

John Morrill, Clerk of the Court
United States District Court
Southern District of California
333 West Broadway, Suite 420
San Diego, CA 92101

Dear Clerk of the Court for the United States District Court for the Southern District of California:

We are leading law professors and social scientists actively engaged in jury system research. We have written articles, conducted studies, and consulted with court systems on the process of jury selection. We have reviewed the Jury Selection Plan for the United States District Court for the Southern District of California and have identified nine modifications that would improve the Court's ability to assemble racially and ethnically diverse jury pools:

1. Designate source lists in addition to the underrepresentative voter registration list.
2. Refill the jury wheel annually, rather than every two years.
3. Direct the Clerk to regularly submit the names on the master and qualified wheels to the national change-of-address database of the United States Postal Service to be corrected.
4. Direct a follow-up notice to be sent to potential jurors who fail to respond to the jury qualification notice or summons.
5. Direct a replacement jury qualification notice to be sent to the same zip code when a jury qualification notice or summons is returned as undeliverable or is not returned.
6. Adopt a one-step summoning process by combining the jury qualification notice and summons.
7. Incorporate a reference to a litigant's entitlement to access jury selection records under the Jury Selection and Service Act of 1968.
8. Direct the Clerk to conduct periodic examinations of racial and ethnic diversity in the jury pool.
9. Specify which jury selection records will be preserved and made available to litigants preparing a motion challenging the composition of the jury pool.

Racially and ethnically diverse jury pools are necessary to produce juries selected from a fair cross-section of the community, a right that is guaranteed by the Sixth Amendment of the Constitution, the federal Jury Selection and Service Act of 1968, and this Jury Plan's policy. Diverse jury pools also encourage public confidence in the justice system and may improve the quality of jury deliberations.

Our recommendations are based on our own jury expertise and scholarship, as well as recommendations of the Ninth Circuit's Jury Trial Improvement Committee, and best practices identified by the American Bar Association's *Principles for Juries & Jury Trials* and the National Center for State Courts, a national authority on judicial administration.

Recommendation 1: Designate source lists in addition to the underrepresentative voter registration list.

Current plan language: “Source Lists (See 28 U.S.C. §§ 1861 and 1863(b)(2) and (3)): Voter Registration Lists: The Court finds that county voter registration lists represent a fair cross section of the citizens residing within the communities in the Southern District of California.” Section 2.01.

Recommended modification: Add other source lists.

Why this modification will help ensure or protect jury diversity: The voter registration list underrepresents people of color, and a jury pool created from this list will likely be racially and ethnically underrepresentative.

The most recent data from the United States Census shows that in California the voter registration rate varies by race and ethnicity. Specifically, the voter registration rate for the White non-Hispanic population is 66.8%, but the voter registration rate for the Black non-Hispanic population is 55.5%, the rate for the Hispanic population is 39.7%, and the rate for the Asian population is 39.5%.¹ County-specific data reflects that in San Diego county, for example, the total voter registration rate is 77.2%, but the Latino voter registration rate is 67.9%, and the Asian-American registration rate is 47.1%.² A jury pool constituted from the voter registration list therefore likely underrepresents people of color, and the use of additional lists has the potential to improve the diversity of the jury pool.³

For this reason, the Ninth Circuit Jury Trial Improvement Committee recommended “that voter registration lists should be supplemented in order to increase inclusiveness and to provide better representation of the adult citizen population who are qualified to serve as jurors.”⁴ The

¹ United States Census Bureau, *Voting and Registration in the Election of November 2018*, Table 4b “Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2018.” (See Appendix A for internet link to document.)

² California Civic Engagement Project, Univ. of Southern California, Sol Price School of Public Policy, Table 5 “California Registration Rates by Race/Ethnicity and County, 2018 Primary Election.” (See Appendix A for internet link to document.) In Imperial County the total population’s voter registration rate is only 56.6%. *Id.*

³ One member of this Court made a related point in *United States v. Hernandez-Estrada*, 2011 WL 1119063, at *4 (S.D. Cal. 2011) (“the Court agrees that supplementation of the District’s source list with DMV lists would result in greater inclusiveness, and potentially, better representation of minority groups that do not register to vote in the same proportion as non-Hispanic whites”).

⁴ Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations* at 4 (adopted by the Judicial Council of the Ninth Circuit, May 2004). (See Appendix A for internet link to document.)

Committee recognized that “in California . . . voter registration lists . . . over-represent Caucasian populations.”⁵

Indeed, one member of this Court has suggested that “[t]he District should give serious consideration to adopting the recommendation of the Ninth Circuit Jury Trial Improvement Committee (“Committee”) to supplement voter registration lists with DMV lists to increase inclusiveness and provide better representation of the jury-eligible population.”⁶ That recommendation can be implemented by modifying this Court’s proposed jury plan. The use of additional source lists is consistent with the Jury Selection and Service Act of 1968, which mandates that District courts “shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by” the statute’s policy goals of securing a jury selected from a fair cross-section of the community and prohibiting discrimination. 28 U.S.C. § 1863(b)(2).

Accordingly, the jury plan for the United States District Court for the Northern District of California states that: “To foster the policy and protect the rights secured by 28 U.S.C. §§ 1861 and 1862, driver’s license and state ID information will be used to supplement voter record information for the creation of master jury wheels,” and notes that “[a]dditional sources may be added in the future if feasible.”⁷

Similarly, the United States District Courts for the Central and Eastern Districts of California require other source lists in addition to the voter registration list. The jury plan for the Eastern District creates the jury pool from “voter registration lists and the State of California Department of Motor Vehicles records,”⁸ and the plan for the Central District states that “[t]he names of prospective jurors shall be drawn from the names of registered voters, licensed drivers, and holders of California Identification Cards (issued by the California Department of Motor Vehicles)”⁹

Many other federal district courts use the drivers’ license and state identification card lists in addition to voter registration lists to create a master jury wheel that includes a fair cross-section of the community.¹⁰ Some federal district courts use additional lists, such as persons who have

⁵ *Id.* (citation omitted).

⁶ *United States v. Hernandez-Estrada*, 2011 WL 1119063, at *12 (S.D. Cal. 2011).

⁷ United States District Court for the Northern District of California, *Plan for the Random Selection of Grand and Petit Jurors*, Gen. Order No. 6, Part V (Aug. 7, 2017). (See Appendix A for internet link to document.)

⁸ United States District Court for the Eastern District of California, *Jury Management Plan*, Section 2.01 (Jan. 25, 2016). (See Appendix A for internet link to document.)

⁹ *The Plan of the United States District Court, Central District of California, for the Random Selection of Grand and Petit Jurors*, General Order No. 19-07, Part 4 at pg. 2, lines 23-25 (July 15, 2019). (See Appendix A for internet link to document.)

¹⁰ See, e.g., United States District Court for the Eastern District of Texas, *Amended Plan for the Random Selection of Jurors in all Divisions*, Part 4 (April 4, 2019) (“Because it is not clear that

voter registration lists . . . alone provide litigants in the divisions in the Eastern District of Texas with a fair cross section of relevant communities (divisions), the Court finds that in order to foster the statutory policies of 28 U.S.C. §§ 1861 and 1862 in this district, it is necessary pursuant to 28 U.S.C. § 1862(b)(2) to supplement these lists of registered voters with lists of licensed drivers from all counties within each division”); *Revised Plan of the United States District Court for the District of Delaware for the Random Selection of Grand and Petit Jurors*, Part 4 (Jan. 1, 2019) (“This Court hereby finds that, in order to best effectuate the Act’s goal of having juries re[represent a fair cross-section of the community in the District of Delaware, the names of grand and petit jurors . . . shall be selected at random from data identifying all registered voters, licensed drivers, and individuals who are issued a State identification card”); *see also, e.g.*, United States District Court for the Eastern District of Washington, *Plan for the Random Selection of Grand and Petit Jurors*, Part 2.01 (Jan. 1, 2017) (creating jury wheel from voter registration lists “along with drivers license and identification card lists”); United States District Court for the District of Idaho, *Plan for the Random Selection of Grand and Petit Jurors*, Part 2.01 (Aug. 11, 2017) (creating jury wheel from voter registration lists “along with drivers license and identification card lists”); United States District Court for the District of Montana, *Jury Plan*, Section 2.01 (Feb. 2019) (creating jury wheel from “general election registered voters, licensed drivers and state identification card holders”); United States District Court for the Western District of Michigan, *Juror Selection Plan*, Part 6(a) (Nov. 19, 2013) (creating jury wheel from “persons over the age of 18 licensed by the Michigan Secretary of State to drive motor vehicles; and iii. persons over the age of 18 who have been issued a personal identification card by the Michigan Secretary of State”) (See Appendix A for internet links to documents.).

applied for or received unemployment insurance, recipients of Aid to Families with Dependent Children, or tax filers.¹¹ Similarly, the state of California has recently passed legislation adding the list of resident state tax filers as a source list for the state jury pool.¹²

These jury plans are consistent with the recommendation of the American Bar Association's *Principles for Juries & Jury Trials* that the pool of potential jurors should be drawn from at least two source lists.¹³ As the relevant comment observed: "Obviously if that [source] list is not representative of a cross-section of the community, the process is constitutionally defective ab initio."¹⁴ The National Center for State Courts has likewise recognized that a jurisdiction's "choice of source lists is an important policy decision . . . insofar that it establishes the inclusiveness and the initial demographic characteristics of the potential jury pool."¹⁵

¹¹ See, e.g., United States District Court for the Western District of New York, *Jury Plan*, at 2 (April 2018) (voter registration lists can be supplemented with "Lists of licensed drivers maintained by the New York State Department of Motor Vehicle('DMV'); Lists of persons receiving New York State Unemployment Insurance Benefits from the New York State Department of Labor; Lists of recipients of Home Relief and recipients of Aid to Families with Dependent Children from the New York State Office of Temporary & Disability Assistance; List of filers of IT-100 Fast Form, IT-200 or IT-201 Resident Income Tax Return, IT-214 Claim for Real Property Tax Credit, or IT-203 Nonresident and Part-Year Resident Income Tax Return from the New York State Department of Taxation and Finance."); United States District Court, Northern District of Illinois, Plan for Random Selection of Jurors, Part 5(a) (Jan. 8, 2020) (jury wheel should include the voter registration list as well as "lists of persons licensed by the Illinois Secretary of State to drive motor vehicles and persons to whom the Illinois Secretary of State has issued a personal identification card, and lists of persons who have applied and/or received unemployment insurance from the Illinois Department of Employment Security within the last two years."). (See Appendix A for internet links to documents.)

