IN THE SUPREME COURT OF THE STATE OF NEVADA

MANINDER SINGH, INDIVIDUALLY AND AS HEIR OF THE ESTATE OF JASVIR KAUR, KEWAL SINGH, AND NIRBHAI SINGH; GURDEV SINGH, AS HEIR OF THE ESTATE OF JASVIR KAUR, KEWAL SINGH, AND NIRBHAI SINGH; SURJIT KAUR, INDIVIDUALLY AND AS HEIR OF THE ESTATE OF KEWAL SINGH; LAKHVIR HANS, AS HEIR OF THE ESTATE OF KEWAL SINGH; AND SHERYL BELL, ADMINISTRATOR OF THE ESTATES OF KEWAL SINGH, AND JASVIR KAUR AND NIRBHAI SINGH, Appellants, vs. NISSAN MOTOR COMPANY, LTD.; AND NISSAN NORTH AMERICA, INC, Respondents.	Electronically Filed Dec 30 2024 11:55 AM Elizabeth A. Brown Clerk of Supreme Court Case No.: 85869

AMENDED BRIEF OF AMICUS CURIAE ACLU OF NEVADA IN SUPPORT OF REVERSAL AND IN SUPPORT OF APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a) must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

American Civil Liberties Union of Nevada Foundation, Inc., is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership interest in it. This amicus curiae is represented by Christopher Peterson.

No other law firms have appeared for the amicus in this case or are expected to appear for the amicus in this Court.

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NRAP 29(c)(5) DISCLOSURE

The undersigned counsel of record certifies that no attorney for any other party took part in authoring this brief, in whole or in part. In addition, undersigned counsel certifies no person or entity contributed money or other consideration to fund the preparing or submission of this brief.

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STATEMENT OF INTEREST

The American Civil Liberties Union (ACLU) of Nevada is a state affiliate of the national ACLU, a nonprofit, nonpartisan organization that has been the nation's guardian of liberty for over 100 years. The ACLU works to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. As an organization that seeks to protect the civil liberties of all Nevadans, the ACLU is interested in ensuring that Nevadans who perform their civic duty when summoned and participate in jury selection are protected from unconstitutional discrimination.

Amicus has sought authority to file pursuant to NRAP 29(c).

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ARGUMENT

This Court found that Appellant Singh failed to "present a compelling argument that *Dixon* [*v. State*, 137 Nev. 217, 485 P.3d 1254 (2021)] is unworkable or badly reasoned," which Singh would need to establish to overturn *Dixon* under this Court's precedent.[1] *Maninder Singh v. Nissan Motor Co., Ltd.*, No. 85869, 2024 Nev. Unpub. LEXIS 732, at *4 (Sep. 12, 2024). However, *Dixon* is "badly reasoned" because it ignores *Batson*'s purpose in protecting people participating in jury service from discrimination, instead erroneously focusing only on the litigants' right to a fair trial. As the United States Supreme Court has previously recognized, a person who has suffered discrimination during jury selection has little to no recourse to remedy that discrimination on their own, which is why litigants have third party standing to issue a challenge on behalf of such a person. Contradicting this fundamental principle, *Dixon* denies the right to have litigants address discrimination if the discrimination is directed at jurors who are sitting as alternates. The opportunity to participate in jury selection is akin to participation in the elective process: "Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective

[1] Appellant Singh previously argued that *Dixon* was wrongly decided. Appellant's Opening Brief at 11, fn. 2; Appellant's Reply Brief at 24.

franchise." *Powers v. Ohio*, 499 U.S. 400, 408, 111 S. Ct. 1364, 1370 (1991). *Batson* and its progeny not only serve the general public's and litigants' interests in a fair trial but protects each person that participates in the jury selection process from suffering discrimination while carrying out their civic duty. *Id.*, 499 U.S. 400, 409, 111 S. Ct. 1364, 1370 (1991); *Batson v. Kentucky*, 476 U.S. 79, 87, 106 S. Ct. 1712, 1718 (1986) ("As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated *against the excluded juror*.") (emphasis added)). No matter who strikes a potential juror in a discriminatory manner, "there can be no doubt that the harm is the same -- in all cases, the juror is subjected to open and public racial discrimination." *Georgia v. McCollum*, 505 U.S. 42, 49, 112 S. Ct. 2348, 2353 (1992). The harm is as much, if not more, to the person serving as to the parties in the proceeding.

Respectfully, *Dixon* was "badly reasoned" because the decision misconstrued the nature of the right protected by *Batson*. First, the primary right protected in *Batson* belongs to the potential juror, not the parties litigating the trial, and second, the right protected is to be free from unlawful discrimination during jury selection, not the right to actually sit on a particular jury. When it claimed that "where the *Batson* violation involves a prospective alternate and no alternate participates in deliberations, the discrimination did not directly impact the jury's makeup and the

