County Public Defender (collectively, "We"). The reforms proposed by the Access to Justice Commission and the Committee on Equity & Fairness to the Juror Qualification Form are grounded in sound jury management policy and set the Court System on the right course; however, the proposed Form still has flaws, and we will make recommendations on ways they can be corrected. To achieve the Court System's goal of achieving representative juries, the Court System must put all its prestige behind a public education campaign on the importance of representative juries to a fair and just criminal justice system. The Court must not only collect reliable data, but must also make the anonymous, aggregate jury data that it

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[1] Like the Sixth Amendment to the U.S. Constitution, Section 1-11 of the Nebraska Constitution guarantees an accused In a criminal case a "public trial by an impartial jury of the county and district in which the offense Is alleged to have been committed." In this Public Comment we rely only upon the Sixth Amendment; but at another time it would be appropriate to consider the substance and requirements of the right to an "impartial jury" under this section of the Nebraska Constitution.

[2] *See* Part V, *infra* at pp. 30 - 44 for discussion of *Sanders* and why its holding in this respect must be disavowed or overruled.

collects routinely accessible to defendants and their counsel pretrial and without precondition.

The proposed reforms are badly needed. The current Juror Qualification Form (the "Questionnaire") is not designed to secure data that is reliable, and it has, in practice, created an absolute bar to disclosure of any anonymous, aggregate jury data. This data is crucial to any determination of whether a meritorious fair cross-section claim exists. The Questionnaire's sweeping ban on disclosure is compounded by *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (NE 2005) ("*Sanders*"). Indeed, the NAACP submits that the text of the current Questionnaire in combination with the *Sanders* ruling contravenes both the Nebraska Jury Selection Act's ("JSA") disclosure requirements and United State Supreme Court precedent. Specifically, in the unanimous Supreme Court case, *Test v. United States*, 420 U.S. 28 (1975), construing the Federal Jury Selection & Service Act of 1968 ("JSSA") upon which the Nebraska JSA was modeled, and holding that defendant has an unqualified, unconditional right to inspect jury lists before trial in preparation of a motion challenging the venire. Because the Nebraska JSA was modeled on the identical provisions of the federal statute at the heart of the *Test* case, the disclosure bar must be viewed inappropriate and improper. As a result, in criminal cases where African Americans and Blacks are accused, the NAACP has zero assurance that a jury will have been drawn from a fair cross-section of the community served by the trial court, for the Nebraska Court System does not make available the necessary data by which that can be determined.

The above synopsis is intended to applaud the proposed amendments as a promising start of badly needed Nebraska Court System jury reform, accompanied by NAACP suggestions of essential reforms that we believe are essential and will significantly strengthen the steps taken. Today's Public Comments will be limited to (1) explaining how the Court System fails to comply with constitutional and statutory requirements, (2) providing suggestions for improvement and reform of the text of the proposed Questionnaire, and (3) providing our recommendation of additional Rules that are necessary to provide guidance as to compilation of the jury data at each stage of the jury selection process and as to defendants and defense counsel's access to the jury data, pretrial and without condition. We also urge the Court System to undertake an educational campaign as to the historic roots of the "impartial jury" requirement, why the demographic data sought is so important to the protection of the constitutional rights to representative juries and prevention of discriminatory peremptory challenges, and to make clear that the data will only be disclosed in anonymous, aggregate reports, fully protecting juror privacy. This educational campaign, designed in a way that is sensitive to all communities, should both enhance public confidence in the Court System and bolster juror disclosures.

I. Overview

The proposed amendments to Court Rules 6-1002, 6-1003, and the Juror Qualification Form (Questionnaire) involving data collection must be informed by First Principles of Data Collection-Compilation-Disclosure ("data collection system") drawn

from caselaw, *Duren v. Missouri*, 439 U.S. 357 (1979); *Test v United States*, 420 U.S. 28 (1975); *State v. Plain*, 898 N.W.2d 801 (Iowa 2017); and *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019); and the Nebraska Jury Selection Act, Nebraska Rev. Stat. §25-1645 – 25-1678, its text and legislative history.

Duren established the elements of a fair cross-section challenge:

> "In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process."[3]

During the eight months preceding Duren's trial, defendant established significant underrepresentation by proving that women were 54% of the jury-eligible population but accounted for only 26.7% of the persons summoned for jury service, and only 14.5% of the persons on the post-summons, weekly venires from which jurors were drawn. In March 1976, when Duren's trial began, 15.5% of those on the weekly venires were women (110 of 707). His jury was selected from a 53-person panel on which there were 5 women; all 12 jurors chosen were men.

Duren and *Lilly* make clear that there are two components to the proof required to demonstrate *Duren* prong 2 underrepresentation: one, there must be some degree of underrepresentation of African Americans (or other distinctive group) on the defendant's own jury pool or jury voir dire panel or venire, and two, when compared to the percentage of the distinctive group in the community's jury-eligible population, there must be statistically significant underrepresentation of African Americans in the jurisdiction's jury pools or jury panels over the most recent six months or one year for which jury data is available. This latter jury data is commonly referred to as aggregate, historical data; it seeks to establish that the underrepresentation of African Americans has been statistically significant for a recent period of time, and sufficiently long enough to confirm that the underrepresentation on defendant's own jury pool or jury panel is not an aberration. If there is no such underrepresentation, there has been no Fair Cross-Section violation.

<u>Data Collection System Principle No. 1:</u> It is the aggregate, historical jury data that plays the central role in proving *Duren* prong 2 underrepresentation. This aggregate data

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[3] 439 U.S. at 364. To show the "systematic" cause of the underrepresentation, Duren pointed to Missouri's law exempting women from jury service, and to the manner in which Jackson County administered the exemption. Concluding that no significant state interest could justify Missouri's explicitly gender-based exemption, the Court held the law, as implemented in Jackson County, violative of the Sixth Amendment's fair-cross-section requirement.

involves numbers and not names; it is anonymous; to repeat, no names or personal identifying information are involved. For example, if over the last six months 2400 persons have been summoned and represent either the jury pool or the jury panel, and 60 of those summoned or assigned to a panel are African Americans, the African Americans represent 2.5% of the pool or the panel as the case may be. If African Americans constitute 6% of the jury-eligible population for the community served by the trial court, there is underrepresentation of African Americans by 3.5%. The question under *Duren* then is whether that degree of underrepresentation is fair and reasonable in relation to African Americans' percentage in the jury-eligible community. This is the data that the Court System must collect, monitor, and provide defendants who have made a discovery request in advance of trial. None of it involves individuals' names or personally identifying information. This jury data is generally collected from prospective jurors' answers to the Juror Questionnaire, but it does not require disclosure of the Questionnaire itself. The Court System will also provide defendant with the jury data as to his or her own jury pool and panel or venire, with the latter typically provided on the first day of trial. The Nebraska caselaw has not grasped the importance *Duren* and its progeny place on aggregate, historical jury data with respect to race and ethnicity in the contexts of asserting and evaluating fair cross-section claims.

Data Collection System Principle No. 2: The aggregate, historical jury data must be requested by defendants early in the pre-trial stage and considered by the trial judge at a hearing during the pretrial stage. This enables determination whether there is underrepresentation that is not fair and reasonable in relation to the group's percentage of the jury eligible community, and if so, in time for defendant to retain a jury expert who can identify the cause and speak to the issue of whether there has been "systematic exclusion." If the aggregate, historical jury data does *not* indicate significant underrepresentation, defense counsel and the court will realize there is no basis for a fair cross-section challenge. Section 25-1678(1) of the Nebraska Jury Selection Act underscores the importance of an early effort by defense counsel as it imposes a strict timeliness duty on defense counsel to file a "motion [to quash or for other relief] *within seven days after the moving party discovered* or *by the exercise of diligence could have discovered the grounds for such motion*, and in any event before the petit jury is sworn in to try the case." This provision is important for two reasons.

First, we are aware that sometimes defense counsel have waited until the day of trial to see the racial composition of defendant's jury pool and panel *before* developing a fair cross-section strategy. Such tactics can result in chaos and possible trial delay on the first day of trial when counsel then moves for time within which to undertake discovery on *Duren*'s second and third prongs. The JSA makes clear that the day of trial is too late—way too late—to raise the fair cross-section issue with the court, and defense counsel's belated motion or discovery request should be summarily denied on the ground that defense counsel, "by the exercise of diligence could have discovered the grounds for such a motion" and failed to do so. Defense counsel must engage in the bulk of their research on a fair cross-section challenge pretrial, and, if they believe there may be grounds, they

must file a motion "in anticipation" of a fair cross-section challenge as soon as they've discovered those grounds.

Second, this strict timeline is intended to provide trial judges and jury managers with adequate time, if needed, to make a mid-course correction before the day of trial. A defendant's standing cannot be determined until the composition of his or her jury pool and panel are determined, when defendant can see the jury panel and with simple arithmetic ascertain whether there is underrepresentation. This means a defendant's motion to quash or for other relief cannot be finalized and filed until the day of trial and then only if underrepresentation has been found to exist on defendant's own jury pool or panel. *State v. Lilly*, 930 N.W.2d at 305. However, to repeat, §25-1678(1) protects the Court System from the trial disruption if defense counsel waits until the day of trial to give the Court System notice that the "defendant has grounds" for a fair cross-section motion.

Data Collection System Principle No. 3: The defendant's right of access to the jury data pretrial is guaranteed by the Nebraska Jury Selection Act, Neb. Rev. Stat. §25-1678(4), which guarantees that defendants will have access to jury data "in connection with the preparation . . . of a motion" seeking "appropriate relief on the ground of substantial failure to comply with the Jury Selection Act in selecting the grand or petit jury." The identical provision of the Federal JSSA was construed by a unanimous Supreme Court, *Test v. United States,* to provide defendants with "an unqualified right" to jury data pretrial:

> This provision [of the Federal Jury Selection & Service Act] makes clear that a litigant has essentially an unqualified right to inspect jury lists. It grants access in order to aid parties in the 'preparation' of motions challenging jury-selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community.'

Id. at 30 (citing 28 U.S.C. § 1861). The *Test* decision was issued only four years before Nebraska enacted §25-1678, which is a verbatim copy of the JSSA provision construed in *Test*. Conventional principles of statutory construction would hold that the Nebraska Legislature embraced *Test*'s construction of the JSSA.

Data Collection System Principle No. 4: *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005), subordinated the defendant's right under §25-1678 to have access to the jury data to concerns about juror privacy. We explain in Part V why that contravened constitutional and statutory precedent and must therefore be overruled. But we note here and emphasize that at the time *Sanders* was decided the court system only utilized paper questionnaires and collected no data as to juror's race. As a result, it could not provide any aggregate, historical data to the defendant about the impact of its jury selection process on nonwhites, and defense counsel therefore sought jury lists and jury

questionnaires with the intent to compare the names to Department of Motor Vehicles information that did contain racial data., However, once a 21st Century Court computerized data collection system has been installed, which the Court is committed to doing, the problems that arose in *Sanders* should rarely, if ever, arise. The Court will have gathered and compiled the relevant demographic data through its computerized data collection system, and defense counsel will be able to obtain the jury data they need by informal request or motion if not made publicly available, broken down by race and ethnicity, for the six-month period or year preceding the trial date . There will be no need for defense counsel to have access to the individual juror questionnaires.

Data Collection System Principle No. 5: The Court System must compile juror data at each stage of the jury selection process, including the empanelment stage preceding the swearing in of juries for service on the trial jury. Data compilation at each stage of the jury selection process is critical to effectuation of the twin constitutional rights protecting the jury selection process: the Sixth Amendment's guarantee that juries be selected from jury pools and voir dire panels that reflect a fair cross-section of the community and the Fourteenth Amendment's equal protection *Batson* guarantee that prohibits discriminatory peremptory strikes. As explained in Part VII infra, in order to effectuate the *Batson* protections, the juror data at the empanelment must be capable of disaggregation based on the race and ethnicity of the defendants.

II. Conference of Chief Justices' Resolutions and the Nebraska Supreme Court's Access to Justice Report's Recommendations Provide Important Background and Context for Nebraska's Proposed Rule and Juror Qualification Form Amendments

As the Court embarks upon review and reform of its rules, procedures, and practices concerning jury selection and an accused's Constitutional right to an "impartial jury," resolutions of the Conference of Chief Justices and recommendations of the Nebraska Supreme Court's Access to Justice Report provide guidance and should embolden all participating in the effort.

The Conference of Chief Justices (CCJ) of the 50 states has "recognize[d] that too many persons, especially persons of color, lack confidence in the fairness of courts and the criminal justice system." *2020 CCJ Resolution 1 in Support of Racial Equality and Justice for All*. In particular, the CCJ commended state courts that "collect, maintain and report court data regarding race and ethnicity that enables courts to identify and remedy racial disparities," and it encouraged courts "to engage in conversations with communities of color, so that, in the words of Bryan Stevenson, our courts 'get proximate' to the challenges faced by such communities." The CCJ also recognized the importance of the public's perception of the fairness of court systems. CCJ Resolution 1 committed its member Chief Justices "to intensify efforts to combat racial prejudice within the justice system, both explicit and implicit, and to recommit to examine what systemic change is needed to make equality under the law an enduring reality for all, so that justice is not only

fair to all but also is recognized by all to be fair."
https://ccj.ncsc.org/__data/assets/pdf_file/0017/51191/Resolution-1-In-Support-of-Racial-Equality-and-Justice-for-All.pdf

The Nebraska Supreme Court has also recognized how important it is that the public perceive that its court system is fair in appearance and result. Nebraska Access to Justice Commission (2022) has several supportive recommendations. Strategic Principles 4 and 5 emphasize the importance of reliable data collection to achieving juries that represent a fair cross section of their communities. Strategic Principle 4 provides:

> "4. All Court Users Should Have Equal Access to Court Services, Enjoy Full Participation in the Judicial Process, and Be Treated with Fairness, Dignity, a Respect."

The Commission's explanatory text emphasized the importance of representative jury pools to the public's confidence in the system: "The initiatives under this strategic principle are designed to promote public confidence in the accessibility, fairness and impartiality of the court system by identifying, and addressing, practices and procedure which tend to exclude or disadvantage any court users, (including] initiatives designed to remove barriers to jury service and achieve a more representative jury pool." Two initiatives are of particular note in this regard. Initiative 4.8: "Recommend procedural reforms to achieve a more representative jury pool" and Initiative 4.1: "Make recommendations for standardizing the information and resources provided to jurors on implicit bias.""

The Access to Justice Commission Strategic Principle 5 provides:

> "5. The Access of Justice Commission Should Collaborate with Court Users, Court Administration, and Justice Stakeholders To Engage and Educate the Public About the Courts, and To Improve the Collection of Reliable Data to Support Evidence-Based Recommendations."

Notably, the Commission's explanatory text emphasized the importance of "reliable data" to identifying justice system shortcomings, such as whether there is underrepresentation of a racial group at any stage of the jury selection process: "Access to reliable data is essential to the important work of identifying gaps and disparities in access and measuring the impact of reforms so that best practice can be identified and implemented."

The NAACP applauds the Nebraska Court System's outreach to minority communities across the state through the "listening" sessions conducted by members of the Access to Justice Commission and others during 2023 and 2024. The NAACP appreciates being included in the Omaha and Lincoln sessions. The NAACP also appreciates that Chief Justice Heavican was receptive to the NAACP's April 2023 request that the Nebraska Court System follow the Iowa Supreme Court's precedent of engaging in

ongoing dialogue with the NAACP about justice system issues. Such ongoing dialogue between the NAACP and the Iowa Chief Justices and State Court Administrators began in 2015 with then-Chief Justice Mark Cady. The first NAACP meeting with Chief Justice Heavican, Justice Stacy, Court Administrator Steel, and Deputy Court Administrator Prenda was held on June 16, 2023. That meeting focused on the important reasons for achieving juries that are representative, explained that demonstrable progress has been made in achieving representative juries in Iowa by ongoing dialogue, litigation, training, and implementation of good jury management practices. It concluded with an in-depth presentation of a NAACP Memorandum on steps needed for quality system of jury data collection and analysis, and agreement to continue the ongoing dialogue.