¹² S. 592, 2020 Leg., Reg. Sess. (Cal. 2020) (Senate Bill No. 592, An act to amend Section 197 of the Code of Civil Procedure, and to amend Section 19542 of, and to add Sections 19548.4 and 19585 to, the Revenue and Taxation Code, relating to juries, approved by Governor, September 28, 2020; Filed with Secretary of State, September 28, 2020; in effect on January 1, 2022). (See Appendix A for internet link to document.)

¹³ American Bar Association, American Jury Project, *Principles for Juries & Jury Trials*, 51 (2005) ("Principle 10(A)(1): The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction."). The ABA Principles were endorsed by the Conference of Chief Justices, a body composed of the chief justices of each state supreme court. Conference of Chief Judges, Resolution 14: In Support of the American Bar Association Principles for Juries and Jury Trials, adopted as proposed by the Court Management Committee at the 29th Midyear Meeting on January 18, 2006. (See Appendix A for internet links to documents.)

¹⁴ *Id.* at 54, quoting *People v. Wheeler*, 583 P.2d 748, 759 (Cal. 1978).

¹⁵ Mize, Honorable Gregory (ret.), Paula Hannaford-Agor, and Nicole Waters, *The State-of-the-States Survey of Jury Improvement Efforts: Compendium Report*, 13, National Center for State

Recommendation 2: Refill the jury wheel annually, rather than every two years.

Current plan language: “The Clerk of Court will create and maintain a master jury wheel. In accordance with 28 U.S.C. § 1863(b)(4), the Clerk is directed to empty and refill the master jury wheel by the first of May every two years after the general national elections.” Section 1.08.

Recommended modification: Increase the frequency with which the Clerk refills the jury wheel to every year.

Why this modification will help ensure or protect jury diversity: A jurisdiction that updates the jury wheel every two years will miss the potential jurors who change residences within that two-year period. Those missing jurors are more likely to be people of color because renters change residences more frequently than homeowners;¹⁶ and there is racial disparity in homeownership rates.¹⁷ Updating the jury wheel more frequently allows for the inclusion of more of these potential jurors.

Courts (April 2007). (See Appendix A for internet link to document.)

¹⁶ United States Census Bureau data from 2017 demonstrates that the “mover rate for renters (21.7 percent) was higher than for owners, which was 5.5 percent.” Derick Moore, Senior Communications Specialist, U.S. Census Bureau, *Overall Mover Rate Remains at an All-time Low*, by (Dec. 21, 2017); *id.* (“The highest mover rates by race were the black or African-American alone population, while the lowest were the non-Hispanic white population.”). (See Appendix A for internet link to document.)

¹⁷ According to the United States Census Bureau, “[h]omeownership in the US varies significantly by race and ethnicity. In 2019, the homeownership rate among white non-Hispanic Americans was 73.3%, compared to 42.1% among Black Americans.” Homeownership rates show that Black Americans are currently the least likely group to own homes, USA Facts, Source: U.S. Census Bureau, Housing Vacancies and Homeownership (July 28, 2020), updated Oct. 16, 2020); *see also* U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Third Quarter 2020, Release Number: CB20-153, Table 7. Homeownership Rates by Race and Ethnicity of Householder: 2016 to 2020; *see also* Robin E. Schulberg, *Katrina Juries, Fair Cross-Section Claims, and the Legacy of Griggs v. Duke Power Co.*, 53 Loy. L. Rev. 1, 21 (2007) (“African-Americans . . . have a higher mobility rate than whites, a disparity apparently associated with a higher rate of poverty and a lower rate of home ownership. Therefore, the failure to update addresses will disproportionately impact the rate at which African-Americans will receive jury mailings.”); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. Rev. 707, 714 (1993) (“Because minorities are statistically more mobile than whites, a greater percentage of minorities than whites never receive jury questionnaires mailed to outdated addresses.”) (footnotes omitted). (See Appendix A for internet links to documents.)

The American Bar Association's *Principles for Juries & Jury Trials* recommends that jurisdictions update their juror lists "at least annually."¹⁸ Consistent with that recommendation, the jury plans for the United States District Courts for the Central and Eastern Districts of California require the jury wheel to be refilled once a year.¹⁹ Other federal district courts similarly require the jury wheel to be annually refilled.²⁰

Semi-annual updates of the jury wheel have even more potential to increase diversity. The National Center for State Courts recommends that "[c]ourts that are located in states or metropolitan areas with higher than average migration rates should consider creating or updating their master jury lists even more frequently (e.g., semi-annually or quarterly) if feasible."²¹

Recommendation 3: Direct the Clerk to regularly submit the names on the master and qualified wheels to the national change-of-address system of the United States Postal Service to be corrected.

Current plan language: (No relevant language.)

Recommended modification: Add an instruction to the Clerk of Courts to regularly submit the names on the master and qualified wheels to the national change-of-address (NCOA) system of the United States Postal Service to be corrected.

Why this modification will help ensure or protect jury diversity: Jury diversity is diminished when a jurisdiction has out-of-date addresses on its jury wheels. This is because renters change residences more frequently than homeowners;²² and there is racial disparity in homeownership

¹⁸ American Bar Association, American Jury Project, *Principles for Juries & Jury Trials*, 51 (2005) (Principle 10(A)(1)). (See Appendix A for internet link to document.)

¹⁹ *The Plan of the United States District Court, Central District of California, for the Random Selection of Grand and Petit Jurors*, General Order No. 19-07, Part 5 at pg. 4, lines 23-24 (July 15, 2019) ("Each Master Jury Wheel shall be emptied and refilled annually prior to January 1."); United States District Court for the Eastern District of California, *Jury Management Plan*, Section 1.08 (Jan. 25, 2016). ("In accordance with 28 U.S.C. '1863(b)(4), the Clerk is directed to empty and refill the master jury wheels by October 1st each year . . ."). (See Appendix A for internet links to documents.)

²⁰ See, e.g., United States District Court for the District of Massachusetts, *Plan for the Random Selection of Jurors*, Section 6(a)(iv) (Nov. 1, 2015) ("The Clerk shall empty and refill the Master Jury Wheel once every year during the period between January 1st and April 30th in conformance with this Plan or at more frequent intervals as deemed necessary or expedient by the Clerk under the supervision of the Chief Judge."); United States District Court for the Western District of New York, *Jury Plan*, at 3 (April 2018) ("Each Master Jury Wheel shall be emptied and refilled at least annually . . ."). (See Appendix A for internet links to documents.)

²¹ National Center for State Courts, Jury Managers' Toolbox: *Best Practices to Decrease Undeliverable Rates*, 1 (2009). (See Appendix A for internet link to document.)

²² See note 16.

rates.²³ Many of these out-of-date addresses can be corrected by using the NCOA database. According to the then-Director of the Center for Jury Studies at the National Center for State Courts, “[a]necdotal reports from commercial jury vendors suggest that NCOA address verification returns 10% to 15% of records” from the master jury list with an updated or corrected address.²⁴

The Ninth Circuit Jury Trial Improvement Committee recognized that “transitory populations” and “the high number of undeliverable questionnaires” “have a negative impact on the extent to which the juror source lists accurately represent populations in the districts.”²⁵ “In light of these findings,” the Ninth Circuit Jury Trial Improvement Committee recommended “that courts have the people constructing the master jury wheel run the names through the National Change of Address System (NCOA)”²⁶ Other commissions charged with improving jury yield and racial representation in the jury pool have also recommended the use of the NCOA database.²⁷

Indeed, one member of this Court has agreed that “[t]he District should also follow the Committee’s recommendation to run addresses on the source list through the National Change of Address System.”²⁸

Employing the NCOA database is cost-efficient. As the Ninth Circuit Jury Trial Improvement Committee pointed out, “[t]he cost of using NCOA is usually only a few hundred dollars, a cost that can quickly be recouped by reducing the number of undeliverable questionnaires.”²⁹

²³ See note 17.

²⁴ Paula Hannaford-Agor, Jury News: “Neither Snow, nor Rain, not Heat, nor Gloom of Night Stays These Couriers from the Swift Completion of Their Appointed Rounds,” 25 Ct. Management., no. 3, at 66 (2010). (See Appendix A for internet link to document.)

²⁵ Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations* at 4, 5 (adopted by the Judicial Council of the Ninth Circuit, May 2004). (See Appendix A for internet link to document.)

²⁶ *Id.* at 5.

²⁷ See, e.g., Washington State Jury Commission, *Report to the Board for Judicial Administration*, at ix (2000), (Recommendation 4: “The combined list should be processed through a National Change of Address program in order to obtain updated address information before mailing.”); J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 Hastings L. J. 1433, 1438 (1996) (“The Judicial Council should adopt a Standard of Judicial Administration recommending use of the National Change of Address system to update juror source lists.”). (See Appendix A for internet link to document.)

²⁸ *United States v. Hernandez-Estrada*, 2011 WL 1119063, at *12 (S.D. Cal. 2011).

²⁹ Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations* at 5 (adopted by the Judicial Council of the Ninth Circuit, May 2004). (See Appendix A for internet link to document.)

The National Center for State Courts has echoed that conclusion because “[i]n almost every instance, the savings in printing and postage costs greatly exceed the cost of the NOCA update.”³⁰

The process of correcting addresses through the NCOA database is also fast and safe. “Typically, NCOA vendors can process and return update lists electronically 24 to 48 hours after receipt. After completing the NCOA updates, the vendor is required by its licensing agreement with the U.S. Postal Service to destroy all copies of the mailing list it received from the customer.”³¹

Adding this requirement to the jury plan helps ensure that the NCOA database is used on a regular basis to update addresses. For example, the United States District Court for the District of Massachusetts includes in its jury plan the requirement that “[t]he Clerk shall submit the names on the Master Jury Wheel and the Supplemental Jury Wheel twice a year to be updated through the national change-of-address system of the United States Postal Service and corrected as appropriate before issuing summonses.”³²

Recommendation 4: Direct a follow-up notice to be sent to potential jurors who fail to respond to the jury qualification notice or summons.

Current plan language: “The Clerk will mail a juror qualification questionnaire notice to every person randomly selected pursuant to Section 3.01 of this plan. 28 U.S.C. § 1864(a).” Section 3.02.