defendant was not tried by a jury whose members were selected pursuant to discriminatory criteria," the *Dixon* Court erred in focusing on secondary impacts, i.e. composition of the jury and the defendant's right to a fair trial, not the person whose rights were directly violated. *Dixon v. State*, 137 Nev. 217, 222, 485 P.3d 1254, 1259 (2021). Under *Dixon*'s reasoning, an alternate juror subject to discrimination, no matter how blatant, has no remedy for the violation of their constitutional right if alternates did not deliberate in the case. *See McCullom*, 505 U.S. at 56, 112 S. Ct. at 2357 (observing that while a juror could theoretically bring suit for discrimination, the barriers to such a suit are "daunting"). And while the *Dixon* Court accurately observed that no person has a right to sit as an alternate juror, this observation is not particularly relevant since no one has the right to sit as a juror in any capacity. *Compare Dixon*, 137 Nev. at 222 (stating that there is no right to be an alternate juror) *with Powers*, 499 U.S. at 409, 111 S. Ct. 1364, 1370 (1991) ("*An individual juror does not have a right to sit on any particular petit jury*, but he or she does possess the right not to be excluded from one on account of race." (emphasis added)). However, every person, whether they are ultimately seated as a juror or not, has the individual right to be free from discrimination while exercising their civic right, privilege, and duty to participate in the jury selection process. *Powers*, 499 U.S. at 409.

Similar to the ruling itself, the cases cited favorably in *Dixon* all failed to consider the rights of the juror subject to discrimination and *Batson*'s role in protecting those rights. *See, e.g.*, *Roberts v. Singletary*, 794 F. Supp. 1106, 1125 (S.D. Fla. 1992) (failing to recognize harm to individual juror and focusing exclusively on whether defendant was prejudiced by discriminatory preemptory challenge) (cited by *Dixon*, 137 Nev. at 221). The federal appellate court decisions cited in *Dixon*, arguably the most persuasive authority provided, all preceded the United States Supreme Court opinions in *Powers* and *McCollum* which were issued in 1991 and 1992 respectively and clarified that jurors themselves had a right to avoid discrimination during jury selection and litigants raising *Batson* challenges were effectively protecting that right as a third party. *See Dixon*, 137 Nev. at 221 (citing *United States v. Lane*, 866 F.2d 103 (4th Cir. 1989); *Nevius v. Sumner*, 852 F.2d 463, 468 (9th Cir. 1988)). By comparison, *United States v. Harris*, the federal appellate court decision cited by *Dixon* as a conflicting authority, was issued well after *Powers, McCollum*, and *Edmundson* and specifically addressed the harm to the juror. *United States v. Harris*, 192 F.3d 580, 587-88 (6th Cir. 1999) ("Moreover, the harm inherent in a discriminatorily chosen jury inures not only to the defendant, *but also to the jurors not selected because of their race*, and to the integrity of the judicial system as a whole.")(emphasis added)(cited by *Dixon*, 137 Nev. at 221).

Racial discrimination against a juror causes real, concrete harm that has nothing to do with the litigants' right to a fair trial. "People of color have reported for jury duty only to be targeted by harassment, subjected to unnecessary and embarrassing questioning, and confronted with harmful stereotypes." Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection*, 61 (2021), available at https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf. These experiences "send the message that people of color are presumed unqualified by state actors to decide important questions." *Id.* (internal quotation marks omitted). Prospective jurors should be presumed to be competent and by extension aware when they are subjected to racially biased questioning and harassment during jury selection. Subjecting people to racism from the litigants or even the judges without recourse solely due to their position as alternates will not alleviate this problem.

As the Supreme Court of United States has previously observed, a *Batson* challenge by a third party is practically the only remedy available to a juror struck in a discriminatory manner, stating "although individuals excluded from jury service on the basis of race have a right to bring suit on their own behalf, the barriers to a suit by an excluded juror are daunting." *McCullom*, 505 U.S. at 56, 112 S. Ct. at 2357. This is why a defendant "can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race" when the defendant is not

of the same race as the juror, *Powers*, 499 U.S. at 415 (emphasis added), and the government may raise a *Batson* challenge to protect a juror when a defendant exercises a discriminatory challenge. *McCollum*, 505 U.S. at 59. Yet under *Dixon*, blatant public racial discrimination against an alternate will only be remedied if the juror would have ultimately been seated, which is a truly arbitrary condition for justice to be found. Recognizing and rectifying racial discrimination against a juror that otherwise violates our federal and state constitutions should not depend on whether another juror has an unexpected emergency.

When courts have recognized, as the Supreme Court of the United States has clarified, that *Batson* challenges are as much about protecting people participating in the jury selection process from discrimination as it is about the final outcomes for a trial's litigants, those courts have correctly found that racial discrimination against a person participating in jury service, even an alternate, is structural error. *See Harris*, 192 F.3d at 587-88 ("Moreover, the harm inherent in a discriminatorily chosen jury inures not only to the defendant, *but also to the jurors not selected because of their race*, and to the integrity of the judicial system as a whole." (emphasis added)). Only when courts have erred in limiting the scope of the violation to the challenging party's rights do they erroneously apply harmless error.

Dixon correctly recognized that litigants are harmed when the jury seated has been shaped by unlawful discrimination and the public has an interest in juries

untainted by racial discrimination. However, *Dixon* ignores that it is the right of the person actually subjected to discrimination that is most entitled to protection and who *Batson* and its progeny were particularly meant to protect. In failing to provide the same protection to alternates as to seated juror, *Dixon* fails to serve this primary purpose and so should be overturned.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amicus brief, and to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e), which requires that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman.

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Finally, I hereby certify that this brief complies with the type-volume limitations of NRAP 40(b)(3) and NRAP 29(e) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 1729 words.

DATED this 30th day of December 2024.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of December 2024. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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