The NAACP and the Douglas County Public Defender (DCPD) have engaged in dialogue on these issues as well. As a result of that dialogue with Thomas Riley, we learned of the futility that defense counsel feel because of their inability to obtain access to the jury data that is needed to determine whether jury pools and jury panels are representative. Because training on the fair cross-section constitutional right and on good jury management practices have proven instrumental to the progress in Iowa, Defender Riley proposed and obtained a Sixth Amendment training grant from the National Association of Criminal Defense Lawyers (NACDL) to provide three training sessions on fair cross-section law and best practices to judges, court personnel, prosecutors, defense attorneys, and community members. The first two of those training sessions have been held, on March 8 and April 26.

In January 2024 the NAACP requested a meeting with Nebraska AOCP to learn about the actual operation of its data collection and analysis. In response Deputy State Court Administrator Amy Prenda replied:

> **<u>"Juror Qualification Form Data</u>**
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> All work related to examining juror qualification forms (confidential portion with demographic data) ended in 2013 when we no longer had the resources (e.g., gather the paper versions; enter the data). This means the data has not been examined for years. While the Nebraska Judicial Branch does have an e-Jury system that counties may use, not all the counties use it, including our 3 largest counties who have their own electronic jury questionnaire form (Sarpy stopped collecting demographic in 2013 because collection/analyzing discontinued; Lancaster has an estimated 40% who complete a paper form and this data is not entered; Douglas has an estimated 30% who complete a paper form and data is not entered). And when the University of Nebraska Public Policy Center examined the electronic forms (99,906) in JUSTICE from 2014-2019, race/ethnicity data was only available in 51,361 of the cases (48.6% of the forms did not include race/ethnicity data). In other words, we still have a large number of paper qualification forms being returned to the jury commissioners and not entered or analyzed. Therefore, it was determined the data could not be statistically reliable.

> **“Proposed Amendment to Juror Qualification Form**
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> The Nebraska Access to Justice Commission and the Committee on Equity and Fairness submitted a proposed rule amendment to eliminate the confidential portion of the Nebraska Juror Qualification Form and revise the form to include the demographic information in the main body of the form. While providing demographic data remains optional, the intent of the revisions are (sic) to encourage potential jurors to provide demographic data to ensure the jury pool represents a fair cross-section of the community. The form was further revised to be easier for a juror to understand and complete so jury commissioners receive the information they need to determine whether a person is qualified to be a juror.
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> **“Why is this Important?**
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> With the proposed amendments and revisions to the form, we hope to address the challenges we have collecting race/ethnicity data. Because of these proposed amendments, we also expect to have more robust data on why jurors are opting out of jury service, do not meet requirements, or are disqualified, postponed, or excused. If the Supreme Court supports **these** revisions to the form, we are ready to implement with a plan towards providing education and outreach, including to the jury commissioners, potential jurors, and communities (e.g., the production of a video for those who receive the juror qualification form that will inform them on the importance of jury duty and completing the form).”

Amy Prenda, Deputy State Court Administrator, Email letter to Russell Lovell et al, Feb. 12, 2024. The proposed amendments to Court Rules 6-1002 and 6-1003 and the proposed revisions to the Juror Qualification Form were posted for Notice and Public Comment on February 9.

III. Serious Problems Exist in the Current Juror Qualification Form that Have Put the Nebraska Court System in Noncompliance with the Fundamental Fair Cross-Section Guarantees of the Sixth Amendment and the Nebraska Jury Selection Act for At Least 16 Years, Since 2008.

The Nebraska Judicial Branch’s proposed new Rule and amendments to the Juror Qualification form are badly needed because Nebraska has long been in noncompliance with its obligations under both the Sixth Amendment and the Nebraska Jury Selection Act. As Amy Prenda’s email quoted immediately above explains, no demographic data has been gathered and examined for years, and what data has been gathered in counties using the e-jury system, the data is incomplete and cannot be relied upon.

The defendant's constitutional right to have his trial jury drawn from a jury pool and jury panel representative of the community in which the court sits was recognized over forty years ago in *Taylor v. Louisiana*, 419 U.S. 522 (1976) and *Duren v. Missouri*, 439 U.S. 357 (1979). Four months after the *Duren* decision the Nebraska Legislature embraced the defendant's fair cross-section right as a matter of Nebraska statutory law, stating its purpose was to "ensure that (1) All persons selected for jury service are selected at random from a fair cross section of the population of the area served by the court." Neb. Rev. Stat. §25-1645. What is now known as the Jury Selection Act was modeled on the Federal Jury Selection and Service Act of 1968, which included specified procedures providing defendants and their counsel with access to jury data in the "preparation" and investigation of potential fair cross-section challenges. Neb. Rev. Stat. §25-1678.

A. Representative Juries Are a Fundamental Constitutional Right that Promotes Both Fairness and Accuracy in Jury Deliberations and Decision-Making and Are Critical to Maintaining Public Confidence in the Fairness and Integrity of the Judicial System.

Trial by jury has been a core value of Anglo-American law since the Magna Carta in 1215. Historically, it has been a fundamental right in a democracy. Celebrated as essential in the Declaration of Independence, the right to an "impartial jury" was explicitly included in the Bill of Rights among a cadre of vital rights guaranteed to one who has been criminally accused. The historic concept of a jury of one's peers is today expressed and sustained by the fair cross-section jurisprudence of the Sixth Amendment to the Constitution. Among the purposes thereby served,[4] juries that are representative of the communities they represent provide assurance that the decision-making in the resolution of society's most difficult controversies and issues will be thoughtful, deliberative, and fair and will build the confidence of the public in the fairness and integrity of the judicial system because of the representativeness of the decision-making body.

No one knows better than Paula Hannaford-Agor, Director of the Center for Jury Studies at the National Center for State Court, how racially representative juries can promote and enhance public confidence in a court system. Hannaford-Agor is very familiar with the Social Science data that demonstrates that the deliberations by representative juries are of higher quality. They deliberate longer and discuss more case facts. They make fewer factual errors, and their more careful and thoughtful consideration of the evidence makes for fewer uncorrected factual errors. Based on her long experience, Hannaford-Agor contends that representative juries provide the best protection against implicit bias infecting a jury's deliberations. Courts nationwide,

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[4] *See* Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975). *See also* Thiel v. United States, 328 U.S. 217, 227 (1946) ("Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.") (Frankfurter, J., dissenting on the facts).

including Nebraska's, have sought to minimize implicit bias in the decision making of juries, *e.g.,* Nebraska Access to Justice Commission (AJC), Initiative 4.1 ("Make recommendations for standardizing the information and resources provided to jurors on implicit bias.").

Even small numerical increases in the number of people of color in the jury pool or jury voir dire panel can greatly improve the equity of verdicts. One example comes from a Duke University study of 785 criminal trials in Florida in a jurisdiction where African-Americans made up just 4% of the population. The study found that juries selected from all-white jury voir dire panels of twenty to thirty persons convicted 81% of black defendants and only 66% of white defendants, even when controlling for other factors. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1027-28 (2012).[5] But when there was even just one African-American on the jury voir dire panels, the juries selected from that jury panel voted to convict black and white defendants at roughly the same rate, 71% and 73% respectively. *Id*. In other words, even in a jurisdiction with a small percentage of people of color, even small changes in the raw numbers (just one African-American on the voir dire panel) helped eliminate the conviction gap between black and white defendants. *Id*.

It is crucial to the administration of justice that Court Systems not only are fair and just but are perceived as fair and just by the public. Again, Social Science data and polling confirm that outcomes reached by racially mixed juries are much more likely to be perceived as fair by the public. Understandably, verdicts reached by all-white juries in cases involving non-white defendants are seen as less fair, particularly when a random selection of jurors from the general population of the community would suggest that all-white jurors should occur much less frequently. Hannaford-Agor's presentation during the March 8, 2024 NACDL Training for judges, jury managers, prosecutors, defense attorneys, and community members made all of these points and more.

B. Since 2008, by Virtue of the Juror Qualification Form Making Answers to the Demographic Questions Optional and Failing to Explain Effectively the Important Reasons for the Demographic Information, A High Nonresponse Rate Has Resulted, Rendering the Jury Data Collected Not Statistically Reliable. The Court Should Require Prospective Jurors Responding to the Questionnaire to Answer the Race and Ethnicity Questions.

Part VII of the current Nebraska Juror Qualification Form has governed jury selection since 2008, including the current 2024 year:

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[5] The terminology used in the Anwar study has been the source of confusion. The stage of the jury selection process studied was called the "jury pool" by the authors but it is apparent it was the equivalent of the voir dire jury panel stage that determines who will serve on the seated trial jury: "The data are unusually rich in providing information on the age, race, and gender not only for each of the 6–7 members of the seated jury but also *for the approximately 27 members of the jury pool for the trial from which the seated jury is selected."* Anwar, supra at 1019 (emphasis added).

> **“CONFIDENTIAL JUROR INFORMATION—OPTIONAL**—(This information is requested to assist in ensuring that all people are represented on juries. Nothing disclosed in this section will affect your selection for jury service and you are not required under penalty of law to answer any questions in this section. The information in this section will not be shared with parties or attorneys to any case and may only be reviewed for research purposes as authorized by the Nebraska Supreme Court.)

The Qualification Form’s (“Questionnaire”) questions regarding race, ethnicity, and gender data (“demographic data”) are not included in the required first two pages of the Form, whose answers must be “certif[ied] under penalty of perjury.” Rather, the demographic questions are on a separate detachable page 3 whose opening statement that “[t]his information is *requested*” make clear that responding to the race questions is optional. (Emphasis added). The demographic questions in Part VII of the Questionnaire—so crucial to the aggregate, historic data necessary to determine whether a jury pool or panel reflects a fair cross-section—are the only questions on the current Questionnaire that are not mandatory, that are not required to be answered under penalty of being found “guilty of contempt of court.” As a result, the nonresponse rate has regularly exceeded 40% in the years in which data has been collected. State Court Administration has confirmed that such high nonresponse rates make statistical analysis of the collected jury data unreliable. *See* Amy Prenda email to Russell Lovell, supra (February 12, 2024). General statistical convention holds that a nonresponse rate in excess of 20% makes the data unreliable.[6]

Even more, the current Questionnaire for years has provided an assurance that “the information in this section will not be shared with the parties or attorneys to the case.” The assurance is not limited to nondisclosure of each juror’s personal identity and individual answers to the demographic questions. Instead, as we discuss below, this assurance is regularly construed as the basis for denying defendants all the demographic information collected on the Questionnaire, including anonymous aggregate, historical jury data. Why? The collection of demographic data and disclosure in aggregate, historical form does not invade any individual’s privacy or do any person harm, and it serves valuable purposes. The NAACP submits this aspect of the current Questionnaire conflicts with the Court System’s obligation under the Nebraska Jury Selection Act to provide defendants with aggregate, historical jury data upon request without precondition.[7] It also conflicts

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[6] “Not only is that true of Administrative Office of Courts and Probation (“AOCP”) data, but it is also true of the data collected in Lancaster and Douglas Counties. When the University of Nebraska Public Policy Center examined the electronic forms (99,906) in JUSTICE from 2014-2019, race/ethnicity data was only available in 51,361 of the cases; 48.6% of the forms did not include such data. Of the 60% and 70% of Lancaster and Douglas residents who did complete the Questionnaire online, nearly half—48.6%—“did not include race/ethnicity data.” *See* Amy Prenda, Feb. 12, 2024 email.

[7] *See* discussion of *Sanders* in Part V, *infra*, at pp. 30 – 44.

with the obligation of the States under the Sixth Amendment[8] to ensure that no distinctive group is unfairly and unreasonably underrepresented in relation to the group's percentage of the jury-eligible population in the community, because it precludes measure of the group's representation. And it almost certainly conflicts with a corollary right to access to jury data under the Sixth Amendment in order to ascertain whether there might be a fair cross-section challenge to the venire. As the Supreme Court of Iowa held in *State v. Plain*, "the constitutional fair cross-section purpose alone is sufficient to require access to the information necessary to prove a prima facie case."[9]

The Court System's only explanation for the demographic questions regarding jury data is the lone statement on the Questionnaire: "This information is requested to assist in ensuring that all people are represented on juries." The Court doesn't and can't "ensur[e] that all people are represented on juries," but the point the Court is trying to make, namely, that it wants the jury to be truly representative of the community, is surely correct. But with sincere respect, a much better job could have been and should be done.

The Court could have said so in those terms and that the constitutionally and statutorily dictated goal is a jury representing drawn from a Fair Cross-Section of the community served by the trial court. In its message to jurors accompanying the Questionnaire, or on its webpage, the Court might have explained how and why representative juries drawn from a fair cross-section of the community are so important (1) to the guarantee of a fundamental constitutional right, (2) the proper and best functioning of the jury, and (3) the public's perception of the justice system as fair and just. Instead, while the Nebraska Judicial Branch webpage provides extensive helpful information under the tab "Jury Service," it has no information about the importance of representative juries. Nor is there anything indicating that each juror's answers to the demographic questions are vital to the Court System's having complete and accurate aggregate jury data, which is critical to its ability to monitor whether they are achieving representative juries and to defendant's ability to determine whether there is a viable fair cross-section claim or not. There is no explanation that defense counsel will only need access to anonymous, aggregate or cumulative jury data in order to make this determination. Nor is it explained that jurors' personal information will not be disclosed—or if, in a nontypical cases it is disclosed, that defendant's attorney will be under a strict protective order that will assure the jurors' privacy.

In sum, the Nebraska Judicial Branch provided no meaningful explanation, to the public or to prospective jurors, of the importance of representative juries to the Court System, nor of the importance of demographic data to the implementation of the constitutional right of defendants to a jury drawn from a fair cross-section of the

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[8] The United States Supreme Court holds that the Sixth Amendment's Impartial Jury guarantee has been incorporated in the 14th Amendment and thereby made applicable to the States. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
[9] 898 N.W.2nd 801, 828 (Iowa 2017).

community, nor of the assured privacy of prospective jurors' responses. The NAACP does not perceive any persuasive reason why the demographic questions are not included in the parts of the Questionnaire which are mandatory to answer. We strongly recommend that the Court revise the Questionnaire to require prospective jurors responding to it to answer the demographic questions.

C. Part VII's Assurance That "the [demographic] information in this section will not be shared with attorneys or parties" Was Not Limited to Jurors' Personal Identifying Information and, as a Result, Defense Counsel Have Systematically Been Denied Access to All Jury Data, Including the Aggregate, Anonymous, Historical Jury Data that Is Essential to Implementation of the Fair Cross-Section Right and Whose Disclosure Impacts No Juror's Privacy Rights.

Part VII's assurance that the information obtained "will not be shared with parties or attorneys to any case" has posed an insurmountable obstacle to defendant's access to the jury data to which the Sixth Amendment and the Nebraska Jury Selection Act entitle them. The NAACP submits that has resulted in an ongoing, pervasive violation not only of defendants' constitutional rights and their statutory right under the Nebraska JSA. As stated above, *supra* at p.9, Douglas County Attorney Thomas Riley has stated that defense counsel's inability to obtain access to *any* jury data (because of the Questionnaire's sweeping nondisclosure assurance) has caused counsel to conclude it is futile to raise fair cross section claims in Nebraska. Since 2008 the sweeping nondisclosure mandate of Part VII of the Jury Questionnaire has failed to distinguish between names and personal identifying information (which are not needed to prove fair cross-section claims) from aggregate, anonymous historical data (which is needed to prove fair cross-section claims). We urge the Supreme Court to make that distinction. The NAACP recognizes that the goal of protecting the privacy of jurors is an undeniably important one, but providing that protection is in no way inconsistent with providing defense counsel access to the aggregate, anonymous historical data crucial to determining whether a viable fair cross-section goal exists.[10]

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[10] The Questionnaire was implemented originally in 2008 when the Nebraska Supreme Court implemented a uniform juror questionnaire for al 93 counties and approved a research study of the jury data collected in 2008 by the Minority Justice Committee, as described above. *See* Neb. Ct. R. § 6-10026. Although no further studies have been conducted, the Juror Qualification Form's Part VII has continued to be used by the Court System ever since.