Recommended modification: Add an instruction that when a jury qualification notice or summons is not returned, a follow-up notice shall be sent to that person.

Why this modification will help ensure or protect jury diversity: There is evidence that African-Americans and Latinos fail to respond to jury summons at a disproportional rate.³³ This is due to

³⁰ Paula Hannaford-Agor, Jury News: “Neither Snow, nor Rain, not Heat, nor Gloom of Night Stays These Couriers from the Swift Completion of Their Appointed Rounds,” 25 Ct. Management., no. 3, at 66 (2010). (See Appendix A for internet link to document.)

³¹ *Id.*

³² United States District Court for the District of Massachusetts, *Plan for the Random Selection of Jurors*, Section 6(c) (Nov. 1, 2015) (See Appendix A for internet link to document.)

³³ See *Israel v. United States*, 109 A.3d 594, 604 (D.C. 2014) (“The expert reports that were before the court indicated that African Americans were overrepresented . . . among those who failed to respond to a summons for an unknown reason.”); *United States v. Murphy*, No. 94 CR 794, 1996 WL 341444, at *1 (N.D. Ill. June 18, 1996) (“African-Americans from economically poor zip codes had a substantially lower response rate (60%) to the questionnaires than whites from relatively wealthy zip codes (92%).”); *United States v. Reyes*, 934 F. Supp. 553, 562 (S.D.N.Y. 1996) (evidence showed that “blacks and Hispanics constitute a substantially higher percentage of the group of people who did not return questionnaires than of the group of people who did”); *Com. v. Fryar*, 680 N.E.2d 901, 907 (Mass. 1997) (“[T]he representation of Blacks and Hispanics in the jury pool was adversely affected because the communities with the highest

correlations between race and economic status; when income is controlled for, the response rate for African-Americans and Latinos is the same as whites.³⁴ Sending a follow-up notice can have a dramatic effect on non-response rates.

Research by the National Center for State Courts has shown that courts that send a follow-up notice have an ultimate non-response rate that is 34% to 46% lower than courts that do not send a reminder.³⁵ In Los Angeles, for example, 41% of summonsed jurors failed to appear for jury service when the jurisdiction sent only a single summons.³⁶ But when the court sent a follow-up, the failure to appear rate dropped to just 2.7%.³⁷ Other jurisdictions have enjoyed similar results.³⁸ And the National Center for State Courts has concluded that “non-response and failure-to-appear rates” are some of the “components of jury yield that offer the most potential for

percentage of Blacks and Hispanics have the highest nonresponse rate.”); 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, 775 (2011) (finding “disproportionately high nonresponse rates for predominantly African-American neighborhoods in Wayne County, Michigan”).

³⁴ 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, 774 (2011) (“Failure-to-appear rates are likewise highly correlated with socioeconomic status. . . . Because race, ethnicity, and socioeconomic status are so highly correlated, the effect on the jury pool is that disproportionately fewer minorities serve as jurors.”); Ronald Randall, James A. Woods, & Robert G. Martin, *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 Just. Sys. J. 71, 81 (2008) (Toledo, Ohio study found that “the distribution among whites, blacks, and Hispanics who ignore summonses is similar to their distribution in the general population”).

³⁵ Paula Hannaford-Agor, *An Overview of Contemporary Jury System Management*, National Center for State Courts, Center for Jury Studies, 6 (May 2011); Mize, Honorable Gregory (ret.), Mize, Honorable Gregory (ret.), Paula Hannaford-Agor, and Nicole Waters, *The State-of-the-States Survey of Jury Improvement Efforts: Compendium Report*, at 22, Tbl. 16., National Center for State Courts (April 2007). (See Appendix A for internet links to documents.)

³⁶ 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, 785 (2011) (citing Los Angeles County, CA 2003 Summons Sanction Program (on file with author)).

³⁷ *Id.*

³⁸ See, e.g., *Improving Juror Response Rates in the District of Columbia: Final Report*, Council for Court Excellence, Mar. 2006, at 17 (follow-up in Kings County, New York reduced non-response rate from 55% to 24%); 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, 784–85 (2011) (follow up in Eau Claire, Wisconsin reduced non-response rate from 11% to 1%). (See Appendix A for internet link to document.)

effective control” by the court.³⁹ As a result, some courts have recommended that the state follow-up on non-responses, in order to improve the diversity of the jury pool.⁴⁰

The Ninth Circuit Jury Trial Improvement Committee similarly recommended “that district courts issue a second summons to non-responding citizens.”⁴¹ The Committee recognized that “[r]esearch has found that the most effective way to increase response rates is to send a follow up mailing to non-respondents.”⁴²

Moreover, following up on non-responders can be a low-cost initiative. For example, California’s Riverside County increased jury participation by sending reminder postcards and concluded that they could expect one additional prospective juror to arrive at the courthouse for every ten postcards mailed.⁴³ Since postcard stamps are inexpensive (even less if by bulk rate), and postcards are inexpensive to print, the court found it could expend as little as about two or three dollars per additional juror.

Recommendation 5: Direct a replacement jury qualification notice to be sent to the same zip code when a notice is returned as undeliverable or is not returned.

Current plan language: “The Clerk will mail a juror qualification questionnaire notice to every person randomly selected pursuant to Section 3.01 of this plan. 28 U.S.C. § 1864(a).” Section 3.02.

Recommended modification: Add an instruction that when a jury qualification notice is returned as undeliverable, a replacement notice shall be sent to a different person on the jury wheel from

³⁹ Paula Hannaford-Agor, *An Overview of Contemporary Jury System Management*, National Center for State Courts, Center for Jury Studies, 5 (May 2011); *see also* Judge William Caprathé (ret.) et al., *Assessing and Achieving Jury Pool Representativeness*, at 3, *The Judges' Journal*, American Bar Association, V. 55, No. 2 (Spring 2016) (Describing the “refusal to answer summonses” as a factor that “may be affected by jury pool management.”). (See Appendix A for internet links to documents.)

⁴⁰ *See, e.g., United States v. Royal*, 174 F.3d 1,12-13 (1st Cir. 1999) (“The District of Massachusetts may wish to consider whether . . . sending follow-up postcards to prospective jurors who do not return their qualification forms, would serve the goals of [the Sixth Amendment].”) (footnote omitted); *State v. Tremblay*, No. P1 97-1816AB, 2003 WL 23018762, at *5 (R.I. Super. Mar. 19, 2003) (recommending “more productive follow-ups with respect to prospective jurors who do not return their qualification forms” “to increase jury participation . . . by inner city minority residents”).

⁴¹ Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations* at 7 (adopted by the Judicial Council of the Ninth Circuit, May 2004). (See Appendix A for internet link to document.)

⁴² *Id.*

⁴³ Bowler, S., Esterling, K. & Holmes, D., *GOTJ: Get Out the Juror*, *Polit Behav* (2014) 36: 515. (See Appendix A for internet link to document.)

the same zip code. Add an instruction that when a person has failed to respond to a jury qualification notice or summons (or has failed to respond to the follow-up notice if that recommendation is adopted), a replacement notice shall be sent to a different person in the same zip code.

Why this modification will help ensure or protect jury diversity: The rate of jury notices returned as “undeliverable” by the postal service may diminish the diversity of the jury pool.⁴⁴ As the Ninth Circuit Jury Trial Improvement Committee recognized, “the high number of undeliverable questionnaires sent out by the district courts” has “a negative impact on the extent to which the juror source lists accurately represent populations in the districts.”⁴⁵ Similarly, the rate of non-responses can diminish the diversity of the jury pool as there is evidence that African-Americans and Latinos fail to respond to jury summons at a disproportional rate.⁴⁶ (This is due to

⁴⁴ National Center for State Courts, Jury Managers’ Toolbox, *A Primer on Fair Cross Section Jurisprudence*, 3 (2010) (“undeliverable . . . and failure-to-appear rates tend to disproportionately decrease minority representation”); *id.* at 5 (“a factor commonly related to underrepresentation of minorities is undeliverable rates, which are strongly correlated with lower socio-economic status and, in turn, correlated with minority status”); *see also, e.g., Israel v. United States*, 109 A.3d 594, 604 (D.C. 2014) (“The expert reports that were before the court indicated that African Americans were overrepresented among those whose summonses were returned to the Juror Office as undeliverable”); *Com. v. Arriaga*, 781 N.E.2d 1253, 1266 (Mass. 2003) (citing data showing that “a disproportionate number of undeliverable summonses are addressed to inner city locations” where the majority of the state’s Hispanic residents live); *United States v. Barnes*, No. 3:94CR112 AHN, 1996 WL 684388, at *5 (D. Conn. June 26, 1996); (“[U]nderrepresentation... results from the high rate of questionnaires mailed to Hispanic communities which are returned as undeliverable.”); *United States v. Ortiz*, 897 F. Supp. 199, 204 (E.D. Pa. 1995) (“[M]any Hispanics are poor. Like other poor people, they are apt to move more frequently than the more affluent, with their mail not being forwarded to their new address. Secondly, poor people in general have less reliable mail service.”); *see also* 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, 773 (2011) (“Another factor often associated with underrepresentation of minorities is the percentage of juror qualification questionnaires and jury summonses that are undeliverable.”); Samuel R. Sommers, “On the Obstacles to Jury Diversity,” at 3 *The Jury Expert*, V. 21, Issue 1 (American Society for Trial Consultants, January 2009) (“[I]ncreased geographic mobility among racial minorities means that a higher proportion of jury summonses sent to non-White Americans are returned to the court as undeliverable.”). (See Appendix A for internet links to documents.)

⁴⁵ Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations* at 5, 4 (adopted by the Judicial Council of the Ninth Circuit, May 2004). (See Appendix A for internet link to document.)

⁴⁶ *See* note 33.

correlations between race and economic status; when income is controlled for, the response rate for African-Americans and Latinos is the same as whites.)⁴⁷

Accordingly, the jury plans of a number of federal district courts require a replacement summons be sent to a juror in the same zip code as the “missing” juror. For example, the jury plan for the United States District Court for the Northern District of California specifies that: “For each juror summons and qualification form returned to the court as ‘undeliverable’ and those to which no timely response has been received, the Clerk will randomly draw the name of another person residing in the same zip code and mail a new juror summons and qualification notice to that person.”⁴⁸

The United States District Court for the Eastern District of Pennsylvania employs the same policy.⁴⁹ As the Chief Judge for the Eastern District of Pennsylvania explained, “when a juror qualification questionnaire is not returned, another one is sent in its place. . . . By resending questionnaires to individuals located in the same zip code, as opposed to the same county, the court hopes to maintain geographic proportionality and representation.”⁵⁰

This replacement summons approach is also employed by, for example, the United States District Court for the Eastern District of Washington, the District of Connecticut, the Northern District of Illinois, the Western District of Missouri, and the District of Massachusetts.⁵¹

⁴⁷ See note 34.

⁴⁸ United States District Court for the Northern District of California, *Plan for the Random Selection of Grand and Petit Jurors*, Gen. Order No. 6, Part VIII (Aug. 7, 2017). (See Appendix A for internet link to document.)

⁴⁹ See *Plan for the Random Selection of Grand and Petit Jurors in the United States District Court for the Eastern District of Pennsylvania*, page 5 (July 18, 2017) (“In those instances when a mailed juror qualification form is returned to the Clerk’s Office by the United States Postal Service as undeliverable, the Clerk may randomly draw a replacement name from the master jury wheel from the same zip code to which the undeliverable juror qualification form had originally been sent. The Clerk will then mail a juror qualification form to the person whose name is drawn.”); *id.* (“After a reasonable period of time, if the Clerk’s Office does not receive a response to a mailed juror qualification form, the Clerk may randomly draw an additional name from the master jury wheel from the same zip code from which the original juror qualification form had been sent. The Clerk will then mail a juror qualification form to the person whose name is drawn.”). (See Appendix A for internet link to document.)

⁵⁰ Hon. Juan R. Sanchez, *A Plan of Our Own: The Eastern District of Pennsylvania's Initiative to Increase Jury Diversity*, 91 Temp. L. Rev. Online 1, 18 (2019) (footnote omitted). (See Appendix A for internet link to document.)

⁵¹ United States District Court for the Eastern District of Washington, *Plan for the Random Selection of Grand and Petit Jurors*, Part 3.02(b) (Jan. 1, 2017) (“For all qualification notices/forms returned to the Court as ‘undeliverable’ or those to which no response has been received (after the Clerk has sent a follow-up mailing to the person who has not responded), the Clerk, as soon as practicable, will issue the same number of new juror qualification notices to be

Recommendation 6: Adopt a one-step summoning process by combining the jury qualification notice and summons.

Current plan language: “Juror Qualification Questionnaires: The Clerk will mail a juror qualification questionnaire notice to every person randomly selected” from the master jury wheel, Section 3.02, and “Summoning Grand and/or Petit Jurors (See 28 U.S.C. § 1866(b)): The Clerk will issue and serve personally or send by first class mail summonses to the persons whose names are so drawn.” Section 4.02.

mailed to addresses within the same zip code area to which the undeliverable or non-responding qualification notices/forms had been sent.”); United States District Court for the District of Connecticut, *Jury Plan*, Part VIII (June 26, 2020) (“[T]he following steps shall be taken with respect to each questionnaire returned by the Post Office as undeliverable: For each such questionnaire, the jury staff shall draw at random, in accordance with the process last used pursuant to Article VII, the name of a resident who lives in the same zip code to which the undeliverable questionnaire had been sent. The jury staff shall then mail a questionnaire to that resident and, thereafter, follow the procedures set forth in this Plan with respect to that prospective juror.”); United States District Court, Northern District of Illinois, Plan for Random Selection of Jurors, Part 7(b) (Jan. 8, 2020) (“For all juror notification letters returned to the Court as ‘undeliverable,’ the Clerk shall issue the same number of new juror notification letters to be mailed to addresses within the same zip code to which the undeliverable notice has been returned.”); *id.* at Part 7(c) (“Fourteen (14) days after the mailing of any juror notification letter, the Clerk is directed to send a paper juror qualification questionnaire to any person who failed to respond to the juror notification letter. After the Clerk has sent a follow-up paper juror qualification questionnaire to the person who has not responded and no further response is received, the Clerk shall issue the same number of new juror notification letters to addresses within the same zip code that the non-responding juror qualification questionnaire had been sent.”); United States District Court for the Western District of Missouri, *Jury Selection Plan*, at 4 (March 15, 2019) (“For all qualification letters returned to the court as ‘undeliverable,’ the Clerk as soon as practicable, shall mail the same number of new juror qualification letters to addresses within the same zip code to which the undeliverable juror qualification letters were originally sent. The Clerk shall randomly draw these names from the master jury wheel.”); United States District Court for the District of Massachusetts, *Plan for the Random Selection of Jurors*, Section 5(b) (Nov. 1, 2015) (“In order to implement the Court’s policy [that juries are drawn at random from source lists that represent a fair cross-section of the community]. . . the Clerk shall select the name of a person at random, from the Supplemental Jury Wheel, to whom an additional summons will be issued, according to the procedures described in paragraph 8, for each summons returned to the Court as ‘undeliverable’ by the United States Postal Service.”); *id.* at Part 8(a) (“For each summons returned by the United States Postal Service to the Court as ‘undeliverable,’ the Clerk shall draw at random from the Supplemental Jury Wheel the name of a resident who lives in the same zip code area to which the undeliverable summons had been sent and prepare and cause to be mailed to such resident a new one-step juror summons/qualification form.”). (See Appendix A for internet links to documents.)

Recommended modification: Specify that the jury summoning process should employ a combined summons and qualification notice, and not a two-step summoning process (where potential jurors are first sent a qualification notice and then sent a summons).

Why this modification will help ensure or protect jury diversity: The rate of summonses returned as “undeliverable” by the postal service may diminish the diversity of the jury pool.⁵² A jurisdiction can reduce the number of undeliverable summons – and thus increase the diversity of the pool – by using a one-step summoning process.

“Research indicates that 2-step qualification and summoning systems tend to be less efficient compared to 1-step systems.”⁵³ Specifically, the National Center for State Courts has found that “overall jury yields in 2-step courts are 10 to 15 percentage points lower than those of comparable 1-step courts.”⁵⁴ For example, after switching to a one-step process, New York improved its overall jury yield by 9% and Michigan improved its jury yield by 14%.⁵⁵ One-step summoning processes are also less expensive to operate, as “printing and postage costs are an estimated 25% to 50% higher for 2-step jury operations.”⁵⁶

For these reasons, the jury plans of many federal district courts direct the Clerk to employ a one-step process.⁵⁷ For example, the United States District Court for the Central District of California

⁵² See note 44.

⁵³ Jury Managers' Toolbox: *Converting from a 2-Step to 1-Step Jury System*, National Center for State Courts, at 1 (2009). (See Appendix A for internet link to document.)

⁵⁴ *Id.* at 1 n.2.

⁵⁵ Munsterman, G. Thomas, *Jury System Management* (1996) (citing Mehrl F. King, "One Step Summoning, Erie County, New York, 1988," internal memorandum); Paula Hannaford-Agor and Daniel J. Hall, *Third Judicial Circuit Court of Michigan Jury Automation Review: Final Report and Recommendations*, 4, National Center for State Courts (July 2014). (See Appendix A for internet link to document.)

⁵⁶ Jury Managers' Toolbox: *Best Practices to Decrease Undeliverable Rates*, National Center for State Courts, at 1 (2009). (See Appendix A for internet link to document.)

⁵⁷ See, e.g., United States District Court for the District of Massachusetts, *Plan for the Random Selection of Jurors*, Section 7(c) (Nov. 1, 2015) (“The Clerk, by automated or manual means, shall prepare and cause to be mailed to every person whose name is drawn, a one-step juror summons/qualification form . . .”); United States District Court for the Western District of New York, *Jury Plan*, at 4 (April 2018) (“This District has adopted the one-step summoning and qualification procedure. Accordingly, all prospective jurors shall be qualified and summoned in a single procedure through the use of the Jury Management System”); United States District Court for the Western District of North Carolina, *Plan for the Random Selection of Grand and Petit Jurors*, at 5-6 (Sept. 2013) (“The Federal Courts Administration Act of 1992, Public Law 102-572, signed October 29, -6- 1992, authorized District Courts to use a one-step qualification procedure in lieu of the two separate procedures. Therefore, pursuant to Title 29 U.S.C. Section 1878, and by approval of this Plan, jurors will be qualified and summoned in a single procedure.”). (See Appendix A for internet links to documents.)

“adopt[ed] a one-step process to summon and qualify prospective petit and grand jurors. The Clerk shall use this one-step approach in lieu of the two separate procedures (a qualification process, followed by a separately issued summons) otherwise provided for by the Act.”⁵⁸ The United States District Court for the Northern District of California similarly uses a single mailing to send potential jurors a “juror summons and qualification notice.”⁵⁹

Recommendation 7: Incorporate a reference to a litigant’s entitlement to jury selection records under the Jury Selection and Service Act of 1968.

Current plan language: “Release of Juror Records (See 28 U.S.C. § 1867(f)): The contents of records and papers used in the Jury Selection Process will not be disclosed, except upon written order of the Court. Applications for disclosure of records related to the Jury Selection Process must be made by motion to the Chief Judge or Jury Judge and must set forth why disclosure should be allowed.” Section 6.02.

Recommended modification: Add language that references a litigant’s entitlement to access jury selection records pursuant to section 1867(f) of the Jury Selection and Service Act of 1968.

Why this modification will help ensure or protect jury diversity: Litigants’ ability to enforce the right to a jury selected from a fair cross-section of the community depends on having access to the jury selection records that would reveal a fair cross-section violation. As the United States Supreme Court explained “without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.”⁶⁰ The Supreme Court therefore held that “an unqualified right to inspection is required not only by the plain text of the [Jury Selection and Service Act of 1968], 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.’”⁶¹ For that reason, many federal jury plans incorporate a specific reference to the right to access jury selection records.

There are two specific entitlements to jury selection records in the Jury Selection and Service Act of 1968 (JSSA):

- First, the statute explicitly provides for access in the section regarding “Challenging compliance with selection procedures.”⁶² When a litigant is preparing a motion to dismiss

⁵⁸ *The Plan of the United States District Court, Central District of California, for the Random Selection of Grand and Petit Jurors*, General Order No. 19-07, Part 6 at pg. 5, lines 8-11 (July 15, 2019). (See Appendix A for internet link to document.)