The Questionnaire's text presents a statutory construction issue, one with constitutional overtones. The NAACP contends it should have been construed in light of the Questionnaire's own statement of purpose in its first sentence that "the information is requested to assist in ensuring that all people are represented on juries," which essentially mirrors the statement of purpose in Nebraska Jury Selection Act §25-1645. Instead, Part VII gave a sweepingly broad assurance that "CONFIDENTIAL JUROR INFORMATION" will not be shared with "parties or attorneys to any case and may only be reviewed for research purposes by the Nebraska Supreme Court." Since the Questionnaire implements §25-1673, that statute provides helpful guidance for construction of the Questionnaire's text and confirms that the confidential information to be protected from disclosure are the names of jurors, jury lists, and any personal identifying information. Such information has

Because Part VII's sweep severely intrudes upon defendants' Sixth Amendment and Nebraska JSA rights, the Questionnaire's nondisclosure mandate in the current data collection system has serious constitutional and statutory issues. For example, without the anonymous aggregate jury data that shows the number of Blacks and the Black percentage of Douglas County's jury pools and voir dire venires for the six months or one year preceding the defendant's trial date, defendants will be unable to make out a prima facie fair cross-section challenge under *Duren v. Missouri*. 439 U.S. 357 (1979). The NAACP submits that the Questionnaire's absolute nondisclosure provisions violate defendants' Sixth Amendment's fair cross-section corollary right of access to jury data, as found by the Supreme Courts of Missouri and Iowa , and their statutory right of access to such aggregate, historical data under the Nebraska JSA, Nebraska Revised Statute §25-1678. As the United States Supreme Court made clear in *Test v. United State*s, access to this anonymous jury data is crucial so that the defendant can make an informed evaluation as to whether a meritorious fair cross-section challenge can be made:

> This provision [of the Federal Jury Selection & Service Act] makes clear that a litigant has essentially an unqualified right to inspect jury lists. It grants access in order to aid parties in the 'preparation' of motions challenging jury-selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community.'

Id. at 30 (citing 28 U.S.C. § 1861).

The Nebraska Jury Selection Act (JSA) was modeled on the Federal Jury Selection & Service Act of 1968 (JSSA). In all important respects, the text of the JSA's fair cross-section provisions, §25-1645 and 25-1678, is identical to that of the JSSA. The legislative history of the Nebraska Jury Selection Act, its text and its statement of purpose, has been lost in history, never examined by the Nebraska Supreme Court. Careful examination of that history will be persuasive in resolution of the issue of access to jury data by defense counsel. It will also provide valuable insight into preparation of a public education campaign on the importance of representative juries in securing the confidence of all the public in the fairness and integrity of the justice system and in the fair deliberation and decision-making of Nebraska juries regardless of the color of the defendant. It is for these reasons that the NAACP contends that defendants are entitled, under the JSA and the Sixth

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no relevance in contemporary fair cross-section litigation. Thus, any juror privacy assurance in the Questionnaire should have been carefully and narrowly crafted so that neither §25-1673 nor Part VII of the Juror Questionnaire in any way precluded disclosure of the historical, aggregate data that is central to proof of a fair cross-section challenge—data that can be disclosed without releasing the names and personal identifying information of any juror.

Amendment right[11] to anonymous aggregate, historical jury data pretrial and without precondition, as developed more fully below.

The Nebraska JSA, like the Federal JSSA, is a very balanced piece of legislation. Our review of the Nebraska caselaw leaves us with the impression that the Court does not appreciate the structural procedures built into the JSA that ensure that the trial judge and jury manager will have ample time to make mid-course corrections in those instances when the jury data show substantial underrepresentation. The Nebraska JSA followed the Federal JSSA in imposing a duty on defense counsel to file a motion alerting the trial judge "within 7 days" of the date that counsel "discovered or by the exercise of diligence could have discovered the grounds for" a fair cross-section challenge. Neb. Rev. Stat. § 25-1678(1). Again, this key provision of the JSA enables the Court System to have the time to make a mid-course correction, if need be, well in advance of trial. The strict pretrial timeline ensures that defense counsel cannot wait until the day of trial (and personal observation of the racial composition of defendant's voir dire panel) to provide notice of the grounds that counsel believes will support a fair cross-section challenge. Section 25-1678(1) recognizes that springing the grounds for such a claim on day 1 of trial would not provide adequate time for the trial judge and court personnel to carefully review the evidence, assess the situation, consider the issue of systematic exclusion and whether discovery on that issue would be appropriate at that time, and resolve the issues that have arisen; and, therefore, dismissal for such a tardy claim would be warranted.

However, when the aggregate, historical jury data establishes statistically significant underrepresentation, there is evidence of systematic exclusion, AND there is underrepresentation on defendant's own jury panel on the first day of trial, §25-1678(1) contemplates defendant will file a motion to quash that very day—before the jury is sworn. Because current practice in most court systems is that a defendant will not know the racial composition of his or her jury panel until the panel is assigned to his or her courtroom on the first day of trial, the defense counsel will not be able to make a final determination as to whether to file a motion to quash *until counsel has seen the jury panel from which the jury will be selected* . The defendant need not have statistically significant underrepresentation on his own panel—because of the relatively small sample size, that could seldom be shown statistically—but there must be *some* underrepresentation on defendant's own jury panel. If there isn't, defendant will not have been harmed by the underrepresentation of defendant's distinctive group in the historical aggregate data. In a word, defendant will be unable to establish his *standing* to assert the fair cross-challenge.

So how does the defendant go about providing the advance notice "of grounds" that subsection (1) requires? Section 25-1678 intends that defendant engage in pretrial discovery as to whether there the aggregate, historical data reveals significant underrepresentation of the distinctive group, and, if grounds were found, defendant must

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[11] Arguably defendants are also entitled to this data under Section 1-11 of the Nebraska Constitution. *See* fn. 1, *supra*.

promptly file a notice of anticipated motion to quash, listing the grounds and advising the trial judge that defendant's decision as to whether to file a motion to quash the panel (or for other relief) will be made on the opening day of trial shortly after the racial composition of defendant's own jury panel is known. It is not until then that the defendant can show the necessary personal injury necessary to having standing to raise the systemic fair cross-section claim. The drafters of §25-1678(1) understood that this reality meant that most of the necessary work in "preparation" of a fair cross-section claim had to be completed well in advance of the day of trial. *See* Nina Chernoff & Joseph Kadane, 16 Things Every Defense Counsel Should Know about Fair Cross-section Challenges, https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1004&context=cl_pubs[12]

Demographic data has generally not been collected and combined into records in Nebraska since 2013; what data has been gathered or can be obtained is incomplete and unreliable because demographic questions are optional; and defense counsel have not been given access to jury lists and questionnaires since 2005 because they are regarded as "confidential." The NAACP respectfully submits that the Nebraska Court System has been in violation of defendants' statutory and constitutional rights of access to the jury data necessary for a fair cross-section challenge since at least 2008. Tragically, as Professor Chernoff has so succinctly written: "No Records, No Right!"[13]

D. In Addition to the Current Questionnaire's Serious Flaws, For at Least Eleven Years No Jury Data has Been Collected by the AOCP, and the Data Collection in Douglas and Lancaster Counties Has Been Severely Compromised Because of Their Failure to Input Jury Data from Paper Questionnaires.

The critical flaws in the current Questionnaire discussed above have been compounded by two additional failures in AOCPs data collection experience. The first is the reality that statewide jury data collection by AOCP has been non-existent since 2013—an entire decade! The AOCP Deputy Director advised that AOCP and Sarpy County stopped all jury data collection in 2013. Although Lancaster and Douglas Counties have continued to collect data, we have been advised that neither inputs the responses made on paper questionnaires into the electronic data base; as a result, since 30% - 40% of their responses have been on paper questionnaires, the only jury data in the State that has been collected up to the current time is seriously compromised due to its unreliability. It seems likely that the practice of not inputting data from paper Questionnaires likely adversely impacts low-income persons as they have less access to the internet. The Douglas and

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[12]The NAACP submits that the Court should provide a guidance on the above-described timeline for a fair cross-section challenge, because we have found it to be counterintuitive. That is, if not alerted to the necessary pretrial timeline, busy defense counsel may be inclined to wait until they can see whether there is underrepresentation on the defendant's own panel. This is a recipe for losing—and for post-conviction ineffective assistance of counsel claims.

[13] Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719 (2016).

Lancaster counties' staffs also help persons who need assistance in filling out paper questionnaires over the phone; a good number of the persons needing assistance may be persons with a disability. In both instances the non-inclusion of these persons in the electronic database of Douglas and Lancaster Counties likely has an adverse impact on persons of modest means, which generally means an adverse impact on Blacks and other non-white minorities.

Deputy State Court Administrator Prenda explained: "All work related to examining juror qualification forms (confidential portion with demographic data) ended in 2013 when we no longer had the resources (e.g., gather the paper versions; enter the data). This means the data has not been examined for years." The NAACP understands that modern computer systems can significantly ease the administration of data collection, but we respectfully submit that AOCP's excuse for abandoning all data collection because of obsolete computers rings hollow. Given the fundamental constitutional and statutory right at stake, the Minority Justice Committee's 2008 Report's findings of statistically significant underrepresentation of Blacks in Douglas County and of Hispanics in Dakota and Dawson Counties, unless the 2009-2013 jury data from Douglas, Dawson, and Dakota Counties demonstrated otherwise, the NAACP submits AOCP *at a minimum* was constitutionally obligated to continue monitoring the data from these three counties (and any others in noncompliance per the 2013 jury data).

IV. Consideration of Revisions to the Juror Questionnaire Are a Welcome First Step to Bring Nebraska Data Collection into the 21st Century, But the Court Should Not Make the Demographic Questions Optional and Instead Should Require Them To Be Answered, and The Court Should Include a Hot Link Directing Jurors to the Court's Web Page and a Full Explanation of the Reasons for the Change. The Court Should Explain the Meaning and Purposes of the Impartial Jury Right and Fair Cross-Section Requirement and the Importance of Representative Juries to Defendants, to the Rule of Law, and to the Public's Perception of the Fairness and Integrity of the Judicial Branch. The Explanation Should Be Accompanied by Assurance that Jurors' Names and Personal Identifying Information Will Continued to Be Carefully Preserved as Private and not Disclosed. Leaving the Demographic Questions Optional Will Almost Certainly Continue to Fail to Secure a Response Rate High Enough to Ensure Reliable Data.

The Access to Justice Commission's Report made recommendations, and these proposed Rule Amendments and Questionnaire revisions are the first concrete steps taken to implement the Commission's recommendations. The NAACP applauds the spirit with which they have been proposed. However, there are three systemic flaws in the amended rules and revised juror questionnaire that, if left uncorrected, will cause these positive

reforms to fall far short of reinvigorating in Nebraska the right to juries drawn from a fair cross-section of the community.

A. The Proposed Questionnaire's Demographic Questions Are Still Optional, and Experience Has Demonstrated that That Choice Leads to a High Nonresponse Rate Rendering the Jury Data Collected Unreliable.

Before we can understand the flaws in the proposed reforms, we must first examine the positive steps that have been proposed. The revised Questionnaire states: "The demographic information in the box below is *requested* to assist in ensuring that the jury pool represents a fair cross-section of the community. *You are encouraged, but not required* to provide this demographic data." The optional nature of the demographic questions is emphasized by providing a *"Prefer not to answer" box* for each question. (Emphases added).

The revised Questionnaire's emphasis on the "optional" nature of the demographic questions, when combined with only a 1-sentence explanation, is systemic flaw number 1. It can and must be corrected, or it will significantly impede judges' decision-making on the statistical evidence as to whether underrepresentation exists—effectively penalize defendants for the Court System's failing. History teaches, that when courts are not confident about the jury data they will typically set very high statistical thresholds that almost always result in findings that, while there unquestionably *is* underrepresentation, it is not substantial enough to make out a prima facie case on *Duren* prong 2 (underrepresentation). In effect, defendants are penalized even though the unreliability in the jury data was the direct product of the court system's decision to make the questions seeking the data optional. The failure effectively to explain the importance of the jury data to the defendant's constitutional right and to the court's system's significant interest in the public's positive perception of the justice system exacerbates the problem.[14]

The NAACP's strong preference is that the Court make the demographic data questions mandatory, not optional, with solid explanation of the importance and need for the data and assurance of confidentiality of individual information.

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[14] For the many courts that have employed the Comparative Disparity test to determine Duren prong 2, Hannaford-Agor's research that the majority set a threshold showing of 50%. In contrast, the Social Scientists' Amicus Brief filed in the *Berghuis v. Smith* case suggested, based on their statistical analyses, that the threshold should be set at 15% in jurisdictions for a distinctive group whose jury-eligible population was 10% or more, and at 25% in jurisdiction for a distinctive group whose jury-eligible population was less than 10%. It explained: "Using this two-tiered standard for comparative disparity achieves the method's advantage of adequately quantifying the extent of a group's underrepresentation, while minimizing the possibility that underrepresentation of small distinct groups will be overstated." The NAACP submits that the courts which have set the threshold at 50%, or more, lacked confidence in the reliability of the jury data due to high nonresponse rates. They may also not have appreciated the statistical correlations supporting a much lower Comparative Disparity threshold.

It is in the interest of the Court System's goals of efficiency in operation and accuracy of court data to encourage and facilitate prospective jurors to complete their Jury or Questionnaires online. The Court System should follow Iowa's lead and give an encouraging nudge to answering the race question about programming the E-Juror online Questionnaire to only allow submission upon completion of every question. This is a common feature of electronic surveys and still allows prospective jurors to complete the survey on paper without answering the race questions. Digitized data collection provides the opportunity to utilize a common computer programming technique which, by not allowing respondents to submit their incomplete answers electronically, will increase significantly the response rate to the race and ethnicity questions. The Iowa Court System began to take these steps in 2019 and there has been no ill reaction or problems, and the nonresponse rate in calendar year 2023 was less than 10% statewide.[15]

In strongly recommending this position to the Court, the NAACP also urges the Court to include a clear explanation of the reason for change and to improve it with a hot link on the E-juror Questionnaire to the Judicial Branch's webpage where a full explanation of the importance of representative juries should be prominently explained:

> "The Nebraska Judicial Branch strongly encourages you to review the many important ways in which representative juries are critical to implementation of individual constitutional rights and to the public's perception that the Court System is fair and just. Your answers to the demographic questions are vital to ensuring jury data that is complete and reliable, but your individual answers and personal identity

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[15] Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719 (2016). It is our understanding that under statistical convention a nonresponse rate of greater than 20% is widely considered to make the data unreliable for statistical analysis. The nonresponse rate to the race/ethnicity question on the Iowa questionnaire historically was similar, regularly higher than 40%. The Iowa Judicial Branch took two steps to address this problem, and they have proven successful. First, the Iowa juror questionnaire removed the statement that the race/ethnicity question was optional. Likewise, there is no "Prefer not to answer" box among the race/ethnicity boxes on the questionnaire. Second, it encouraged jurors to complete the race question on the E-Juror questionnaire by explaining that the "information helps the court ensure jury panels are representative of the community" and it put that sentence in bold print. The proposed Nebraska questionnaire has a similar encouraging sentence, but it is not highlighted or put in bold type. It needs to be highlighted on the Questionnaire, and much more explanation is necessary because the Nebraska Questionnaire for the past 16 years has described the demographic data as "CONFIDENTIAL INFORMATION" and given a sweeping assurance of nondisclosure of this information. Thus, it is very important that a full explanation be made of the fundamental purposes that representative juries fulfill on the "Jury Service" portion of the Judicial Branch website. While Iowa did not eliminate the paper copy option, Iowa encouraged jurors to complete the online questionnaire as that would facilitate digital data collection, and, following the practice of businesses that program digital surveys or questionnaires, Iowa programmed the E-Juror digital codes so that the Iowa E-Juror questionnaire could not be digitally submitted unless all questions were answered, including the race/ethnicity questions. As a result, the Iowa Court System's cumulative jury data is now statistically reliable. For the 18-month period, January 2022 through June 2023, Iowa jury data shows a state-wide response rate of higher than 90% on the race/ethnicity question; that is, a nonresponse rate of less than 10%.

will not be disclosed. Only aggregate, anonymous jury data will be disclosed to attorneys and parties." [INSERT HOT LINK to the Jury Service explanation of the fair cross-section right.]

The hot link from the E-Juror Questionnaire to the Judicial Branch Jury Service webpage should be a central feature of the outreach campaign that Deputy Court Administrator indicated was being planned. The NAACP cannot overstate the importance of the E-Juror "hot link" as it will be seen by every juror who has been summoned. It should be prominently displayed on the Questionnaire. Indeed, the questionnaire could be programmed so that every juror must give an assurance that he or she has visited the Jury Service webpage.