⁵⁹ United States District Court for the Northern District of California, *Plan for the Random Selection of Grand and Petit Jurors*, Gen. Order No. 6, Part VIII (Aug. 7, 2017) {“The Clerk will mail to every person whose name is thus drawn a juror summons and qualification notice . . . ”}. (See Appendix A for internet link to document.)

⁶⁰ *Test v. United States*, 420 U.S. 28, 30 (1975).

⁶¹ *Id.*, citing 28 U.S.C. § 1861.

⁶² 28 U.S.C. § 1867(f).

the indictment or stay the proceedings on the grounds that the jury office has substantially failed to comply with the JSSA, the litigant is entitled to access “[t]he contents of records or papers used by the jury commission or clerk in connection with the jury selection process.”⁶³ Specifically, “[t]he parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion.”⁶⁴

- Second, the same section of the JSSA explicitly describes a litigant’s entitlement to jury selection records as one of the limited exceptions to the general rule of non-disclosure: “The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except . . . as may be necessary in the preparation or presentation of a motion” alleging a substantial failure to comply with the JSSA.”⁶⁵

The Ninth Circuit has accordingly recognized that “[t]he right to inspect jury lists is essentially unqualified.”⁶⁶ As a District Judge for the District Court for the Northern District of California has explained: “This right is virtually absolute: the only limitation on this right of access is that the inspection must be done at ‘reasonable times.’ No probability of merit need be shown. To avail himself of this right of access to otherwise nonpublic jury selection records, a litigant need only allege that he is preparing a motion challenging the jury selection procedures. There is no doubt on this point whatsoever.”⁶⁷

A jury plan can clarify and protect this right by including a reference to the JSSA’s language. For example, the jury plan for the United States District Court for the Central District of California states that “Juror Selection Records shall not be disclosed, except as necessary in the preparation or presentation of a motion under 28 U.S.C. § 1867(a), (b), or (c); a party preparing such a motion, or any party in a case in which such a motion has been filed, may inspect, reproduce, and copy Juror Selection Records regarding the Master Jury Wheel from which either the grand or petit jury in the case was selected, at all reasonable times, and at the party’s expense, during the preparation or pendency of such a motion.”⁶⁸ Many federal district courts have included similar language in their jury plans.⁶⁹

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *United States v. Studley*, 783 F.2d 934, 938 (9th Cir. 1986)

⁶⁷ *United States v. Layton*, 519 F. Supp. 946, 958 (N.D. Cal. 1981) (citations omitted).

⁶⁸ *The Plan of the United States District Court, Central District of California, for the Random Selection of Grand and Petit Jurors*, General Order No. 19-07, Part 12 at pg. 15, lines 10-16 (July 15, 2019). (See Appendix A for internet link to document.)

⁶⁹ See, e.g., *United States District Court for the Northern District of Alabama, Plan for the Random Selection of Grand and Petit Jurors*, Part VIII(C) (Feb. 10, 2017); *United States District Court, Western District of Louisiana, Plan for the Random Selection of Jurors*, Part 19(a)(3) (Aug. 8, 2019); *United States District Court for the Eastern District of Texas, Amended Plan for*

Recommendation 8: Direct the Clerk to conduct periodic examinations of racial and ethnic diversity in the jury pool.

Current plan language: (No relevant language.)

Recommended modification: Direct the Clerk to conduct periodic examinations of racial and ethnic diversity in the jury pool in order to assess the extent to which the jury pool reflects a fair cross-section of the community.

Why this modification will help ensure or protect jury diversity: The only way a jurisdiction can be sure that it is protecting the right to a jury selected from a fair cross-section of the community is to review reliable data about the representativeness of the jury pool.⁷⁰ For this reason, the Jury Selection and Service Act “require[s] district courts upon the refilling of jury wheels to make a random sample of returned questionnaires to determine whether the jury wheels comply with the provisions of the Jury Act and to require the analysis to be performed locally by the clerk of the district court under the directions of the Administrative Office.”⁷¹

As one member of this Court has explained, “[a]ccording to the JSSA, the Southern District is required to ‘submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify.’ 28 U.S.C. § 1863(a). The Form AO–12: Jury Representativeness Statistics is the form that is used by the district courts to aid them in (1) determining whether their jury wheels comply with the randomness and nondiscrimination provisions of the JSSA; and (2) comparing statistical samplings of jury wheels against general population data. . . . According to instructions provided by the Administrative Office on the form, the AO–12 form ‘is required to be completed upon ... [t]he periodic refilling of the master wheel’”⁷²

the Random Selection of Jurors in all Divisions, Part 9(e)(4) (April 4, 2019); United States District Court for the District of Connecticut, *Jury Plan*, Part XVII (June 26, 2020); United States District Court for the Western District of New York, *Jury Plan*, at 8 (April 2018); *Jury Selection Plan of the United States District Court for the Central District of Illinois for the Random Selection of Grand and Petit Jurors*, Pg. 12 (June 1, 2015); United States District Court for the District of Maine, *Plan for the Random Selection of Grand and Petit Jurors for Service in the District of Maine*, Part VII(4) (July 13, 2020); *Revised Plan of the United States District Court for the District of Delaware for the Random Selection of Grand and Petit Jurors*, Part 8 (Jan. 1, 2019). (See Appendix A for internet links to documents.)

⁷⁰ One member of this Court made a related point in *United States v. Hernandez-Estrada*, 2011 WL 1119063, at *10 (S.D. Cal. 2011) (“Reliable representativeness statistics are important for purposes of monitoring the District’s selection procedures and ensuring that the District is complying with the JSSA.”).

⁷¹ *Report of the Proceedings of the Judicial Conference of the United States*, pg. 114 (1982). (See Appendix A for internet link to document.)

⁷² *United States v. Hernandez-Estrada*, 2011 WL 1119063, at *11 (S.D. Cal. 2011).

Adding a requirement into the jury plan that the AO-12 or equivalent form be completed at specific intervals may help ensure that the form is regularly completed.⁷³ For example, the jury plan for the United States District Court for the Central District of California specifies that: “A Report on Operation of the Jury Selection Plan (“Form AO-12”) shall be completed each time a Master Jury Wheel is refilled and any time there is a change in this Plan.”⁷⁴

Similarly, the jury plan for the United States District Court for the Eastern District of Texas includes a requirement to complete the AO-12 form: “As required by the Judicial Conference of the United States, a report shall be prepared after each periodic refilling of each master jury wheel giving general data relating to master jury wheels with an analysis of race and sex of prospective jurors based on juror qualification forms returned during the qualifying process. Such report shall not be made until six months after summoning the first panels from the jury wheels in order to provide sufficient data to complete the analysis. For the purposes of comparing jury wheel demographics with Bureau of Census data, the most recent estimates of citizen population provided by the Administrative Office of the United States Courts shall be used.”⁷⁵

⁷³ See *id.* (“It appears that the Southern District has not been completing AO–12 forms upon the refilling of the master wheel.”); see also *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1158 n.1 (9th Cir. 2014) (“the Southern District issued an order, General Order No. 626–A, which . . . requires the regular completion of Form AO–12 reports”).

⁷⁴ *The Plan of the United States District Court, Central District of California, for the Random Selection of Grand and Petit Jurors*, General Order No. 19-07, Part 12, pg. 15, lines 2-4 (July 15, 2019); see also United States District Court for the Western District of New York, *Jury Plan*, at 8 (April 2018) (“The Clerk of Court shall retain all jury records and papers complied and maintained by the Clerk of Court, including the following documents . . . Administrative Office reports: JS-11, JS-11G and AO-12.”); *Jury Selection Plan of the United States District Court for the Central District of Illinois for the Random Selection of Grand and Petit Jurors*, Pgs.11-12 (June 1, 2015) (“The clerk shall retain the following documents: . . . AO-12 Report on Operation of Jury Selection Plan . . .”). (See Appendix A for internet links to documents.)

⁷⁵ *Amended Plan for the Random Selection of Jurors in all Divisions*, Part 6 (April 4, 2019); see also, e.g., United States District Court for the Northern District of West Virginia, *Plan Prescribing Method for the Composition of Jury Wheels and the Qualification and Random Selection of Grand and Petit Jurors*, Part 2.04 (“In order to verify that a fair cross section of the community will be selected through the use of the source lists consistent with the Jury Selection and Service Act of 1968, a report will be made by the Clerk of this Court to the Chief Judge as expeditiously as the qualifying process permits, showing the race and sex of a fair sample of those persons selected pursuant to this plan who have returned juror qualification forms whether or not such persons were subsequently deemed qualified or unqualified, or were excused or exempted or served.”). (See Appendix A for internet links to documents.)

The JSSA's reporting requirement is consistent with the American Bar Association's *Principles for Juries & Jury Trials* conclusion that a "court should periodically review the jury source list and the assembled jury pool for their representativeness and inclusiveness of the eligible population in the jurisdiction."⁷⁶

Recommendation 9: Specify a nonexclusive list of jury selection records that will be preserved and made available to litigants preparing a motion challenging the composition of the jury pool.

Current plan language: "Retention of Juror Records: In accordance with 28 U.S.C. § 1868, the Clerk will keep all records and papers relating to the Jury Selection Process for four years following the emptying and refilling of the master jury wheels and the completion of service of all jurors selected from those master jury wheels, or for such longer periods of time as the Court may require." Section 6.03.

Recommended modification: Add specific language describing which records and papers related to the jury selection process, at a minimum, should be retained and made available to litigants. Include a reference to the creation of and access to the Administrative Office's forms comparing jury demographic data to Census demographic data.

Why this modification will help ensure or protect jury diversity: Again, the only parties with standing to enforce the right to a jury selected from a fair cross-section of the community are litigants, and their ability to enforce that right is dependent on access to jury selection records that would reveal a fair cross-section violation.⁷⁷ A jury plan that specifically identifies some of the jury selection records that must be maintained and preserved will better protect the fair cross-section guarantee.

An example of specific language describing jury selection records can be found in the jury plan for the United States District Court for the Central District of California. That jury plan identifies a number of "Juror Selection Records" that may be inspected, reproduced, and copied by a party preparing a motion challenging the composition of the jury pool, including:

- "Non-Court personnel shall be given detailed instructions regarding any work they are asked to perform, and shall be required to certify that all work performed has been completed pursuant to those instructions. The instructions provided, and the certifications returned upon completion, will be considered 'Juror Selection Records,'"⁷⁸

⁷⁶ American Bar Association, American Jury Project, *Principles for Juries & Jury Trials*, 51 (2005) (Principle 10(A)(3)). (See Appendix A for internet link to document.)

⁷⁷ *Test v. United States*, 420 U.S. 28, 30 (1975) ("[W]ithout inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.").

⁷⁸ *The Plan of the United States District Court, Central District of California, for the Random Selection of Grand and Petit Jurors*, General Order No. 19-07, Part 3, pg. 2, lines 16-21 (July 15, 2019). (See Appendix A for internet link to document.)

- “The Source Data, the Clerk’s written requests for the Source Data, and the declarations from each agency providing Source Data will be considered ‘Juror Selection Records,’ . . .”⁷⁹
- “The Merged Source Lists, the list of names placed in the Master Jury Wheels, and any Orders of the Chief Judge directing that a Master Jury Wheel be supplemented with additional names shall be considered ‘Juror Selection Records,’ . . .”⁸⁰
- “The Clerk shall maintain a record of the following: the names of persons sent a Summons; whether the Summons was returned as undeliverable; whether each prospective juror submitted or returned a Questionnaire; whether each Questionnaire submitted was completed; whether any Questionnaires were returned to prospective jurors for additional information; whether each prospective juror was postponed, disqualified, exempted, or excused; whether each prospective juror was directed to report during the on-call period; and whether each prospective juror reported as directed. This record, and the following documents, will be considered Juror Selection Records: the affidavits of service completed pursuant to 28 U.S.C. § 1866(b); any Summons returned as undeliverable, with its original envelope; and all submitted or returned Questionnaires.”⁸¹
- “The Clerk shall maintain records, which will be considered Juror Selection Records, noting whether each person directed to appear on a particular day is Present and Available to serve as directed, and if not, why: nondeliverable Summons, failure to respond to the Summons, postponement, disqualification, exemption, or excuse. Any orders to show cause issued to persons who fail to respond to a Summons will also be considered Juror Selection Records.”⁸²
- “[A] record of whether each juror selected for a petit jury panel was excused, disqualified, exempted, excluded, or selected to serve as a juror or alternate juror.”⁸³

Other federal district courts similarly specify the jury selection records that must be compiled and maintained.⁸⁴

⁷⁹ *Id.* at Part 4, pg. 3, lines 14-17.

⁸⁰ *Id.* at Part 5, pg. 5, lines 2-5.

⁸¹ *Id.* at Part 6, pg. 7, lines 8-18.

⁸² *Id.* at Part 7, pg. 8, lines 4-9.

⁸³ *Id.* at Part 7, pg. 10, lines 6-8. The plan also designed as “Juror Selection Records” a record of “all prospective jurors who are deemed to have completed service pursuant to this paragraph.” *Id.* at lines 16-17.

⁸⁴ *See, e.g.,* United States District Court for the Western District of New York, *Jury Plan*, at 8 (April 2018) (“The Clerk of Court shall retain all jury records and papers compiled and maintained by the Clerk of Court, including the following documents: 1) Jury Selection Plan; 2) Orders regarding refilling of the master jury wheel, petit juries, and grand juries; 3) Jury memos from the Administrative Office and internal memos; 4) Qualification questionnaires 5) Pre-screening questionnaires 6) Individual petit jury and grand jury panel information 7) Administrative Office reports: JS-11, JS-11G and AO-12.”); *Jury Selection Plan of the United*

In particular, the jury plan should make clear when the “AO-12” form will be completed and made available. (The AO-12 form, described above, provides a statistical comparison of the demographics of the jury pool to the demographics of the community.) For example, the jury plan for the United States District Court for the Central District of California specifies that: “All completed AO-12s will be considered ‘Juror Selection Records’” to which a litigant preparing a jury challenge will have access.⁸⁵

Conclusion

In sum, the Court’s ability to assemble racially and ethnically diverse jury pools would be enhanced if the jury plan (1) designated source lists in addition to the underrepresentative voter registration list; (2) established that the jury wheel should be refilled annually, rather than every two years; (3) directed the Clerk to regularly submit the names on the master and qualified wheels through the national change-of-address database to be corrected; (4) directed a follow-up notice to be sent to potential jurors who fail to respond to the jury qualification notice or summons; (5) directed a replacement jury summons to be sent to the same zip code when a summons or questionnaire is returned as undeliverable or is not returned; (6) adopted a one-step summoning process by combining the jury summons and qualification form; (7) incorporated a reference to a litigant’s entitlement to access jury selection records under the Jury Selection and Service Act of 1968; (8) directed the Clerk to conduct periodic examinations of racial and ethnic diversity in the jury pool; and (9) specified which jury selection records will be preserved and made available to litigants preparing a motion challenging the composition of the jury pool.

We would like to express our gratitude to the Court and the Clerk of the Court for the opportunity to share our recommendations. We are available to provide any additional information or feedback that might be helpful.

States District Court for the Central District of Illinois for the Random Selection of Grand and Petit Jurors, pgs.11-12 (June 1, 2015) (“The clerk shall retain the following documents: Jury Selection Plan; AO-12 Report on Operation of Jury Selection Plan; Orders regarding refilling of the master jury wheel, petit juries, and grand juries; Written instructions to State Board of Elections to provide list of registered voters; Affidavit from State Board of Elections that instructions to provide list of registered voters were followed; Voter data files; Qualification questionnaires; Individual petit jury and grand jury panel information.”). (See Appendix A for internet links to documents.)

⁸⁵ *The Plan of the United States District Court, Central District of California, for the Random Selection of Grand and Petit Jurors*, General Order No. 19-07, Part 12, pg. 15, lines 2-4 (July 15, 2019); *see also* United States District Court for the Western District of New York, *Jury Plan*, at 8 (April 2018) (“The Clerk of Court shall retain all jury records and papers compiled and maintained by the Clerk of Court, including the following documents . . . Administrative Office reports: JS-11, JS-11G and AO-12.”); *Jury Selection Plan of the United States District Court for the Central District of Illinois for the Random Selection of Grand and Petit Jurors*, Pgs.11-12 (June 1, 2015) (“The clerk shall retain the following documents: . . . AO-12 Report on Operation of Jury Selection Plan . . .”). (See Appendix A for internet links to documents.)

Sincerely,

Jeffrey Abramson

Professor of Law and Government
University of Texas at Austin School of Law

Selected jury-related publications:

- WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY, Harvard University Press (2000)
- *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 U. Mich. J. L. Reform 1 (2018)
- *Four Models of Jury Democracy*, 90 Chi.-Kent L. Rev. 861 (2015)
- *Second-Order Diversity Revisited* [Symposium: *The Civil Jury as a Political Institution*], 55 William & Mary L. Rev. 739 (2014).
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- *Two Ideals of Jury Deliberation*, 1998 U. Chi. Legal F. 125 (1998)

Nina Chernoff

Professor of Law
City University of New York Law School

Selected jury-related publications:

- *Black to the Future: The State Action Doctrine and the White Jury*, 58 Washburn L. J. 103 (Winter 2019)
- *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719 (July 2016)
- *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing it With Equal Protection*, 64 Hastings L. J. 141 (Dec. 2012)
- *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, with Dr. Joseph B. Kadane, 33 Just. Sys. J. 47 (2012); adapted for and reprinted in JURYWORK: SYSTEMATIC TECHNIQUES § 5:40 (2013-2014 ed.)

Shari Seidman Diamond

Howard J. Trienens Professor of Law
Professor of Psychology
Northwestern University School of Law

Selected jury-related publications:

- *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges* (with J. Salerno), Louisiana Law Review (forthcoming).
- JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE (with Sanja Kutnjak Ivković, N.S. Marder, and V.P. Hans eds.,) Cambridge University Press, forthcoming)
- *The Contemporary American Jury*, 14 Annual Review of Law and Social Science 239-258 (2018).

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- *Increasing Jury Representativeness* (with Caprathe, Hon. William (Ret.), Paula Hannaford-Agor, Stephanie M. Loquvam), 55 Judges’ Journal 16-20 (2016).
- *Selected to Serve: An Analysis of Lifetime Jury Participation* (with Rose, M.R. & M. Musick), 9 J. Empirical Legal Studies 33-55 (2012).

Jeffrey Fagan

Isidor and Seville Sulzbacher Professor of Law
Columbia University Law School

Selected jury-related publications:

- *Measuring A Fair Cross-Section of Jury Composition: A Case Study of the Southern District of New York* (with A. Gelman, D.E. Epstein, and J. Elias). Presented at the Annual Meeting of the Midwest Political Science Association, Chicago, April 4, 2008
- *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, (with Catherine M. Grosso, Michael Laurence, David C. Baldus, George W. Woodworth & Richard Newell) 66 UCLA L. Rev. 1394 (December, 2019).
- *New Frameworks for Racial Equality in the Criminal Law*, (with M. Bakhshi), 39 Colum. Hum. Rts. L. Rev. 1 (2007)

Andrew Guthrie Ferguson

Professor of Law
American University, Washington College of Law

Selected jury-related publications:

- *WHY JURY DUTY MATTERS: A CITIZEN’S GUIDE TO CONSTITUTIONAL ACTION* (NYU Press 2013).
- *The Big Data Jury*, 91 Notre Dame L. Rev. 935 (2016).
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- *Jury Instructions As Constitutional Education*, 84 U. Colo. L. Rev. 233 (2013).

Jacinta Gau, Ph.D.

Associate Professor of Criminal Justice
University of Central Florida

Selected jury-related publications:

- *A jury of whose peers?: The impact of selection procedures on racial composition and the prevalence of majority-white juries*, Journal of Crime and Justice, 39(1), 75-87 (2016).

- Research project with the Ninth Judicial Circuit Public Defender's Office, *Study on the Race of Potential and Actual Jurors: Minority Attrition in Pre-Trial Stages of Jury Selection* (2013-2015).

Thaddeus Hoffmeister

Professor of Law

University of Dayton School of Law

Selected jury-related publications:

- *Deterring Juror Misconduct in a Connected World: A Comparative Analysis*, 90 Chicago Kent Law Review 981 (2015).
- *Google, Gadgets, and Guilt: The Digital Age's Effect on Juries*, 83 University of Colorado Law Review 409 (2012).
- *Applying the Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA Law Review Discourse 28 (2011).
- *Resurrecting the Grand Jury's Shield: The Grand Jury Legal Advisor*, 98 Journal of Criminal Law and Criminology 1171 (2008).