Once an updated computer system is operational and the jury data is electronically collected (and demographic data from paper questionnaires routinely inputted into the electronic system), the trial judge's response to a defendant's discovery request can be completed by providing a computer-generated demographic report of the aggregate, historical jury data for that County's juries over the 6 months or 1 year preceding the defendant's trial date. As explained earlier, it is the aggregate, historical data that is necessary for resolution of fair cross-section challenges. Aggregate data is anonymous data; the name, address, and other personal information of jurors are not disclosed. This explanation should also be made clear on the Judicial Branch webpage under Jury Service, as it is necessary that the Court allay any anxiety jurors may have that their personal data will be released.

In Iowa such demographic jury data reports have been provided by the Court System on Excel spreadsheets, which has facilitated the necessary calculations as to representativeness at the key stages of the jury selection process. In sum, the Trial Judge will be able to respond to defendants' discovery requests by ordering the jury manager to disclose the digital demographic jury data as to each stage of the jury selection process; this electronic disclosure will typically conclude jury data discovery. The Court will retain jurisdiction to incrementally order release of additional court records in the rare case when it has been established that release of completed Juror Qualification forms is necessary; even then the jurors' privacy interest can be protected by redaction of jurors' names and use of a protective order. *See Gause v. United States,* 6 A.3d 1247 (D.C. 2010); *Lewis v. State,* 632 A.2d 1175 (Md. 1993).

It is very important that prospective jurors understand that today's 21st Century technology permits the necessary disclosure of jury data to defendants without compromising the Nebraska Court System's longstanding commitment to juror privacy. Once AOCP has completed its computer update, only anonymous aggregate jury data will be disclosed.[16]

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[16] During the interim period until a new Judicial Branch computer system and data collection program have been purchased and installed, disclosure of the actual completed Juror Qualification Forms may be

Such an explanation and assurance are especially important because of the current Questionnaire's assurance for the past sixteen years that "The information in this [Part VII] section will not be shared with the parties or attorneys to any case and may only be reviewed for research purposes as authorized by the Nebraska Supreme Court." Without a full explanation it is understandable that some members of the public and court observers may be anxious that the proposed changes might compromise jury privacy. The explanation that only aggregate, anonymous historical data will be disclosed—complete with examples of aggregate, anonymous historical jury data—is also necessary to inform judges across the State that this very significant change in practice and procedure can be implemented without burdening the courts and without compromising juror privacy. They will quickly come to appreciate that only a modest amount of time and effort will be required to administer jury data collection. Most importantly, they will welcome the changes when they realize the efficiency and savings in time they will bring and, perhaps most importantly, how they will significantly enhance the public's perception of the fairness of the Nebraska Court System.

As Chief Justice Heavican reported in his 2024 State of the Judiciary Address, the Judicial Branch no longer is reliant upon the Executive Branch for Information Technology services as it has its "own, self-maintained domain at NEJudicial.gov." In addition, the Judicial Branch IT "continue[s] to relieve more counties of the financial burden of overseeing court IT functions . . . [and] is more amenable to needed ongoing changes. . . ." At least once the Court System has secured the necessary computing capacity and software for a 21st Century case management system, responding to the occasional jury data discovery request will be of little concern to judges and court personnel—and they will enjoy and be proud of the enhanced public perception of the Court System's fairness and integrity.

B. The Proposed Juror Questionnaire Continues to Allow Persons Who are Multi-Racial to Identify As Such and That Is Consistent with the U.S. Census. The NAACP Suggests that the AOCP Should Consider Adding a "Multi-Racial" Box as That Would Minimizes the Risk of Duplicate Counting of Jurors.

The race-ethnicity demographic portion of the *current* Juror Qualification Form lists the various racial classifications and instructs the respondent to "select one or more." It

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necessary in some counties. In such circumstances, the District Court Judge will consider whether a protective order is necessary. Once an updated computer system is operational and the jury data is electronically collected (and paper questionnaires physically inputted into the electronic system), the trial judge's response to a defendant's discovery request often will be completed by providing a demographic report of the aggregate, historical jury data for that County's juries over the 6 months or 1 year preceding the defendant's trial date. This is the necessary jury data for resolution of fair cross-section challenges.

then lists two ethnicity classifications and instructs to select one from "Hispanic or Latino" or "Non-Hispanic or Latino." On March 28, 2024 the U.S. Office of Management and Budget published updated standards that will govern the Census going forward. The demographic portion of the *proposed* revised Juror Qualification Form correctly anticipated this change as it combines "Race/Ethnicity" into one question or category, which lists racial classifications and the "Hispanic-Latino" classification together with the instruction that the respondent should "Select all that apply." OMB also adds a new "Middle Eastern or North African" category.

The NAACP applauds both the current and proposed race questions to the extent that both allow persons who are multi-racial to express their full identity. Forms that only allow respondents to check one box are offensive to many multi-racial persons because they feel the single box requirement is a vestige of the segregation era's "one drop" rules of classification. Allowing expression of one's multi-racial identity is consistent with the U.S. Census's approach that instructs respondents to "mark one or more boxes." This is important because the fair cross-section caselaw compares court systems' jury data racial percentages to the corresponding racial jury-eligible Census population percentages for the county in which the trial will occur.

However, the NAACP would add one caution. For those who are multi-racial, the Court System's computers must be programmed to "sort" them as multi-racial persons and identify each of their races, as Census Reports do. The NAACP submits that Nebraska may want to consider the approach used on Iowa's Juror Questionnaire, which has a "Multi-racial" drop box to check and instructs respondents to check every racial box that is applicable.

Before Iowa included a "multi-racial" drop box on its questionnaire, some judges had included multi-racial Blacks in their count of "Blacks" even though they had not checked the "Black/African American" box on the juror questionnaire. However, some judges overlooked the necessity that the adjustment they had made in the "Black" jury data count (to include multi-racial Blacks) required a similar adjustment in determination of the Black Census jury-eligible population count—that is, multi-racial persons who had Black or African American as one component of their Multi-racial ethnicity needed to be added to the Census "Blacks alone" count and percentage. The NAACP believes it is permissible for judges and/or the Court System to include multi-racial Blacks in their "Blacks" jury count, as long as they make the corresponding adjustment to the Blacks Alone Census population count and percentage.

V. The Amended Qualification Form's Deletion of the Assurance that "all demographic information collected would not be disclosed" Is a Necessary Step, But It Is Insufficient to Ensure the Defendant's Right of Access to Aggregate, Historical Jury Data In Light of the Nebraska Supreme Court's Holding in *State v. Sanders* that Good Cause/Necessity Must Be Demonstrated Before Such

Data Can Be Disclosed. No Showing of Underrepresentation Can Be Made Without Access to the Aggregate, Historical Jury Data, and as a Result, *Sanders* Precludes Defendants from Making a Meritorious Fair Cross-Section Challenge and Constitutes a Systemic Denial of a Fundamental Constitutional Right. *Sanders* Is Contrary to the Legislative History and Text of the Nebraska Jury Selection Act and the Supreme Court's Unanimous Holding in *Test. v. United States*. It Should Therefore Be Disavowed in This or a Supplemental Rulemaking Process.

The proposed amendment to Rule §6-1003[17] strikes its text in its entirety and the revision of the Current Questionnaire strikes Part VII[18] in its entirety, which clearly removes the prohibition on disclosure of the data to defendants. The NAACP applauds both steps. However, the Rule is silent as to whether there is any precondition or threshold showing that defendant must make to have access to jury data. Both reforms are major steps in the right direction, but they fail to address *State v. Sanders*, 697 N.W.2d 657 (Neb. 2005), which is filled with mistaken holdings on fair cross-section law. Most relevant to the proposed Rule amendments is the Nebraska Supreme Court's holding in *Sanders* that Defendant Sanders was required to demonstrate good cause/necessity in order to obtain access even to aggregate, historical jury data without which underrepresentation cannot be established. *Sanders* has the potential to be a major obstacle in the way of fair cross-section reform. We strongly believe that its disregard or failure to consider the legislative history of the JSA and *Test v. United States* and its unawareness of computer technology's capabilities with respect to collecting, sorting, and facilitating analysis of data render it so doctrinally unsound that it qualifies as "egregious error" meriting initiation of procedures to promulgate a new Rule overruling *State v. Standers*.

A. The Underrepresentation Was Sufficient to Show Defendant Sanders's Standing and, Pursuant to a Protective Order, to Entitle Him to Discovery of the Aggregate, Historical Jury Pool Lists.

Defendant Sanders' Appellants Brief and the State's Appellee's Brief did not disagree on the facts setting forth the procedural steps taken by the defendant in pursuit of his request for discovery of jury records. Appellant' Brief, pp. 7-8 and 22-28; Appellee's Brief, pp. 16-18. Those procedural steps provide important context that is unclear from the Court's Opinion.

Why didn't the defendant request the Lancaster County aggregate, historical demographic (race-ethnicity) jury pool data, rather than the jury pool lists and the juror

[17] "Confidential juror information" Part VII protocol, including the sentence: "No one shall be permitted access to these detached sections [Part VII of the Nebraska Juror Qualification Form, which set asked jurors to indicate their race-ethnicity-gender] except as set forth in this rule."
[18] "The information in this section will not be shared with the parties or attorneys to any case and may only be reviewed for research purposes as authorized by the Nebraska Supreme Court."

questionnaire? The answer is, because there were no Court System jury records that provided the demographic data he needed to determine whether there was underrepresentation of nonwhites at any of the stages of the process in 2002 or preceding years. That might have been due to the court system's failure to take steps to ensure the accuracy of jurors' addresses. Defense counsel's only option was to compare jury pool lists of names to DMV records, as he had done with the master jury lists. Were there steps that could be taken to protect jury privacy? At least two options come to mind. Court personnel could have compared the names with the DMV records and then filed a summary of the data with the court. The district court judge could have issued a protective order that required defense counsel alone to review the lists and make the comparisons to the DMV records. We will examine the Nebraska statutes and the Nebraska Supreme Court's many errors in its construction of them.

First, a key fact that was never acknowledged or discussed by either the *Sanders* district court or the Supreme Court but cannot be overlooked: Lancaster County was not collecting any race-ethnicity demographic data at all in this era—not at the jury pool or voir dire venire stages, not even at the master jury list stage. Because the Task Force on Minorities and Justice had found that racial minorities 18 and older only comprised 3.6% of Lancaster County juries despite their comprising 8.5% of the U.S. Census 18 and older population, the district court authorized disclosure of the master jury lists for 2000 – 2002. Defense counsel then compared the names on the list to Department of Motor Vehicles' records, which showed the race of driver's license holders. The race was unknown for nearly a quarter, 24%, of those on the jury list. Of the remainder, nonwhites constituted 7.5%, which the district court concluded was not significant.

Then the defendant filed a supplemental discovery motion under current § 25-1678 that "requested access to (1) the current jury pool list for Lancaster County and the pool lists for 2000 through 2002; (2) practice, policies, and regulations governing the manner in which a jury pool is created for any jury convened in the district court; and (3) jury pool questionnaire forms maintained by the jury commissioner for all individuals called for jury service in 2000 through 2003." *Id.* at 662-663. Defendant of course didn't ask for the aggregate, historical jury pool data for the years 2000-2002 because Lancaster County jury data records did not collect race data.

Defense counsel alleged the Minority and Justice Task Force data suggested that underrepresentation of minorities on Lancaster County juries might be linked to the manner in which prospective jurors were notified and the subjective nature of disqualification decisions. As he had done when the master jury lists were provided to him, he would again compare the names to the DMV records in order to determine the racial composition at these stages subsequent to the master jury list.

Because the defendant asked for jury pool list and the jury pool questionnaires, the district court understandably viewed the request as implicating §25-1635 [now 25-1673], which made it unlawful to disclose names except to other court officials or "as herein

provided," unless the court found there was good cause for disclosure. The court held that "while there was good cause for disclosure of the master jury list, there was not good cause to disclose the identity of jurors in individual cases." The district court held:

> "If there is no significant difference in the racial makeup of the Master Jury Pool compared to the racial make-up (sic) of [Lancaster] county, and the methods used to select the jury venire for a particular case are random at each step, the result will satisfy the requirements of due process even though a particular jury venire, or even several jury venire [sic], may not be representative of the racial make-up (sic) of the community."

Id. at 663 (quoting District Court).

The Nebraska Supreme Court made the same errors:

> Contrary to Sanders' claims that minorities were underrepresented, the evidence showed that minorities on the master list were fairly represented in relation to the community. In addition, the evidence presented regarding Lancaster County's procedures for calling jurors from the master jury list failed to show exclusion of minorities much less "systematic exclusion."

Id. The Court went on to emphasize: "Further, his challenge under § 25–1637 [current §25-1678] is properly limited to the manner in which the jury selection process was carried out *as reflected in his case*." *Id.* at 667. (Emphasis added.) This was clear error on two counts.

First, the Court's exclusive focus on the extent of underrepresentation on Defendant's own master jury list is error under *Duren* and its progeny. The *Sanders* Court failed to realize that the primary focus of fair cross-section challenges is based on the aggregate, historical data for the 6 months or 1 year preceding the start of defendant's trial. The jury data from the defendant's own jury selection process is relevant but only to establish his standing; that is done by showing there was some underrepresentation of a distinctive group, but it need not be statistically significant. *State v. Lilly I*;[19] *State v. Veal II*. Based on the two most commonly used measures of underrepresentation, the Absolute Disparity and the Comparative Disparity tests, even at this very preliminary stage of discovery Defendant Sanders had made a sufficient showing to have standing to raise a fair cross-section challenge and clearly had made a sufficient showing to obtain further discovery (assuming *Test*'s holding that no showing is required is somehow not applicable)

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[19] The Iowa Supreme Court requires that there be some underrepresentation on the defendant's own jury pool and jury panel in order for him to have standing to make a fair cross-section challenge, but, when standing is established, the historic, aggregate jury data is determinative of the fair cross-section challenge. *State v. Lilly,* 969 N.W.2d 794 (Iowa 2022); *State v. Veal*, 972 N.W.2d 728 (Iowa 2022)..

The limited race-ethnicity data only permitted comparison of Lancaster County's Census nonwhite population of 8.5% to the 7.5% nonwhite population of the 2002 master jury list and to the 3.6% nonwhite population on the Lancaster County 12-person trial juries (as found by the MJC Task Force). These comparisons show an Absolute Disparity of 1% and a 11.8% Comparative Disparity on the Defendant's own master jury list,[20]and a 4.9% Absolute Disparity and a 57.6% Comparative Disparity on the aggregate, historic jury data.[21] Even using the jury data most favorable to the State, the underrepresentation of nonwhites on the 2002 master jury list was sufficient to establish Defendant Sanders's standing to make a fair cross-section challenge. Even if this Court rejects *Test*'s holding that defendants need not make any threshold showing to obtain jury records under § 25-1678, Defendant Sanders's limited jury data made a clear threshold showing that established good cause to obtain discovery of the jury records he requested.

Second, *Taylor v. Louisiana* and *Duren v. Missouri* made very clear that the fair cross-section right was by no means limited to the master list but rather was applicable to all stages of the jury selection process prior to the final 12-person petit or trial jury: "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Duren*, 439 U.S. at 363-364.[22] In consequence, that

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[20] *See* Berghuis v. Smith, 559 U.S. 314, 323 (2010): "The trial court considered two means of measuring the extent of underrepresentation of African–Americans on Circuit Court venires: " absolute disparity" and "comparative disparity." "Absolute disparity" is determined by subtracting the percentage of African–Americans in the jury pool (here, 6% in the six months leading up to Smith's trial) from the percentage of African–Americans in the local, jury-eligible population (here, 7.28%). By an absolute disparity measure, therefore, African–Americans were underrepresented by 1.28%. "Comparative disparity" is determined by dividing the absolute disparity (here, 1.28%) by the group's representation in the jury-eligible population (here, 7.28%). The quotient (here, 18%), showed that, in the six months prior to Smith's trial, African–Americans were, on average, 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list. App. to Pet. for Cert. 215a."

[21]The Comparative Disparity, based on the district court's finding that nonwhite minorities comprised 7.5% of those on Defendant's master jury list, is calculated by dividing the Absolute Disparity (0.01) by the nonwhite Census percentage of the community (0.085): .01 by .085 = 0.1176. The Comparative Disparity, based on the MJC Task Force's 3.6% nonwhite minorities on Lancaster County's juries, is calculated by dividing the Absolute Disparity 0.049) by the nonwhite Census percentage (0.085): .049 by .085 = 0.576.