Nancy S. Marder

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Director, Justice John Paul Stevens Jury Center

Chicago-Kent College of Law

Selected jury-related publications:

- THE POWER OF THE JURY: TRANSFORMING CITIZENS INTO JURORS (Cambridge University Press, forthcoming).
- JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE (with Sanja Kutnjak Ivković, Shari Seidman Diamond, and Valerie P. Hans eds.,) Cambridge University Press, forthcoming).
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- *Introduction to the Jury at a Crossroad: The American Experience*, 78 Chicago-Kent Law Review 909 (2003).
- *Juries, Justice & Multiculturalism*, 75 Southern California Law Review 659 (2002).

Mary Rose, Ph.D.

Associate Professor of Sociology
University of Texas at Austin

Selected jury-related publications:

- *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts* (with Raul S. Casarez, and Carmen Gutierrez), *Journal of Empirical Legal Studies* 15: 378 – 405 (2018).
- *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases* (with Jeffrey Abramson) 2011 Mich. St. L. Rev. 911 (2011).
- *Selected to Serve: An Analysis of Lifetime Jury Participation* (with Shari Seidman Diamond and Marc A. Musick), *Journal of Empirical Legal Studies*, 9: 33 – 55 (2012).
- *Juries and Judges in the Public's Mind: Race, Ethnicity, and Jury Experience* (with Christopher E. Ellison, and Shari Seidman Diamond), *Judicature* 93: 194 – 200 (2010).
- *Access to Juries: Some Puzzles Regarding Race and Jury Participation*, In: R. Sandefur (Ed.) *ACCESS TO JUSTICE: SOCIOLOGY OF CRIME, LAW, AND DEVIANCE* 12: 114 – 144 (2009).

Suja A. Thomas

Peer and Sarah Pedersen Professor of Law
University of Illinois College of Law

Selected jury-related publications:

- *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (Oxford Univ. Press 2016).
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November 23, 2020

Via Electronic Mail

Judicial Council of the Ninth Circuit
c/o The Honorable Sidney R. Thomas, Chair

Re: Objection to Proposed Jury Plan for Southern District of California

Dear Honorable Members of the Judicial Council,

We write to object to the new, proposed Jury Selection Plan submitted to the Ninth Circuit by the United States District Court, Southern District of California. *See* Attachment A. Because we believe that the single-source method for identifying potential jurors in the proposed plan fails to comply with the Jury Selection and Service Act of 1968 as well as the fair cross-section and equal protection guarantees of the U.S. Constitution, we respectfully ask the Council to encourage the Southern District to reconsider it. *See* 28 U.S.C. § 1863 (“The panel shall examine the plan to ascertain that it complies with the provisions of this title.”). Our objection lies in the decades-long underrepresentation of African Americans on the master and qualified wheels from which the Southern District draws its jurors.

Background of this objection.

In the fall of 2017, a coalition of ten diverse Bar Associations—together with the Federal Defenders of San Diego, Inc.—wrote to the Southern District of California federal district court with a request to expand the source list from which the court selects its jurors. *See* Attachment B. This coalition expressed concern that the Southern District’s practice of using voter rolls exclusively to identify potential federal jurors was contrary to the Jury Act’s promise that “all citizens shall have the opportunity to be considered for service on grand and petit juries” (28 U.S.C. § 1861). *Id.* The signatories therefore requested that the court expand its source list. *See id.*

Since 2004, the Ninth Circuit’s Jury Trial Improvement Committee has recommended that all district courts supplement voter registration lists “to increase inclusiveness and to provide better representation of the adult citizen population who are qualified to serve as jurors.” *See* Attachment C. *See also* AMERICAN BAR

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Letter to Judicial Council of the Ninth Circuit Objecting to the
Proposed Southern District of California Jury Plan

ASSOCIATION, *Principles for Juries and Jury Trials*, Principle 10(A)(1) (“The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction.”). Today, all federal district courts in California—except the Southern District—use supplemented source lists.¹ Additionally, the district courts in Washington, Idaho, Montana, and Hawaii use supplemented lists.² Unbeknownst to the 2017 letter’s signatories at the time of drafting, the Ninth Circuit’s Jury Trial Improvement Committee had also recommended that same year that the Southern District consider supplementing its juror source list. *See* Attachment D.

In response to the 2017 letter described above, the Southern District asked for input from the United States Attorney’s Office for the Southern District. *See* Attachment E. The United States Attorney’s Office recommended a “fuller statistical analysis of the actual impact supplementation would have” in the Southern District before making any changes. *See* Attachment F. The court never changed its exclusive reliance on voter lists to identify jurors and—despite an offer from Federal Defenders and the diverse bar associations to “research jury plans and recommend improvements to our current jury procedures to further enhance citizen participation in our local federal courts”—the court never responded to the offer to collaborate.

Instead, without notice and without seeking comment from the organizations who had previously indicated interest in this issue, the Southern District posted a new Jury Plan to its website last month. The Plan directs the continued, exclusive use of voter lists as the sole source to identify potential jurors.

¹ E.D. Cal. Jury Plan, *available at*

[http://www.caed.uscourts.gov/caednew/assets/File/GO%20569\(1\).pdf](http://www.caed.uscourts.gov/caednew/assets/File/GO%20569(1).pdf); N.D. Cal. Jury Plan, *available at* https://www.cand.uscourts.gov/wp-content/uploads/general-orders/GO_06_8-7-2017.pdf; C.D. Cal Jury Plan, *available at* <https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO%2019-07.pdf>.

² E.D. Wa. Jury Plan, *available at*

<https://www.waed.uscourts.gov/sites/default/files/jury/JuryPlan.pdf>; W.D. Wa. Jury Plan, *available at* <https://www.wawd.uscourts.gov/sites/wawd/files/LocalJuryPlan.pdf>; D. Id. Jury Plan, *available at* [https://www.id.uscourts.gov/Content_Fetcher/index.cfm/District of Idaho Jury Plan 2769.pdf?Content_ID=2769](https://www.id.uscourts.gov/Content_Fetcher/index.cfm/District%20of%20Idaho%20Jury%20Plan%202769.pdf?Content_ID=2769); D. Mont. Jury Plan, *available at* <https://www.mtd.uscourts.gov/sites/mtd/files/Jury%20plan%20-%202002-2019%20-%20Signed.pdf>; D. Haw. Jury Plan, *available at* https://www.hid.uscourts.gov/files/order341/2017_02_28_jury_approved%202017%20Jury%20Plan.pdf.

Two decades of known, persistent underrepresentation of Southern District communities is enough.

The proposed Jury Plan for the Southern District asserts that the “Court finds that county voter registration lists represent a fair cross section of the citizens residing within the communities in the Southern District of California.” *See* Attachment A. The problem with this finding is that it is undermined by twenty years of the court’s own data. The Jury Selection and Service Act requires the court to report on its jury selection process. *See* 28 U.S.C. § 1863(a). The district court evaluates its jury wheel representativeness through reports called “AO-12s.” The Southern District’s own AO-12s for the years 1999 through 2019 show persistent, significant underrepresentation of African Americans. *See* Attachment G.

According to the Southern District’s AO-12s, the proportion of African American citizens in its jury wheel samples is consistently far lower than the Southern District’s own calculation of the proportion of African American citizens in the district. African American citizens’ representation in the jury wheels, based on the known proportion of that community in the district, is never remotely achieved. Additionally, the magnitude of this underrepresentation is consistently far greater than, for example, the jury wheels’ ability to accurately capture White citizen representation. This disparity is troubling, to say the least.

From 1999 to 2019, the Southern District’s single-source method for jury pool selection has resulted in—at best—62.2% of the expected African American citizen representation in the jury wheel. *See infra* Chart 1. For several years, the African American citizen representation in the Southern District jury wheel has been *less than half* of what it would be if the wheel were truly representative. On average, over the last 20+ years, the Southern District’s method of selecting jurors solely from voter lists has resulted in the representation of African American citizens in its jury wheel being just 53.3% of what would be expected based on the proportion of that population in the District. *See id.*

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Letter to Judicial Council of the Ninth Circuit Objecting to the
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Jury Wheel	Percent of African Americans citizens in Jury Wheel Sample ⁴	Percent of African Americans citizens in the S.D. Cal. community	Percent of African American citizen population in Jury Wheel Sample compared to what would be expected based on their representation in the community
February 2019 Wheel	3.33	5.5	60.5
February 2017 Wheel	3.06	5.5	55.6
February 2015 Wheel	3.24	5.4	60
March 2013 Wheel	3.36	5.4	62.2
February 2011 Wheel	3.05	5.4	56.5
March 2009 Wheel	2.84	5.9	48.1
March 2007 Wheel	2.51	5.9	42.5
January 2005 Wheel	2.63	5.9	44.6
February 2003 Wheel	2.8	5.9	47.5
February 2001 Wheel	3.1	5.9	52.5

³ This chart was compiled using data from the Southern District's AO-12s in Attachment G. Some years, the Southern District issued multiple AO-12s at different intervals (e.g., a few months from the filling of the wheel, a year from the filling of the wheel, more than a year from the filling of the wheel). Additionally, for some years, the Southern District calculated representativeness for both the master and qualified wheels. For those years with multiple AO-12s, the data most *favorable* to the Southern District's current methodology (in terms of achieving representativeness of African Americans on its wheels) was selected for the above chart.

⁴ For some years, the court provided the percent of the sample "with unknowns removed." Where available, that data is presented in Charts 1 & 2—again, as it is most *favorable* to the Southern District's current methodology.

February 1999 Wheel	3.21	5.7	56.3
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In contrast, the White citizen population represented in the Southern District’s jury wheels has never been less than 85.7% of what would be expected.⁵ *See infra* Chart 2. The jury wheel has even slightly *overrepresented* the White citizen population (i.e., in 2013, 75.98% of the jury wheel were White citizens when White citizens only made up 74.9% of the community). *See id.* Overall, the proportion of White citizens in the Southern District jury wheels since 1999 is 91.6% of what would be expected based on the percentage of that population in the community (compared to just 53.3% for African Americans). *See id.*

Chart 2.⁶

Jury Wheel	Percent of White citizens in Jury Wheel Sample	Percent of White citizens in S.D. Cal. community	Percent of White citizen population in Jury Wheel Sample compared to what would be expected based on their representation in the community
February 2019 Wheel	67.82	74.2	91.4
February 2017 Wheel	68.42	74.2	92.2
February 2015 Wheel	69.16	74.9	92.3
March 2013 Wheel	75.98	74.9	101.4
February 2011 Wheel	64.18	74.9	85.7
March 2009 Wheel	64.85	74	87.6
March 2007 Wheel	64.43	74	87

⁵ It appears that the large numbers of potential jurors selecting their race as “other” has led to some racial groups appearing to be somewhat regularly underrepresented. But no group is underrepresented as regularly—or by as large a degree—as African Americans.