Paula Hannaford-Agor's research has indicated that a majority of courts have set thresholds of a 50% Comparative Disparity. In contrast, the Social Scientists' Amicus Brief filed in the Berghuis v. Smith suggested, based on their statistical analyses, that the threshold should be set at 15% in jurisdictions for a distinctive group whose jury-eligible population was 10% or more, and at 25% in jurisdiction for a distinctive group whose jury-eligible population was less than 10%. It explained: "Using this two-tiered standard for comparative disparity achieves the method's advantage of adequately quantifying the extent of a group's underrepresentation, while minimizing the possibility that underrepresentation of small distinct groups will be overstated." The NAACP submits that the courts who have set the threshold at 50% lacked confidence in the reliability of the jury data due to high nonresponse rates and also may not have appreciated the statistical correlations supporting a much lower Comparative Disparity threshold.

[22] *Duren* was the seminal case establishing the Sixth Amendment fair cross-section right, and its analysis made clear that the proof necessary for fair cross-section challenges relies principally upon aggregate,

the absolute disparity was only 1% underrepresentation at the master source list on Defendant's own jury selection process by no means foreclosed the possibility of much more significant underrepresentation in the aggregate, 2000-2002 historical jury data at the master list or subsequent stages of the process, such as the summoning and disqualifying stages defense counsel pointed out or the later voir dire jury panel stage. The jury records for 2000-2002 were the only way to determine if the aggregate, historical Lancaster jury data showed statistically significant underrepresentation, and as such were crucial to Defendant's ability to determine whether a viable claim existed.

Therefore, when accompanied by a proper protective order, the 2000-2002 jury lists and questionnaires were discoverable under §25-1678 to prove underrepresentation under *Duren* prong 2 and, we submit, systematic exclusion under *Duren* prong 3. Without access to the aggregate, historical records, defendant Sanders had no chance to determine whether statistically significant underrepresentation of nonwhites had occurred in 2000-2002 at any stage of the Lancaster County process and likewise had no ability to prove that the cause of the underrepresentation constituted systematic exclusion. *Sanders*' holding that the defendant's access to jury data under §25-1678 is limited to his own jury selection process is clear error, squarely contrary to *Duren* and its progeny.

B. Nebraska JSA §25-1678 Was Modeled on the Federal JSSA and Its Construction in *Test v. United States*. Therefore, Defendants Are Entitled to Access Jury Data Without Precondition. Any Holding or Statements in *State v. Sanders* to the Contrary Should Be Overruled and/or Expressly Repudiated.

The *Sanders* Court's third major error was its holding: "We further conclude that the district court did not err in denying Sanders access to additional juror information because *Sanders did not demonstrate that such information was necessary for evaluation of his challenges*." *Id.* at 667 (Emphasis added). The terms "good cause" and "necessity" are terms that never appear in the text of §25-1678 and were expressly rejected in *Test v. United States*, 420 U.S. 28 (1975), the definitive Supreme Court decision construing the identical section of the Federal JSSA.

The *Sanders* Court did not consider the JSA legislative history or the *Test* doctrine and instead appears to have borrowed the "good cause" requirement from §25-1673 since the two statutes were inextricably interrelated because the data discovery that Defendant Sanders sought requested the names of those on the jury pool list. §25-1673 made it

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historical jury data. *Duren v. Missouri*, 439 U.S. 357 (1979). In *Duren* the Court based its finding of substantial underrepresentation of women upon jury data from the preceding 8 months.

“unlawful for [any court official] to disclose to any persons*, except* to other officers in carrying official duties or *as herein provided*, the name of any person so drawn or . . . list of such names, except under order of the court.” (Emphasis added). Clearly, §25-1673 was in play but so was §25-1678, the principal data disclosure statute of the JSA; and that statute was specifically cited by the Defendant as the basis for his discovery request. There was no specific mention in the JSA legislative history as to any tension between §25-1673 and §25-1678. We submit that the reasons for that were because §25-1678, as a central component of the JSA, was contemplated as governing data collection, and the existing statutory exception in §25-1673 (allowing disclosure to defendants who had an independent JSA right of access to jury data) was sufficient to avoid tension between the two provisions.

It would appear that the highlighted “except . . . as herein provided” exception to §25-1673’s nondisclosure mandate applied to all authorization of discovery in the Judicial Article. The *Sanders* Court never discussed, much less explained, why §25-2678 didn’t qualify for exception status and thereby avoided §25-1673’s prohibition. Finally, since §25-1678’s companion statute, §25-2645, made achieving a fair cross-section the first goal of the JSA and did not mention juror privacy as among §25-1645’s four goals, it is inexplicable that the *Sanders* Court made no attempt to construe the two statutes as compatible but instead held that §25-1673’s “good cause” threshold showing applied to §25-1678. There clearly were several ways to have done so.

The NAACP fears that some trial judges may read *Sanders* broadly, as generally subordinating defendants’ §25-1678 right to jury data to §25-1673. If there was ambiguity as to whether §25-1678, the central provision of the Judiciary Article, qualified as an exception under the “herein provided” clause, that ambiguity was removed with the 2020 legislation that substituted the text “the Jury Selection Act” for the “herein provided” phrase.

Given the legislative history of the Nebraska JSA, the unanimous holding of the Supreme Court construing the Federal JSSA in *Test v. United States* should be definitive on construction of the Nebraska Jury Selection Act and should guide this Court’s disposition of this key jury data access issue:

> This provision [of the Federal Jury Selection & Service Act] makes clear that a litigant has essentially an unqualified right to inspect jury lists. It grants access in order to aid parties in the ‘preparation’ of motions challenging jury-selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's overall purpose of insuring ‘grand and petit juries selected at random from a fair cross section of the community.’

Test, 420 U.S. at 30 (citing 28 U.S.C. § 1861).

For present purposes it is sufficient to point out that (1) in 1979, the Nebraska Legislature modeled §§25-1465 and 25-1678 of the Nebraska Jury Selection Act by incorporating the key provisions of the Federal JSSA; (2) in 1975, a unanimous Supreme Court in *Test v. United States* construed the very provisions of the JSSA which Nebraska enacted to provide defendants in criminal cases with a right of pretrial access to jury data, *without precondition*; (3) pursuant to venerable canons of statutory construction, it is compelling that the Nebraska JSA embraced the *Test* Court construction of the JSSA when the Nebraska Legislature adopted verbatim the analogous JSSA text only four years later; (4) this legislative history was not brought to the attention of, or considered by, this Court in 2005 when it held, in *State v Sanders*, that §25-1673's protection against disclosure of jurors' names overrode §25-1678's mandate of disclosure of aggregate, historical data unless the defendant could show "good cause/necessity" for the data; (5) a good cause/necessity threshold requirement is generally impossible for defendants to demonstrate when jury data is totally under control of the Court System and defendants have no access to such data at all, and this practical reality was expressly recognized by the Supreme Court in *Test v. United States*; (6) the *Test* Court's analysis and reasoning has been embraced by each of the Appellate Courts that has considered its application, *Lewis v. Maryland, supra*, and *Gause v. United States, supra*; (7) and the only instance in which the Nebraska Court System utilized aggregate, historical jury data and analyzed the data for 8 counties with the most significant racial minority populations was the Court's Minority Justice Committee's 2008 Report, which was based on calendar year 2008 data obtained as a result of the then-new Juror Qualification Form and which notably did not mention any juror's name in its Report. [23]

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[23] A uniform Juror Questionnaire was developed by the Supreme Court and approved for use in calendar year 2008 for the MJC study, and the MJC Committee collected the aggregate data and demonstrated data analysis in the approach forged in *Duren* and caselaw thereafter. Without question, the best Nebraska example of data analysis of historical, aggregate jury data in Nebraska was that done by the Nebraska Minority Justice Committee. The MJC Report succinctly explained that its analysis of the calendar year 2008 jury pool data collected would focus on counties with significant minority populations (over 10%), and counties which submitted enough juror qualification forms for statistical reliability." The counties that were selected for analysis were: Dakota, Dawson, Douglas, Hall, Lancaster, Madison, Sarpy, and Scotts Bluff. The MJC Report explained, at page 6, that there were two primary research questions to be answered:

"The first is: to what extent are the initial pools of jurors representative of the counties which they serve? The second question is: to what extent are the eligible pools of jurors representative of the counties they serve? This requires a comparison of the [U.S. Census] demographics of the county to the demographics of the initial pool and eligible pool for each county."

The Report made a comparison of the Black percentages of the initial and eligible jury pools [23]of each county with the Black percentage of the Census population for each county, with a focus on 8 counties (Dakota, Dawson, Douglas, Hall, Lancaster, Madison, Sarpy, and Scotts Bluff). For example, Blacks comprised 10.4% of the County population but only 7.4% of the initial pool and 7.8% of the eligible pool. The underrepresentation of Blacks was found to be statistically significant at the 2 standard deviation level. The MJC Report's collection and analysis of the 2008 calendar year jury data is characterized by courts as the historic, aggregate jury data. The data that was analyzed was anonymous. There are no privacy concerns as the names of individual jurors do NOT appear; how any juror self-identified was not included in the data.

Professor Chernoff's research found that most state courts have required a good cause or threshold showing by defendants before jury questionnaires would be disclosed, but also found that Nebraska was one of five states that had adopted the Federal JSSA standards construed by the *Test* Court.[24] Chernoff concluded that defendants' access to the aggregate, historical jury data is crucial to their effective exercise of the constitutional fair cross-section right, and her research was cited by the Iowa Supreme Court in *State v. Plain* in finding that a right of access to the data was implicit in the Sixth Amendment fair cross-section right. While acknowledging that "protect[ing the anonymity of jurors . . . [is] supported by significant law and sound public policy," Chernoff explained that "granting defendants access to discovery does not jeopardize these interests."[25]

As the Berkeley Legal Clinic Report has recently pointed out, Nebraska is the only one of the 20 states that have collected race-ethnicity jury data to stop collecting it.[26] As to

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Nowhere in the MJC Report was the race/ethnicity of a particular juror mentioned, and we are unaware of any reported case involving a fair cross-section challenge in which an individual juror's response to a Questionnaire was ever mentioned.

[24] Nina W. Chernoff, *No Records, No Right: Discovery and the Fair Cross-Section Guarantee,* 101 Iowa L. Rev. 1719 (2016). Chernoff's research was limited to the Nebraska JSA text that mirrored the Federal JSSA. It did not purport to examine the caselaw construing the jury data statutes, and therefore, was unaware of the *Sanders* decision and the Juror Qualification Form's bar on disclosure of jurors' names and lists to parties and attorneys.

[25] "After all, defendants are routinely granted discovery in the federal system and jurors' privacy and safety interests have not been noticeably jeopardized. Nor is there evidence that the 11 states that allow access to records have jeopardized the privacy or safety of potential jurors.

There are four reasons why granting discovery does not threaten jurors' privacy or safety. First, the data defendants need is aggregate data about the race of potential jurors over multiple venires. The identity of individual jurors, or even the group of jurors on a petit jury, is legally irrelevant to a fair cross-section claim, so defendants will never need to access that kind of information. Second, both constitutional and statutory cross-section claims must be filed before the trial begins, so there is no possibility that defendants will have access to otherwise secret jury deliberations.

Third, as in other contexts where sensitive information is at issue, courts have the power to issue protective orders to provide additional safeguards. For example, a court can release jury data pursuant to an order that requires the attorneys and experts accessing the data to keep the information confidential. A court can even release data pursuant to an order that provides the attorneys with access but prevents the defendant from seeing the data.

Fourth, many state statutes that fail to explicitly provide for discovery make other jury records publicly accessible. For example, some states make the master list of jurors available to the public upon request. These records are (unfortunately) not the race and operational data defendants need to pursue a cross-section claim, but the public availability of some jury records undercuts the argument that all juror information must be kept secret."

Chernoff, No Records, No Rights, 101 Iowa L. Rev. at 1766-67 (footnotes omitted).

[26] Elisabeth Semel et al, University of California Berkeley Legal Clinic, *Guess Who's Coming to Jury Duty? How the Failure to Collect Juror Demographic Data Contributes to Whitewashing the Jury Box* at p.17, (hereinafter "BLC Report"). https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/failure-to-collect-juror-demographic-data-contributes-to-jury-whitewashing/

the grudging position taken by the majority of state courts, the NAACP notes that this caselaw is largely from the 20th century, decided long before computerized data collection and analysis was available to state court systems. The NAACP submits that that caselaw has been made obsolete with the development of 21st Century technology. That technology enables computerized data collection and analyses that have largely eliminated the 20th Century concerns that data collection and analysis would be burdensome on court systems and might put juror privacy at risk. In sum, this body of caselaw, including that forged by the Nebraska Supreme Court in *Sanders*, needs reconsideration and modification in light of these technological advances.

As to the states, such as Nebraska, that adopted the Federal JSSA, Nebraska is the outlier in requiring a showing of good cause/necessity. Attempts were made to impose a "good cause" threshold showing in two jurisdictions that adopted the JSSA, Maryland and the District of Columbia, but both were rejected. The Maryland and D.C. highest courts embraced the *Test* holding as reflecting the legislative intent of their legislatures in adopting the JSSA, explicitly rejecting attempts to impose preconditions on the defendants' right of access to the jury data. *See Lewis v. State, 632 A.2d 1175 (Md. 1993); Gause v. United States,* 6 A.3d 1247 (D.C. 2010). The NAACP submits *Lewis* and *Gause* are powerful, persuasive precedents supporting the overruling of *Sanders*.

The Supreme Courts of the neighboring states of Iowa and Missouri are even more persuasive than *Lewis* and *Gause*. While observing that neither had legislation providing for release of jury data to defendants, first the Missouri Supreme Court and later the Iowa Supreme Court unanimously construed the Sixth Amendment to include a necessary corollary constitutional right of defendants to be able to access the jury data without any precondition, embracing the reasoning and common-sense logic of *Test*. *See State v. Plain,* 898 N.W.2d 801 (Iowa 2017); State ex rel. *Garrett v. Saitz*, 594 S.W.2d 606 (Mo. 1980). How otherwise, the Courts reasoned, would a defendant be able to ascertain whether there was underrepresentation of the distinctive group in the aggregate, historic data and be able to evaluate making a fair cross-section challenge?

In fairness to the Nebraska Court, the NAACP observes that it is apparent that the *Sanders* Court was totally unaware of the Nebraska JSA legislative history, the *Test* precedent, and the Missouri Supreme Court's decision in *Saitz*, as the appellate briefs were silent as to these precedents. In 2005, when *Sanders* was decided, more than a quarter of a century had passed since Nebraska enacted the JSA, which makes it likely that all institutional memory of §25-1678's legislative history was gone, as a whole generation had passed since enactment of the JSA and the Supreme Court's decision in *Test*.

C. A Related But Fourth Major Error in the *Sanders* Court Analysis Is Its Holding that Defendant's Motion for Discovery under §25-1678 Was "Premature."

Sanders states that defense counsel must wait until the voir dire stage of the defendant's jury selection process before counsel can move for discovery or to make a Fair Cross-Section challenge. The *Sanders* Court was quite explicit in that regard, saying:

> "[T]he specific jury which ultimately heard this case was not yet in the process of being selected when Sanders filed his motion [to quash]. As such, *Sanders' [discovery] motion [for Lancaster County's jury records for the preceding three calendar years] made under § 25–1637 [current §25-1678] was premature*. Therefore, we conclude that the court did not err in rejecting Sanders' challenge under § 25–1637."

Id. at 668 (Emphasis added).

This holding reflects the misunderstanding that the only relevant evidence in a fair cross-section challenge is that of the defendant's own jury selection process. The discussion of the aggregate, historical jury pool and jury panel data in *Duren* and *Berghuis* make clear the *Sanders* Court's key mistake. It is not only evidence of selection of the jury pool and jury panel in defendant's case with which the Supreme Court has been concerned; it is the jury selection process generally, over a period of time, which *Taylor* and *Duren* require us to be concerned and to examine. That process cannot be examined by considering only one case. Moreover, discovery of aggregate, historical data and analysis of it cannot await the beginning of trial. It must begin earlier than that, for the trial court cannot put the prospective or seated jurors on hold while that discovery, analysis, and inevitable argument take place. As an important practical matter, the motion for discovery and the discovery itself must take *before* trial begins. In addition, the express text of two sentences of §25-1678(4) also squarely refute the *Sanders* Court's conclusion that Defendant Sanders's discovery request was "premature." Both were ignored by the *Sanders* Court. Subsection 4 states:

> The contents of any records or papers used by the jury commissioner *in connection with the selection process* and not made public under the Jury Selection Act shall not be disclosed, *except in connection with the preparation* or presentation of a motion under subsection (1) of this section, until after all persons on the jury list have been discharged. The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times *during the preparation* and pendency of a motion under subsection (1) of this section." (Emphasis added.)

The first sentence makes clear that the defendant's right to access jury records is broad indeed: "The contents of *any r*ecords or papers used by the jury commissioner in connection with the selection process . . . ." Subsection (4), not once but twice, made explicitly clear that a defendant's right of access to jury records is not only at the "presentation of a motion [to quash] but also "in connection with the preparation . . . or a motion" and further expressly states that defendant "may inspect, reproduce, and copy

records or papers at all reasonable times during the *preparation* and pendency of a motion under subsection (1)." (Emphasis added.)

Under the JSA, the defendant's right of access to jury data came with a corresponding responsibility. Section 25-1678(1) imposed on defense counsel a duty to give the court and the prosecutor timely notice when grounds for a possible fair cross-section challenge had been discovered. §25-1678(1) thus recognized the necessity that a defendant's discovery and research on a fair cross-section challenge must be done pretrial and completed early enough to provide the trial judge with timely notice: "Such motion [to quash] shall be made within seven days after the moving party discovered or by the exercise of diligence could have discovered the grounds for such motion, and in any event before the petit jury is sworn to try the case." Subsection (1) contemplates that the investigation and even the hearing on the systemic facts should be completed well in advance of the day of trial, enabling the Court System to still have time to make a mid-course correction. All that should be left to do on court service day is determining whether defendant has standing, *i.e.,* that there is some underrepresentation on his or her own jury panel. In sum, the Nebraska JSA statutory scheme and purpose envision that defense counsel can and should obtain pretrial access to review the relevant historical, aggregate jury data to determine whether a meritorious fair cross-section challenge exists and, if so, then defendant must file his or her motion to quash or stay proceedings within seven days. Sanders' motion for discovery was *not* "premature."

Soon after Sanders was decided, §25-1673 was amended by addition of subsection (2), which authorized the Supreme Court to designate researchers to study the Nebraska jury data, including having access to jurors' names and answers to questionnaires.[27] §25-1673's subsection (2) was enacted in 2005, in an abundance of caution, to make doubly clear that the Supreme Court's designee for research, the Minority Justice Committee, could also have access to the jury questionnaires in order to do its study of the Court System's compliance with the fair cross-section requirement. Examination of each juror's questionnaire was necessary in 2008 because there was no statewide electronic collection of jury data. Subsection (2) was limited to providing access to the jury data by a third party, the MJC, and had no application on the construction of §25-1678's right of discovery by defendants' counsel, which has its roots in the fair cross-section requirement of the Sixth Amendment.[28]

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[27]"(2) Notwithstanding subsection (1) of this section, the Supreme Court or an agent of the Supreme Court acting under the direction and supervision of the Chief Justice shall have access to juror qualification forms for research purposes. The Supreme Court and its agent shall treat such information as confidential, and nothing identifying any individual shall be released."

[28]The Supreme Court was very cautious in getting express Legislative approval of their power to promulgate the juror questionnaire; the Court was also cautious in getting express Legislative approval for the Supreme Court to collect and analyze data collected on the new juror uniform questionnaire. The first amendment resulted in the promulgation of a new uniform juror questionnaire for all 93 counties that is still in use today. The second made sure that the Supreme Court could grant access to the aggregate, historic 2023 calendar year jury data to the Minority Justice Committee. Subsection (2) to 25-1673 was necessary because the broad access to jury data authorized in 25-2678(4) was limited to parties in civil and criminal cases. While

In making this Public Comment to the Court, the NAACP submits that *Test*'s reasoning is so compelling, and the text and legislative history of the Nebraska Jury Selection Act is so clear, that this Court should distinguish or overrule *Sanders* when it adopts the proposed Rule rather than wait until the issue arises in a traditional appeal, which could take years. Because the right to trial by a representative jury is so fundamental to American jurisprudence, because its inaccessibility or denial certainly affects the liberty of every defendant who is a person of color, because there is a perception that Nebraska's decade-long failure to gather demographic data and make it discoverable by defense counsel may have contributed to Nebraska's disproportionate incarceration rate of persons of color (among the Nation's 10th highest) by precluding fair cross-section challenges as a practical matter, and because it is so clear today that the *Sanders* ruling should be seen as subject to being overruled as "egregiously wrong" under the Supreme Court's *stare decisis* precedent, this Court should address and overrule *Sanders* now—or immediately propose a new Rule that would overrule *Sanders* and ask for Public Comments.[29]

The NAACP respectfully submits that defendants in Nebraska have a statutory right of pretrial access under the Jury Selection Act at least to the aggregate, historical data that they need to make out a fair cross-section challenge. In today's electronic digital world defendants rarely, if ever, will need access to individual juror's names or answers to the race question, and thus the disclosure of the relevant jury data will in no way impinge upon the privacy protections that are central to §25-1673 and that were mistakenly viewed as prevailing over the §25-1678 right in *Sanders*.[30]

VI. Based on Stare Decisis Principles, Overruling *Sanders* or Otherwise Disavowing It Is the Appropriate Step to Take. Overruling *Sanders* Would Restore "Intrinsically Sounder" Doctrine, and *Sanders* Was "Egregiously Wrong" on All Seven

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the Court's supervisory power over the trial courts may well have provided authority for the Court to obtain and analyze the jury data, given the longstanding independence of each district court and the perceived sensitivity of race and ethnicity data, it was a wise move to obtain express legislative authorization. However, the Legislature's authorization of the Supreme Court in 25-1673(2) to access and analyze the jury questionnaire data did not in any way alter the right of access of defendants to obtain and analyze under §25-1678(4). As developed above, §25-1678(4) was an expressly authorized exception to 25-1673's limitation on disclosure of the names and personal identifying information.

[29] Procedurally, it would seem appropriate for the Court to initiate a new or supplemental Rule and ask the Attorney General and prosecutors groups, such as the County Attorney's Association, and criminal defense lawyers and their association, to submit Briefs or Position Papers as to whether the legislative history of the Nebraska JSA, including *Test v. United States*, requires overruling or modifying *Sanders*, followed by the opportunity for the NAACP and other community groups and criminal defense lawyers to reply.

[30] The NAACP is aware that electronic computerized data collections may be occurring only in Douglas, Lancaster, and Sarpy Counties at this time; until such time as electronic data collection is uniform in counties across the state, those counties utilizing paper Questionnaire can comply by providing defense counsel with a summary of the race data at the jury pool, jury panel, and 12-person jury stages of the process or to provide defense counsel with the completed jury Questionnaires with the names and addresses of each juror redacted.

Factors the United States Supreme Court Has Found Should Be Considered.

The Supreme Court has recently had occasion to set forth Stare Decisis principles to guide itself and courts generally when considering whether to overrule a past precedent. In *June Medical Services v. Russo*, 140 S.Ct. 2103 (U.S. 2024), Chief Justice Roberts observed in some instances there is an initial question, one which the NAACP submits is present as this Court considers overruling *Sanders*:

> Stare decisis principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of stare decisis than would follow the recent development."

Id. at 2134 (Roberts, C.J., Conc.). The Supreme Court decision in *Test v. United States* clearly constitutes "intrinsically sounder" doctrine. *Test* not only was unanimous but also Congress has had 49 years to modify or repeal the *Test* construction of the JSSA, and it has not changed a word of its text or modified *Test* in any way. The NAACP submits that the *Test* gloss on the Federal JSSA was necessarily incorporated in Nebraska's verbatim enactment of the identical JSSA provisions in the Nebraska JSA.

In addition to *June Medical*, the Court elaborated extensively on stare decisis principles in *Dobbs v. Jackson Women's Health Org*. 2228 (2023). While there was disagreement on the principles and the application thereof, the rationale for overruling *Sanders* is unquestionably stronger on each of the principles identified in *Dobbs*, both by the majority and the dissent.

First, the *Sanders* decision involved construction of the Nebraska Jury Selection Act, a state statute. *Roe v. Wade* was a constitutional ruling; *Sanders* was not a constitutional ruling. Thus, overruling *Sanders* does not remove it from the political process. The Nebraska Legislature can legislatively "overrule" this Court's overruling of *Sanders* should it conclude sound public policy warranted a different decision—as long as doing so doesn't violate the Constitution. As the *Plain* and *Saitz* Courts held, we believe the defendant's right to access jury data is a necessary corollary of the defendant's Sixth Amendment fair cross-section right.[31]

Second, the *Sanders* decision was a clear departure from sound precedent. *Test v. United States* was a unanimous Supreme Court decision construing the Federal JSSA, the statute upon which the Nebraska JSA was modeled. *Test* continues to be the governing precedent for the JSSA. It has not been modified by either Court decision or legislation.

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[31] *See* text accompanying fn. 9, *supra*.

Third, overruling *Sanders* would enhance individual rights. Access to the Court System's jury data is essential to enforcement of the Sixth Amendment fair cross-section right, and especially for persons of color who, without such protection, will almost certainly routinely be tried by juries composed entirely of jurors of a different race and ethnicity. The *Dobbs* Court overruled *Roe* despite that fact that the result contracted women's rights.

Fourth, there have been both legal and factual changes since *Sanders* was decided. When *Sanders* was decided in 2005, Lancaster County and likely the rest of Nebraska was not collecting race-ethnicity demographic data. In 2008, the State Judiciary made a new commitment to statewide jury data collection of race-ethnicity data. In 2005 Lancaster County data collection was on paper; in 2024 Lancaster, Sarpy, and Douglass Counties collect jury data electronically, as do most states. Electronic jury data collection is a major technological advance that enables Court Systems to collect race-ethnicity demographic data efficiently and to disclose the anonymous aggregate demographic data to defense counsel (and the prosecutor and trial court as well) without disclosure of any juror's name or personal identifying information. Maintaining the privacy of jurors was the overriding issue in *Sanders*, and these new technological advances make the *Sanders* decision obsolete.

Fifth, the parties failed to research the legislative history of the Nebraska Jury Selection Act and were unaware not only that the JSA was based on the Federal JSSA but also that a unanimous Supreme Court had construed the identical provisions of the JSSA to provide defendants with an unqualified right of jury data access. The *Sanders* Court likewise was totally unaware of this legislative history, and, without such knowledge, *Sanders*' statutory "analysis was far outside the boundaries of any reasonable interpretation of the various [statutory] provisions to which it vaguely pointed." *Dobbs v. Jackson Women's Health Org.* at 2228 (2023). In sum, under the nature of the error factor, the *Sanders* decision was "egregiously wrong and deeply damaging." Id.

Sixth, there is no reliance interest that would be impacted by overruling *Sanders* by Rule. This is a Rulemaking proceeding, not appellate litigation. As such, there are no parties. Overruling *Sanders* by Court Rule will not overturn the result in any case. To the extent that it may take the Court System some time to obtain and install a 21st Century computers and data collection software and train court personnel, it has some equitable discretion. But the fair cross-section right is fundamental to the impartial jury guaranteed every defendant by the Sixth Amendment and therefore cannot be compromised.

Finally, the *Sanders* ruling was not based on an interpretation of constitutional law. Rather, overruling *Sanders* would be based on construction of the Nebraska JSA. As a result, the issue of defendants' access to jury data would not be removed from the political process. It can still be studied by the Legislature, and, if warranted, the Legislature can tweak or modify the JSA.

VII. The recent decision of the U.S Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*), 143 S.Ct. 2141 (2023) ("*SFFA*"), does not in any way affect the data collection and compilation required by the Nebraska Jury Selection Act, by the Sixth Amendment's fair cross-section guarantee, and by the Fourteenth Amendment's equal protection guarantee against discriminatory peremptory challenges.

In *SFFA* the plus-factor preferences that Harvard and the University of North Carolina were providing Black and Hispanic applicants for admissions were found to constitute racial discrimination because the use of a racial preference advantaged Black and Hispanic applicants and disadvantaged other applicants of the unfavored races, including Asian applicants. Because the states' use of race constituted racial discrimination, it could only be upheld if the racial preference satisfied the strict scrutiny test. The Court acknowledged that *Grutter v. Bollinger*, 539 U.S. 306 (2003), held "that student body diversity is a compelling state interest that can justify the use of race in university admissions.'' *Id*. at 2164 (quoting Grutter at 325). But the Court concluded that Harvard and UNC had failed to demonstrate that the racial preference admissions programs were narrowly tailored, and, therefore, constituted unconstitutional racial discrimination.

A. There Is No Discrimination in the Collection, Compilation, and Use of Jury Demographic Data.

Voting and juror service are the two most egalitarian components of citizenship in a democracy. Whether characterized as a civic duty or a burden of citizenship, or an opportunity to participate fully in our democracy and the public life of one's community, juror service is an important aspect of citizenship that falls on everyone 19 years of age and older, regardless of race, ethnicity, and gender. The Nebraska Court System's jury selection process from its inception, identifying and securing jury registration and department of motor vehicle lists for use as the master source list, through the assignment of jurors to courtrooms to participate in voir dire, is in significant part color-blind and involves random selection. When, in consultation with the chief judge, a determination has been made as to the number of jurors who will be needed for an upcoming court session, the requisite number of jurors are randomly identified and summonses sent out along with the Nebraska Juror Qualification Form. Juror disqualification, exemption, and excusal are aspects of the system in which human judgment, exercised both by the jury manager and trial judges, enters the picture prior to voir dire. After disqualifications and excusals have occurred, the random color-blind selection process continues in the assigning of jurors to courtrooms for the voir dire stage of the process, at which times the parties' attorneys will be aware of the race, ethnicity, and gender of jurors when challenges for cause and peremptory challenges are made. Human judgment is, of course, involved in challenges for cause and peremptory strikes that arise during voir dire and prior to swearing in the jury.

Every person summoned as a juror, regardless of race, ethnicity, and gender, is required to complete the Juror Qualification Form, including demographic questions that ask the prospective juror to self-identify his or her race, ethnicity, and gender. Each juror's response will be compiled by the court system and reported/disclosed as aggregate, anonymous juror data. The data will be used by the court system and litigants to protect against discrimination in any aspect of the jury selection process and to ensure that juries are drawn from jury pools and panels that represent a fair cross-section of the community served by the trial court. As explained below, this demographic data provides the Court System with the informational tools to ensure that its twin goals will be achieved at both the front and back ends of the jury selection process. First, data can help ensure that representative jury pools and voir dire panels are not thwarted by policies or practices that have a statistically significant impact. Second, even when a representative voir dire panel has been achieved, protection against its destruction at the conclusion of voir dire by discriminatory peremptory challenges—challenges that without data showing a discriminatory pattern and practice of strikes against a distinctive group would likely go undetected.

Unlike *SFFA*, there is no prospective juror, or group of jurors, that is advantaged or disadvantaged on the basis of race, ethnicity, or gender in any aspect of the juror data collection process or the overall jury selection process. No prospective juror will be disqualified, exempted, or excused because of his or her race, ethnicity, or gender; likewise, no defendant will be advantaged or disadvantaged in the assertion of the fair cross-section right as a result of his or her race, ethnicity, or gender. The seminal case of *Duren v. Missouri* made clear from the inception that every defendant in a criminal case has a constitutional right to insist that his or her jury pool and panel reflect a fair cross-section of the community.

The Sixth Amendment fair cross-section right seeks to ensure the right of each individual defendant to an impartial jury . *Duren* demonstrated that one need not be a member of the underrepresented racial, ethnic, or gender group to have standing to vindicate the fair cross-section right.[32] In *Duren* it was a male defendant who successfully asserted that his fair cross-section right had been violated because women were significantly underrepresented on Jackson County juries. Likewise, for example, a white defendant could raise a fair cross-section challenge if Blacks or some other minority groups were significantly underrepresented on jury pools in the county in which he or she will be tried.

[32] In State v. Garza, 492 N.W.2d 32 (Neb. 1992), this Court indicated that, in order to make a fair cross-section challenge, the defendant must be a member of the distinctive group that is underrepresented: "Moreover, we have not been directed to anything in the record which establishes that Garza is a member of any cognizable group of the population. Nonetheless, his arguments assume that he is Hispanic and that, as such, he is a member of a distinctive and cognizable racial group; we, for the purpose of this analysis, assume the same." Id. at 45. In light of Duren, the Garza Court was clearly mistaken.