⁶ This chart was compiled using data from the Southern District’s AO-12s in Attachment G.

January 2005 Wheel	66.13	74	89.4
February 2003 Wheel	65.5	74	88.5
February 2001 Wheel	70.59	74	95.4
February 1999 Wheel	75.26	77.4	97.2

These charts, compiling twenty years of the Southern District's own data, undermine the District's "find[ing]" in the proposed Jury Selection Plan that voter lists "represent a fair cross section of the citizens residing within the communities in the Southern District of California." We urge this Council to evaluate whether the Southern District's proposed plan of continuing single-source jury wheels fulfills the Jury Act's guarantee that "all citizens shall have the opportunity to be considered for service on grand and petit juries." See 28 U.S.C. § 1861. We make this plea not only as members of the bar, but also as members of the Southern District community committed to advocating for equal justice under law. Cf. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."). Thank you for considering our objection as you review the proposed Jury Selection Plan for approval under 28 U.S.C. § 1863.

Respectfully,

geneviève l. jones-wright

GENEVIÈVE JONES-WRIGHT

President

**Earl B. Gilliam Bar
Association**

George A. Rios III

GEORGE A. RIOS III

President

**San Diego La Raza Lawyers
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Kathryn N. Nester

KATHRYN N. NESTER

Executive Director

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Diego, Inc.**



DAVID LOY

Legal Director

**ACLU Foundation of San
Diego & Imperial Counties**

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November 23, 2020

Letter to Judicial Council of the Ninth Circuit Objecting to the
Proposed Southern District of California Jury Plan

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BRANDON KIMURA

President

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GENEVIÈVE JONES-WRIGHT

Executive Director

**Community Advocates for
Just and Moral Governance**

Michelle Luna Reynoso

MICHELLE LUNA REYNOSO

President

**Justicia Criminal Defense
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Attachments

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Kathryn N. Nester (Nov 24, 2020 09:51 PST)

Email: kathy_nester@fd.org

Signature: Esther Lee Bylsma

Esther Lee Bylsma (Nov 25, 2020 13:16 PST)

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Signature: 

Geneviève Jones-Wright (Nov 23, 2020 11:09 PST)

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Signature: Matias Montillano

Matias Montillano (Nov 23, 2020 09:23 PST)

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Signature: George A. Rios III

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Final Audit Report

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FEDERAL DEFENDERS OF SAN DIEGO, INC.

THE COMMUNITY DEFENDER ORGANIZATION FOR THE SOUTHERN DISTRICT OF CALIFORNIA

December 30, 2020

John Morrill, Clerk of the Court
United States District Court
Southern District of California
333 West Broadway, Suite 420
San Diego, CA 92101

Re: Public Comment on Jury Plan, pursuant to General Order No. 147-I

Dear Clerk for the Southern District of California,

We write to you as attorneys who provide representation under the Criminal Justice Act Plan ("CJA Plan") for the Southern District of California. The primary objective listed in the CJA Plan is to "attain the goal of equal justice under the law." All of us believe modification of the Jury Selection Plan proposed in General Order 147-I is necessary to provide equal justice and to improve the diversity of jury pools in the District.

Diverse jury pools are critical to ensuring our clients' rights to a jury drawn from a fair cross-section of the community under the Sixth Amendment and the Jury Selection and Service Act of 1968. But achieving the goal of diverse jury pools is not only important to criminal defendants. Diverse jury pools also encourage public confidence in the justice system, improve the quality of jury deliberations and provide all citizens an equal opportunity to serve as jurors.

We fully agree with the community organizations who wrote an objection to the Judicial Council of the Ninth Circuit. See Attachment A (letter without attachments). These organizations demonstrated that the District's methods for identifying potential jurors has resulted in the decades-long underrepresentation of African Americans on the master and qualified wheels from which the Southern District draws its jurors.

We also fully agree with legal academics' recommended modifications to the Plan. See Attachment B. Specifically, the Plan should be modified to:

- Designate source lists in addition to the voter registration list.
- Refill the jury wheel annually, rather than every two years.
- Direct the Clerk to regularly submit the names on the master and qualified wheels to the national change-of-address database of the United States Postal Service to be corrected.

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- Direct a follow-up notice to be sent to potential jurors who fail to respond to the jury qualification notice or summons.
- Direct a replacement jury qualification form to be sent to the same zip code when a jury qualification notice or summons is returned as undeliverable or is not returned.
- Adopt a one-step summoning process by combining the jury summons and qualification form.
- Incorporate a reference to a litigant's entitlement to access jury selection records under the Jury Selection and Service Act of 1968.
- Direct the Clerk to conduct periodic examinations of racial and ethnic diversity in the jury pool.
- Specify which jury selection records will be preserved and made available to litigants preparing a motion challenging the composition of the jury pool.

The academics explain how these modifications will improve the Court's ability to assemble racially and ethnically diverse jury pools. The sources the academics rely upon also show that the modifications are consistent with jury selection procedures already followed by districts in this and other circuits, as well as the best practices recommended by the American Bar Association ("ABA") and the National Center for State Courts.

We write separately to emphasize the importance of abandoning a single-source list for the juror selection process, and to request two additional modifications not identified by the academics.

1. The Southern District should follow the lead of every other state and federal court in California and adopt a multi-source jury list.

The community groups and academics offer compelling reasons to abandon a single-source list. In addition to those reasons, this Court should consider that maintaining a single-source list would be inconsistent with other districts within the Circuit, and contrary to the California state legislature's recent finding that California's voter lists do not adequately represent the community.

Every other District within the State of California has a Jury Selection Plan that relies on multiple-source lists. Significantly, each of these multiple-source list plans were either recently reaffirmed or enacted. *See* United States District Court for the Eastern District of California, *Jury Management Plan*, Section 2.01 (Jan. 25, 2016); United States District Court for the Northern District of California, *Plan for the Random Selection of Grand and Petit Jurors*, Gen. Order No. 6, Part V (Aug. 7, 2017); *The Plan of the United States District Court, Central District of California, for the*

Random Selection of Grand and Petit Jurors, General Order No. 19-07, Part 4 at pg. 2, lines 23-25 (July 15, 2019). Because nothing suggests the Southern District is somehow immune from the problems of single-source lists, the Plan should be modified in accord with the other federal courts within the state.

Maintaining a single-source plan is also at odds with the California's continued expansion of multiple-source lists. The California legislature recently determined that voter lists, even when supplemented by DMV records, do not adequately represent the community. The legislative history explained that "significant evidence exists to demonstrate that jury pools skew whiter and richer than the population as a whole, likely due in part to the data sources [such as voter registration and DMV records] utilized by courts when summoning jurors." Assembly Floor Analysis, S.B. 592 at 1 (Cal. Aug. 24, 2020). Relying on recent research, legislators found that "the use of voter data in developing jury lists is likely to result in a significant underrepresentation of Latino jurors," and that "evidence suggests that minorities hold driver's licenses at rates that are far lower than their white peers." *Id.* at 2. The legislators concluded that "the data casts significant doubt as to whether minority litigants are truly able to obtain a jury of their peers under California's existing system" which relies only on voter registration and DMV records. *Id.* In light of those findings, the California legislature passed a law requiring all courts in the state to supplement their source lists with taxpayer records, rather than relying exclusively on voter registration lists or DMV records. See S. 592, 2020 Leg., Reg. Sess. (Cal. 2020).

These legislative findings cast grave doubt on the Southern District's determination that voter lists alone represent a fair cross-section of the community. They also show that California's "motor voter" law, which encourages DMV customers to become registered voters, will not solve the problem. Accordingly, the Southern District should supplement its voter-roll-based jury list with a second, more representative source.

2. The Southern District should strengthen its antidiscrimination policy and eliminate the hardship excuse that will disproportionately exclude Imperial County jurors.

We also believe the Plan's antidiscrimination policy, Section 1.06, should be expanded. The current recognition that citizens will not be excluded from service "on account of race, color, religion, sex, national origin, or economic status" is consistent with Model Jury Plan, U.S. Courts for the Ninth Circuit, § 1.05 (approved October 20, 2016). The Model Jury Plan notes, however, that "districts may choose to include prohibitions against discrimination based on additional classifications, such as disability, age, and sexual orientation." *Id.* The District should join other districts in recognizing that these additional classifications will not be excluded from service.

Finally, we believe the Plan's provision permitting an excuse from service based on travel distance, Section 3.04(c)(2), should be deleted. Notably, the Plan's statement that traveling a "great distance, either in miles or travel time, from the place of holding court" constitutes undue hardship or extreme inconvenience does not appear in the Ninth Circuit Model Jury Plan. See § 3.04(c). More importantly, because our district includes both San Diego and Imperial Counties, but virtually all jury trials take place in San Diego County, this excuse may disproportionately exclude Imperial County residents from our jury pool. Imperial County residents often live hours away from downtown San Diego. Moreover, Imperial County residents are 85% Hispanic or Latino;¹ this hardship rule may work to disproportionately exclude Latino jurors.

We hope that the Court adopts these recommendations, which will bring our District's jury selection procedures in line with other federal districts. Collectively, we believe these measures will promote "the goal of equal justice under the law."

Sincerely,

/s/ Kathy Nester

Kathy Nester
Executive Director
Federal Defenders of San Diego, Inc.

/s/ Jami Ferrara

Jami Ferrara
Criminal Justice Act Panel
Representative
Southern District of California

Other CJA Panel Signatories

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Melissa Lubin
Gerald McFadden
Joe McMullan
Andrew Nietor
Gregory Obenauer
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¹ See U.S. Census, Imperial County QuickFacts (2019), <https://www.census.gov/quickfacts/imperialcountycalifornia>.

December 30, 2020
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