In sum, there is no difference in treatment of individual jurors in any aspect of the Nebraska jury data collection and compilation process. All prospective jurors are similarly situated, and they are similarly treated. The collection, compilation, and disclosure of demographic data is race neutral in principle and in practice. The proposed collection and compilation of demographic juror data that includes race, ethnicity, and gender information does not employ any such factor in a plus or negative manner, nor does in involve any negative stereotype.

There is longstanding precedent for data collection as to race, ethnicity, and gender by governmental entities at the Federal, State, and local levels of government. The collection, compilation, and reporting of such demographic data that includes race, ethnicity, and gender has been done for decades by the U.S. Census Bureau and numerous other Federal, State, and local governmental entities without a thought that such action raised any issue under the Equal Protection Clause. Like the Census and other governmental data, the collection and compilation of jury selection process data maintains the anonymity of individual respondents; the data that is relevant to fair cross-section and *Batson* challenges is aggregate, anonymous historical data. The *SFFA* Court did not say a word that suggested the government could not require citizens generally, and prospective jurors in particular, to fill out demographic information surveys that asked all respondents to self-identify their race, ethnicity, and gender. Indeed, *SFFA* relied upon the universities' race/ethnicity admissions data to support it contention that the actual practices of both universities suggested they utilized racial targets very similar to quotas.

The NAACP submits there just is no "there" there in any claim that *SFFA* bars the collection of demographic jury data. The collection of demographic jury data that includes self-identified race, ethnicity, and gender and the compilation and disclosure only of juror demographic data that includes anonymous demographic information raises no issue of racial discrimination. Nonetheless, assuming arguendo that strict scrutiny does apply to the jury data collection system, the Sixth Amendment impartial jury clause and the Fourteenth Amendment equal protection clause provide the requisite compelling governmental interests to satisfy strict scrutiny.

B. Compliance with the 6th Amendment Fair Cross-Section Right as Compelling Governmental Interest

As covered in depth above, our Public Comments have demonstrated how the collection, compilation, and disclosure of the aggregate, historic juror demographic information is essential to a fair cross-section challenge and to a State's monitoring its processes for compliance with the Sixth Amendment and statutory law. In sum, jury data collection and compilation "use[s] race/ethnicity information to *measure* outcomes, that is, generate the data that will let us know whether the litigants and the courts are complying with existing law." BLC Report at 4 (Emphasis in original.) The determination as to whether there has been statistically significant underrepresentation of a distinctive

group is based exclusively on the jurisdiction's jury data for the 6 months or 1 year preceding the defendant's trial date (*Duren* prong 2).

This demographic jury data is also critical to identifying the stage of the jury selection process that may systemically have caused the underrepresentation of the distinctive group (prong 3 of Duren). Courts across the nation have compared the Black percentage of jurors in the county that is the locus of the defendant's trial for the preceding 1 year with the most recent Black jury-eligible Census population for that county (U.S. citizens 18 years of age and older). Courts have established statistical thresholds as to the extent of underrepresentation that must be demonstrated to make out a prima facie case and the statistical test to be utilized (*e.g.,* Absolute Disparity, Comparative Disparity, Standard Deviation, etc.), but no specific test has been embraced by the Supreme Court. *Berghuis v. Smith*, 559 U.S. 314 (2010). The Nebraska Court has not yet determined which test to utilize, nor has it set a threshold showing necessary to make out a prima facie case, but there are myriad precedents across the country to draw upon. Whatever test is chosen, jury demographic data will be essential to its application and to demonstration of the State's compliance with Constitutional and statutory commands.

C. The Batson 14th Amendment Equal Protection Right as a Compelling Governmental Interest.

Demographic jury data that compiles the race, ethnicity, and gender of jurors is also crucial to enforcement of the Batson protections against racially discriminatory peremptory challenges by either the prosecution or defense counsel which can destroy a jury panel representing a fair cross-section of the community. Justice Kavanaugh, writing for the Court in *Flowers v. Mississippi*, 139 S.Ct. 2228, 2243 (2019), explained:

> *First*, what factors does the trial judge consider in evaluating whether racial discrimination occurred? Our precedents allow criminal defendants raising *Batson* challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race. For example, defendants may present:
> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
> • a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
> • relevant history of the State's peremptory strikes in past cases; or
> • other relevant circumstances that bear upon the issue of racial discrimination.

In *Flowers*, the Court concluded that "the history of the prosecutor's peremptory strikes in Flowers' first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent." *Id*. at 2245. *Flowers* confirmed pattern and practice proof is powerfully persuasive. Because of the demographics of states such as Nebraska and Iowa, with small Black and Hispanic populations, proof of a pattern and practice of discriminatory strikes necessarily requires looking not only at the strikes exercised against Blacks or Hispanic jurors on defendant's own jury panel but also to strikes the prosecutor and/or his or her office have exercised against members of the cognizable group in prior cases. Vice versa is also true. It is important to recognize that *Batson* prohibits discriminatory strikes by prosecutors *and* discriminatory strikes by defense counsel. *See, e.g., State v. Mootz*,808 N.W.2s 207 (Iowa 2012).

Flowers made clear how crucial demographic jury data that includes race, ethnicity, and gender is to vindication of equal protection rights under *Batson*. Data should be collected for every stage of the jury selection process, including the empanelment stage at the back end with a break down as to strikes for cause and peremptory strikes. For the jury data to be meaningful for *Batson* challenges, it must be capable of disaggregation by the race and ethnicity of *defendants*. If there is no ability to disaggregate the jury data, and the data for all defendants is lumped together, a devious prosecuting attorney such as in Flowers is able to disguise his or her discriminatory strikes of Black jurors. For example, by declining to strike any Black jurors in cases involving white defendants, a prosecutor could disproportionately strike Black jurors in cases involving Black defendants without detection.

No matter what lens is utilized, it is inconceivable that the *SFFA* decision precludes the gathering of juror demographic information, including data that includes one's self-identification as to race, ethnicity, and gender. The proposed collection of demographic juror data implicates no issues under the *SFFA* ruling. The proposed collection of demographic juror data that includes race, ethnicity, and gender does not in any way change the operation of the jury selection process, but instead provides the necessary information to monitor whether the system is achieving its goals of nondiscrimination and juries drawn from a fair cross-section of the community. In *SFFA* the universities acknowledged their admissions processes granted racial preferences which the universities argued were justifiable, but they failed to convince the Court. In contrast, data collection in a court system's jury selection process disadvantages no one, nor is anyone benefitted while others not.

To collect and compile demographic data that includes race, ethnicity, and gender information does not make the government jury data collection and compilation processes a racial classification; and it most certainly does not make such longstanding government action racially discriminatory conduct. In the alternative, assuming arguendo collection of racial data must be scrutinized under the strict scrutiny test, it clearly serves compelling governmental interests of protecting against discrimination in jury selection and of

achieving juries that are representative of their communities and the means employed—the data collection, compilation, and disclosure of juror data—are narrowly tailored to implementation of the compelling interests articulated. In sum, the proposed demographic jury data collection not only does not in any way constitute racial discrimination but is crucial to implementation of the Sixth and Fourteenth Amendment constitutional rights that seek to ensure juries that are truly representative in Nebraska.

VIII. Conclusion

The Access to Justice Commission's Report is a promising indication that the Nebraska Supreme Court both recognizes that the right to a fair and impartial jury is critical to the fair operation and well-being of the State's criminal justice system and to the public's confidence in the fairness and integrity of the Nebraska judicial system and is ready to strengthen both, perhaps especially among its citizens of color.

The proposed amendments to the Juror Qualification Form and Court Rules are necessary first steps to ensuring implementation "on the ground" of the Sixth Amendment Impartial Jury Guarantee and fair cross-section right and the Nebraska's Jury Selection Act's commitment to achieving juries on which (1) "all persons are selected at random from a fair cross-section of the population" and (2) "no citizen is excluded from jury service as a result of discrimination based upon race, color, religion, sex, national origin, or economic status." Nebraska Jury Selection Act, 2020 Neb. Laws 387, Neb. Rev. Stat. §25-1645.

In submitting these comments, the NAACP is fully supportive of and grateful for the Court's initiative, but the proposed amendments only address the initial data collection stage of the jury selection process; they say nothing about the compilation and disclosure of juror data. No guidance or commitment is made that the Court will compile juror data at each stage of the jury selection process, including the empanelment stage preceding the swearing in of juries for service on the trial jury. Data compilation at each stage of the jury selection process is critical to effectuation of the twin constitutional rights protecting the jury selection process: the Sixth Amendment's guarantee that juries be selected from jury pools and voir dire panels that reflect a fair cross-section of the community and the Fourteenth Amendment's equal protection *Batson* guarantee that prohibits discriminatory peremptory strikes. No guidance is given as to disclosure of jury data to defendants and their counsel. To paraphrase Professor Chernoff, if defense counsel do not have ready access to the juror data, the fair cross-section right is meaningless; as we explained above, we applaud the removal of the Questionnaire's assurance that the juror data will not be shared with parties or attorneys, but that change alone is insufficient to ensure access on the part of defense counsel because of the continuing roadblock of the *State v. Sanders* decision.

The Court's commitment and guidance on these critical aspects of the juror selection process is crucial for the reinvigoration of the Sixth and Fourteenth Amendment

jury trial rights in Nebraska that we believe the Court envisions. It is in that spirit that the NAACP respectfully submits the proposed additional Rules in the Appendix I and the revisions we proposed in the text above to the Juror Qualification Form. However, it is critical to appreciate that the proposed amendments to the Court Rules and the revision of the Questionnaire, even were they to be revised and supplemented by the Rules the NAACP has proposed, would not be a "silver bullet." At most they would constitute a beginning, first steps on the road to a criminal justice system in Nebraska that is truly committed to racial equality and justice.

In 2019, Iowa Supreme Court Justice Brent Appel observed in his concurring opinion in *State v. Lilly* that only "an across-the-board approach" can accomplish the reforms needed to make the justice system's promise of "[t]he right to a fair and impartial jury trial . . . a reality for African-Americans charged with crimes." 930 N.W.2d at 310. Justice Appel explained:

> First, our jury pools must represent a fair cross section of the community. In order to achieve this goal, the pool of potential jurors must reasonably represent the make-up of the community.
>
> Second, the manner of selecting jurors that ultimately serve from the jury pool must promote achievement of a fair cross section. We will accomplish nothing if we ensure the jury pool more fairly represents the community and then permit the jury selection process to reverse the progress. The desirable impacts of this case in ensuring a fair cross section in the pool of jurors will be a magician's illusion if the advances made here today in ensuring a fair cross section in the jury pool are eviscerated by the process of jury selection. We want the juries that actually sit to represent a fair cross section. In order to meet that goal, we must permit effective voir dire on express *and implicit bias*. Further, we must revise our reliance on *Batson v. Kentucky*, 476 U.S. 79, 93–98, 106 S. Ct. 1712, 1721–24, 90 L.Ed.2d 69 (1986), in order to ensure that our fair-cross-section goals have been met.
>
> Third, Iowa lawyers must be permitted to utilize the voir dire process to explore overt and implicit racial bias. No one claims that such a process is foolproof, but an appropriately designed approach to voir dire may assist in identifying bias and in mitigating its effects.
>
> Fourth, Iowa juries should be instructed, preferably at the beginning of the case, on implicit bias. In my view, such an instruction fairly reflects the law and provides an important protection to ensure that juries decide cases based on the facts and law and not on preconceived, anchored notions of human behavior.[33]

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[33]*See State v. Lilly*, Conc. J. Appel, 930 N.W.2d at 310-311 (citations removed). See also Russell Lovell & David Walker, *A Fair and Impartial Trial Free From Racial Discrimination Will Require An Across-the-Board Approach: Systemic Reforms Still Needed in Light of the "Other" Racial Justice Jury Trial Rulings in State v. Veal and State v. Williams*: Drake Discourse (ONLINE) Law Review, [https://lawreviewdrake.files.wordpress.com/2021/06/a-fair-and-impartial-trial-free-from-

While the Nebraska Court System cannot alter the demographics of the State, it is incumbent upon it to take Nebraska's demographics, including socio-economics, into account as it seeks to make the Nebraska justice system's promise of "[t]he right to a fair and impartial jury trial . . . a reality for African-Americans charged with crimes." *Id*. at 310. Paula Hannaford-Agor, the long-time Director of the Center for Jury Studies of the National Center for State Courts and widely recognized as one of the Nation's most knowledgeable experts on juries and jury management, has pointed out:

> The question of whether minority underrepresentation is caused by socioeconomic factors or by the policies and practices employed by the court in the jury [selection process] underlies virtually all cases alleging underrepresentation of minorities. As Professor Abramson wryly noted in his expert report on a jury challenge in the United States District Court for the District of Massachusetts, "'Metaphorically speaking, there has to be a statute of limitations on how long a District can lament the undesirability of the underrepresentation of minorities in its jury pools without feeling compelled to act with imagination to do better.'"

Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded,* 59 Drake L. Rev. 761, 777 (2011). A good example of Hannaford-Agor's insight was her observation: While "[c]ourts have no control over whether an individual chooses to register to vote, . . . courts do have control over which source lists to use in compiling the master jury list." Drake L. Rev. at 779. The Sixth Amendment does not limit source lists to voter registration and driver's license and non-operator ID lists. In 2008 the Nebraska MJC Report recommended that the Supreme Court be granted the authority to include other reliable lists in its master jury list. The NAACP strongly commends the MJC recommendation as it could make the initial jury pool more representative. The addition of the names and addresses of state tax filers, for example, would almost certainly increase the number and diversity of Nebraskans in the master source list available for summons, and would also ensure current, accurate addresses, which would further efficiency by reducing the number of "undeliverable" summons and by extension the number of jurors summoned, resulting in cost savings.

But for today and the Court's proposed rules and revised Juror Qualification Form, places to begin would be (1) improvement of the Juror Qualification Questionnaire to secure the demographic data on race, ethnicity, and gender; (2) collection of that data for each county and compilation of it at each stage of the jury selection process so that aggregate historical demographic data can be readily accessed by criminal defense counsel, prosecutors, the trial court, state court administration, and the public; and (3)

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disavowal of *Sanders v. Nebraska* and with that authorization of discovery motions by defense counsel, pretrial and without condition, if the aggregate, historic data are not made readily accessible online.

We close with the adage that "a picture is worth a thousand words." Nebraska has not been collecting demographic jury data for over a decade and it is unclear whether it has ever compiled it at the stages of the jury selection process that follow responding to the Questionnaire, that is, the voir dire jury panel and the empanelment stages. For nearly a decade the NAACP has had ongoing dialogue with State Court Administration in Iowa (OSCA) and the Iowa Supreme Court on its jury selection process. Many of the NAACP's recommendations for improvement of the collection and compilation of demographic jury data at the key stages of the Iowa jury selection process, the Iowa Juror Questionnaire, and reporting of the demographic data have been adopted. The NAACP believes it will be helpful to the understanding of our proposed Nebraska Court Rules to attach two related Appendices from our Iowa experience. Appendix II is the Iowa OSCA calendar year 2023 demographic data in three Excel spreadsheet reports that were provided to the NAACP in January: All 99 Counties; Counties with Largest Black Populations; and Counties with Largest Hispanic Populations. Each reports the juror composition at the jury pool, jury panel, and the empanelment/12-person jury stages; each spreadsheet also breaks down the multi-racial data at the jury pool and jury panel stages. Appendix III has two charts that summarize the NAACP's analyses of the 2023 Iowa calendar year jury data for the counties with the largest Black and largest Hispanic jury-eligible populations, confirming that demonstrable progress has been made toward achieving Iowa juries drawn from jury pools that are representative of their communities. Appendix IV shows the NAACP's proposed edits to the Court's proposed amended Juror Qualification Form on the form itself and in track changes in enclosed brief NAACP memo.

Respectfully submitted,

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APPENDIX I

The NAACP Proposed New Rules

A. NAACP Proposed Rule §6-1003:

(1) The Sixth Amendment provides defendants in criminal cases with several fundamental procedural protections, including the right to an "impartial jury." The right to an impartial jury includes the right to a jury drawn from a jury pool and jury panel that reflects a fair cross-section of the community served by the trial court. Representative juries, especially ones with some racial or ethnic mix, have been shown to deliberate longer and have higher quality deliberations; and they also increase the public's confidence in the fairness and integrity of the judicial system.

(2) *State v. Perez* made clear that the "systematic exclusion" required by *Duren v. Missouri*'s third prong can be established by proof that the cause of the underrepresentation of a distinctive group was something "inherent in the jury selection process." Proof that a particular jury system policy or practice has caused the systematic exclusion of a distinctive group does not inquire into the court system's motivation. Unlike equal protection claims under the Fourteenth Amendment, Sixth Amendment fair cross-section challenges do not require proof of intentional or purposeful racial or gender discrimination.

(3) The court system's determination as to whether a jurisdiction is in compliance with the Constitution's fair cross-section requirement almost never requires it to provide the defendant with jurors' personal information or individual responses to the Juror Questionnaire's race/ethnicity question but only the anonymous, aggregate or cumulative demographic data as to the race-ethnicity-gender of those persons who were summoned and who comprised the jury pool and panel. As a result, Neb. Rev. Stat. §25-1673, which mandates nondisclosure of jurors' name (unless necessary

per §25-1678 or upon a showing of good cause) should only very rarely come into play with the implementation AOCP has planned of a 21st Century computer system that can electronically collect the demographic data and transmit it to defense counsel).

(4) Neb. Rev. Stat. §25-1678 recognizes that a defendant's counsel can only make an informed determination as to whether to pursue a fair cross-section challenge after securing and examining the jurisdiction's anonymous, aggregate demographic jury data over a period of time, usually six months but sometime a year. That requires the Court System to release jury data to defendants without precondition pursuant to their right to inspect the jurisdiction's jury data in "preparation" for filing a motion to quash the panel or other relief. Again, it is aggregate, historical jury data that is essential to proof of a fair cross-section challenge, typically the most recent 6-month or 1-year aggregate jury data that is available prior to defendant's trial date. Names and personally traceable information of jurors are not only not essential to making a fair cross-section challenge, they are also not relevant to one; and the aggregate, historical jury data will not threaten or compromise the privacy of prospective jurors. Because the data is essential to evaluating, making, and ruling on a motion to quash the pool or venire, and because jurors' privacy is not jeopardized by their answers to demographic questions regarding their race and ethnicity, responding to the question is no longer optional but is mandatory. Access to the jurisdiction's aggregate, historical jury data and jury data regarding defendant's own jury selection process should be routinely and promptly provided upon request to a defendant early in the pre-trial stage, subject only to the qualification that the defendant's right of access or inspection must occur at any reasonable time. §25-1678's legislative history and text make clear that there is no requirement that defendant must show "good cause" or "necessity" or meet any other precondition in order to secure the right to inspect jury data in the preparation of a motion to quash or for other relief.

B, NAACP Proposed Rule 6-1005

(1) *State v. Sanders*, a 2005 case during which time the Court System used paper questionnaires which did not collect race-ethnicity demographic data, appears to be inconsistent with our construction of §25-1678 and therefore must be addressed. Because the court system failed to collect demographic jury data, defense counsel requested the juror questionnaires for 2000-2002 so that counsel could compare their names to the DMV records on which persons self-identified their race, which was necessary to determine whether there was any systemic underrepresentation of "nonwhites." Because the questionnaires would disclose juror names, the Court held that the discovery request was properly denied because defendant had failed to prove "good cause" and "necessity" under §25-1673 that seeks to protect juror privacy. The Court rejected defendant's argument based on §25-1678, and it held that the discovery request was "premature"

because defendant lacked sufficient proof to make a "sworn statement of facts" in support of defendant's motion to quash.

(2) These facts should not recur in the future, as the Court System is committed to the establishment of record-keeping essential to the Constitution's guarantee of an Impartial Jury and an accused's right under the U.S. Supreme Court's Sixth Amendment jurisprudence that the jury be drawn from a fair cross-section of the community served by the trial court. That demands a 21st Century jury data collection and analysis system, and the monitoring thereof, so that representative jury pools and jury panels are achieved. At a minimum the jury data collected and compiled must include the race and ethnicity of the prospective jurors to whom the Questionnaire has been sent. Once the Court System has secured an updated computer system and electronic data collection has been implemented, the *Sanders* decision will be obsolete by virtue of technological advances. Nonetheless, upon thorough review for reasons we explained above , we have determined that *Sanders* must be overruled.

(3) The parties' and the Court's research failed to uncover and examine the legislative history of the Nebraska Jury Selection Act's §25-1678 and §25-1645 and the caselaw from other jurisdictions, including the United States Supreme Court's unanimous construction of the Federal JSSA, upon which the Nebraska JSA was modeled, in *Test v. United States*. *Test* held that a requirement that defendant demonstrate proof of underrepresentation before the defendant had any access to jury data was futile: "[W]ithout inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge." The *Sanders* Court did not attempt to construe §25-1673 and §25-1678 in harmony, and in failing to do so erroneously subordinated the defendant's right to jury data, which is a primary objective of the Jury Selection Act, to juror privacy interests that could have been fully protected through a protective order or other means. In light of these sections' legislative history and the *Test* case, *Sanders* was wrong; and it is hereby overruled and is no longer of any precedential value. Accordingly, Neb. Rev. Stat. §25-1678 and §25-1673 will be construed to allow defendants unqualified pretrial access to historical, aggregate jury data readily and without precondition per §25-1678.

(4) Alternatively, it appears to the Court that *Sanders* was legislatively overruled in 2020, when the Legislature substituted the phrase "the Jury Selection Act" for the "as herein provided" in §25-1673. That amendment leaves no doubt that defendants' right of access to jury data under §25-1678 constitutes an exception to §25-1673's nondisclosure bar, effectively overruling *State v. Sanders* as of its enactment in 2020.

C. NAACP Proposed Rule 6-1006

(1) Upon installation of a 21st Century computer system and software, the Nebraska Court System will collect race-ethnicity-gender demographic data at each step in the jury selection process and will make that data available to defendants upon request with no precondition; and the Court System will also make such data available to the public by posting it on the Judicial Branch's webpage online semi-annually.

(2) Disclosure of aggregate, historical jury data can be accomplished in computerized data collection systems without revealing the names or personal identifying information of jurors. Disclosure of anonymous, aggregate historical jury data avoids any conflict between the two statutes. Thus, in the future, defendants will seldom need to access juror questionnaires, but when such a need does arise, §§25-1678 and 25-1673 are hereby construed so that disclosure will be ordered and the juror questionnaires or jury lists redacted and disclosure permitted without showing of precondition; if redaction by court staff is not possible, disclosure of the questionnaires should be made without precondition but pursuant to a protective order. In sum, defense counsel's access to jury data pursuant to §25-1678 cannot be subordinated to §25-1673's requirement of good cause for disclosure.

(3) The trial judge retains discretion to limit the breadth of disclosure and pace the timing of disclosure of juror-related records. Not all juror-related records in the court's possession will bear on whether there has been noncompliance with defendant's fair cross-section right. To the extent that the non-relevant information cannot reasonably be segregated from the data to which litigants are entitled under the JSA, the trial court will have to exercise its discretion in deciding how best to protect it (*e.g.*, protective order, "attorneys' eyes only" restrictions, redaction of jurors' names, etc.). While always mindful of a defendant's speedy trial right, the trial judge may order disclosure of records incrementally in determining what information, which is otherwise confidential, might be relevant for "the preparation or presentation of a motion."

(4) Although it should rarely occur once Nebraska has put in place a 21st century computer system and jury management software, if a defendant's discovery motion should seek disclosure of jurors' names or any personal identifying information, the exception in Neb. Rev. Stat. §25-1673 that provides for disclosure per §25-1678 would afford the trial judge discretion to release the data incrementally, which may make it unnecessary to disclose any juror's name, or to issue a protective order that would prohibit disclosure of juror names to any other person than to the party who obtained the order. An example of when it might be necessary during an interim period awaiting the installation of the new computer system could involve a defendant's challenge based on Hispanic ethnicity and the court system records are found to be inadequate to accurately determine the number and percentage of Hispanic jurors that were summoned and who were in its jury pool and jury panel. In such a case, the court system should examine the juror questionnaires for

persons with Spanish surnames and provide defendant with its count of the number of such persons, less non-Hispanic women who in marriage took a Spanish surname. Even in this instance disclosure of jurors' names and personal information to the defendant would not appear necessary as the Court System could review the questionnaires and provide defendant with the count of Hispanic surnames persons or could redact all information but the names and the trial judge could enter a protective order.[34]

APPENDIX II

The Iowa Office of State Court Administration
Calendar Year 2023 Demographic Jury Data Excel Spreadsheets

The Iowa Office of State Court Administration (OSCA) jury demographic data reports for calendar year 2023 (January – December 2023) will be submitted separately in the original Excel spreadsheet format (rather than as a PDF). The Excel spreadsheets have a user-friendly "button" feature at the bottom of the page that conveniently allows the user to access the juror data as follows: Introduction, State Pool Race, Pool MR (Multi-racial) Breakdown, State Criminal Panel Race, Crim Panel MR (Multi-racial) Breakdown, Criminal Empanelment Results.

A. OSCA Calendar Year 2023 Jury Data for All 99 Counties

B. OSCA Calendar Year 2023 Jury Data for Counties with Largest Black Jury-Eligible Populations

C. OSCA Calendar Year 2023 Jury Data for Counties with Larges Hispanic Jury-Eligible Populations

APPENDIX III

NAACP Analysis of OSCA Calendar Year 2023 Jury Data for Counties with the Largest Black Jury-Eligible Populations

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[34] The Berkeley Legal Clinic has recently completed an exhaustive, state-by-state study of jury management practices nationwide, the first such national study of court systems' actual practices regarding jury data collection and made eight recommendations. Semel et al., *Guess Who's Coming to Jury Duty?: How the Failure to Collect Juror Demographic Data Contributes to Whitewashing the Jury Box*, Executive Summary, pp. viii-ix, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/failure-to-collect-juror-demographic-data-contributes-to-jury-whitewashing/ (2024). The NAACP's recommendations for reform in Nebraska, discussed above, were arrived at independently of the BLC's recommendations and have been crafted to fit Nebraska's history, demographics, caselaw, and circumstances; but they are consistent with those of the BLC.

A. NAACP Analysis of OSCA Calendar Year 2023 Jury Data for Counties with the Largest Black Jury-Eligible Populations

Attached as separate page 53 below.

B. NAACP Analysis of OSCA Calendar Year 2023 Jury Data for Counties with the Largest Hispanic Jury-Eligible Populations

Attached as separate page 54 below.

NAACP Analysis of OSCA Calendar Year 2023 Jury Data for Counties with the Largest Black Jury-Eligible Populations

Iowa Office of State Court Administration Juror Data, January-December, 2023: Black Jurors The % of Persons who checked "Black/African American" box on Juror Questionnaire as compared (at jury pool, jury panel, trial jury stages) to **% of Census jury-eligible population "Black/African American alone"** (U.S. Citizens 18 years of age and older), State Data Center, https://www.iowadatacenter.org/index.php/data-by-source/american-community-survey/nativity-and-citizenship-status-race-and-ethnicity. "Jury pool": those who are eligible for jury service (i.e., not disqualified, excused, or postponed) and waiting to be called for a specific court data. "Jury panel" are jurors who reported for service and were assigned to a court room.

County	B%-J-E Pop.	B% Jury Pool	B% Jury Panel	B% Trial Jurors	Panel Stat. Significance
Black Hawk	8.0%	10.3%	7.7%	8.8% (59/673)	
Des Moines	4.3%	5.1%	2.4%	3.2% (6/188)	
Dubuque	2.5%	2.9%	2.1%	2.5% (6/241)	
Johnson	4.3%	7.3%	5.2%	3.9% (8/207)	
Linn	4.1%	5.4%	3.4%	4.2% (20/475)	
Polk	5.5%	6.0%	3.9%	3.7% (20/546)	0.03 < 0.16
Scott	6.1%	7.6%	4.3%	6.9% (29/418)	
Woodbury	3.2%	3.4%	2.5%	2.8% (8/282)	

Jury Pools. The Black representation % on each of the 8 Counties was higher than the Black jury-eligible Census population %. Each County was fully "representative" at the Jury Pool stage.

Jury Panels. Only Johnson County had a Black population percentage at the Jury Panel stage that was at or above the Black jury-eligible Census population percentage (5.2% > 4.3%). However, 4 of the Counties still had Black population percentages on the actual 12-person trial juries that were higher than the Black jury-eligible Census population percentage: Black Hawk; Dubuque; Linn; and Scott. The Des Moines, Polk, and Scott Jury Panel stage had Black population percentages that were nearly 2% below their jury-eligible Census populations: Des Moines (2.4% < 4.3%); Polk (3.9% < 5.5%); and Scott (4.3% < 6.1%). Scott made a remarkable recovery, with its Black trial jurors representing 6.9% of all jurors, well above its 6.1% Black jury-eligible Census population.

Trial Jurors. In 4 of the 8 Counties the Black % of trial jurors was equal to or greater than the Black % of the County's jury-eligible Census population: Black Hawk, 8.8% > 8.0%; Dubuque, 2.5% = 2.5%; Linn 4.2% > 4.1%; and Scott, 6.9% > 6.1%. In all 4 of these counties the Black % of the Jury Panel was less than the Black % of jury- eligible Census population. In Johnson (3.9% < 4.3%) and Woodbury (2.8% < 3.2%) Counties the Black % of jurors was only 0.004 less than the jury-eligible Census population %. In Polk Blacks comprised 3.7% (20/546 = .0366) of jurors compared to their 5.5% of the jury-eligible Census population; 2 standard deviations below expectations in a random process (0.0312 > 0.025). In Des Moines County Blacks comprised 3.2% (6/188 = 0.0319) of jurors compared to their 4.3% of the jury-eligible Census population, but not statistically significant.

NAACP Analysis of OSCA Calendar Year 2023 Jury Data for Counties with the Largest Hispanic Jury-Eligible Populations

Iowa Office of State Court Administration Juror Data, January – December, 2023: Hispanic Jurors
The % of Persons who checked "Hispanics alone" box on Juror Questionnaire as compared (at jury pool, jury panel, trial jury stages) to **% of Census jury-eligible population "Hispanics alone":** (Persons 18 years of age and older who are U.S. Citizens). **State Data Center web page** https://www.iowadatacenter.org/index.php/data-by-source/american-community-survey/nativity-and-citizenship-status-race-and-ethnicity. . "Jury pool": those who are eligible for jury service (i.e., not disqualified, excused, or postponed) and waiting to be called for a specific court data. "Jury panel" are jurors who reported for service and were assigned to a court room.

County	H% J-Eligible	H% Jury Pool	H% Jury Panel	H% Trial Jurors	Stat. Significance
Buena Vista	15.5%	18.1%	15.4%	23.1% (3/13)	
Crawford	14%	13.8%	9.4%	8.3% (1/12)	
Johnson	4%	4.6%	4.6%	6.3% (13/205)	
Linn	2.6%	2.7%	2.90%	2.9% (14/475)	
Marshall	13.6%	13.2%	10.6%	16.5% (23/139)	
Muscatine	13.2%	10.8% (1303/12011)	9.9%	10.7% (6/56)	Yes.2.98E-15< .025
Polk	4.8%	6.3%	5.7%	60% (323/550)	
Scott	5.3%	4.9%	5.1%	5.3% (22/419)	
Woodbury	10.9%	9.9%	10.1%	8.5% (24/283)	

Trial Jurors: The Hispanic % of trial jurors in 6 of the 9 Counties was at or above the Hispanic % of the jury-eligible population, including all of the larger Counties: Buena Vista, Johnson, Linn, Marshall, Polk, and Scott. Crawford, Muscatine, and Woodbury were below, but Crawford had only 1 trial, Muscatine had 4. The Hispanic % on Woodbury juries was 8.5% compared to 10.9% J-E.

Jury Pools: The Hispanic % of jury pools was at or above the Hispanic % of the jury-eligible population in 5 of the 9 counties: Buena Vista, Crawford, Johnson, Linn, and Polk. Two counties with jury pools below J-E% had trial juries that were above the J-E%: Marshall and Scott. Muscatine and Woodbury were below, and the underrepresentation of Hispanics on Muscatine jury pools was statistically significant at the 2 standard deviation level.

Jury Panels: 4 of the Counties whose Hispanic Jury Pool % was at or above the Hispanic % of the jury-eligible population also had Jury Panels above the J-E population: Buena Vista, Johnson, Linn, and Polk; Jury Panels in Marshall and Scott were below the J-E% but their trial juries were above. Crawford, Muscatine, and Woodbury jury panels were below J-E%.