Nos. 11-17357, 11-17373

In the United States Court of Appeals for the Ninth Circuit

SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

ABBOTT LABORATORIES,
DEFENDANT-APPELLANT-CROSS-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 4:07-CV-5702 HON. CLAUDIA WILKEN, PRESIDING

ABBOTT LABORATORIES' RESPONSE TO COURT ORDER REGARDING EN BANC REVIEW

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Abbott Laboratories is a publicly traded corporation. It has no parent corporations and no publicly traded corporation owns more than 10% of its stock.

Although Abbott Laboratories remains the named defendant in this action, AbbVie Inc. is a newly formed publicly traded corporation that comprises the former pharmaceutical division of Abbott Laboratories. Since its formation, AbbVie Inc. has been directing the defense of this action. AbbVie Inc. has no parent corporations and no publicly traded corporation owns more than 10% of its stock.

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INTRODUCTION

This Court ordered Abbott Laboratories to address "whether the case should be reheard en banc." Abbott does not request review of the panel's holding that heightened equal protection scrutiny applies to classifications based on sexual orientation, or of its decision extending *Batson v. Kentucky*, 476 U.S. 79 (1986), to sexual orientation. Abbott condemns discrimination in all forms, including in jury selection, and no discrimination occurred here. But even apart from the proper level of scrutiny and the extension of *Batson*, the issues presented are critically important—both doctrinally and practically—and will affect every jury trial in this Circuit. En banc review is warranted.

In applying *Batson* here, the panel erroneously discarded *Batson*'s requirement that courts *test* claims of discrimination by conducting a "comparative juror analysis"—which this Court, sitting en banc, has held "is required." *Kesser v. Cambra*, 465 F.3d 351, 361 (9th Cir. 2006) (en banc). This means courts "must 'compar[e] … panelists [in the protected class] who were struck with … panelists [outside the protected class] who were allowed to serve.'" *Jamerson v. Runnels*, 713 F.3d 1218, 1224 (9th Cir. 2013). By discarding that requirement here, the panel upset the law and created a direct conflict with the precedents of this Court, the Supreme Court, and other circuits. *E.g.*, *Miller-El v. Cockrell*, 545 U.S. 231 (2005); *Kesser*, 465 F.3d at 361 (en banc); *Green v. LaMarque*, 532 F.3d 1028 (9th

Cir. 2008); and *Ayala v. Wong*, —F.3d— , 2014 WL 707162 (9th Cir. Feb. 25, 2014); *United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011); *Stevens v. Epps*, 618 F.3d 489, 497 (5th Cir. 2010).

Indeed, just weeks ago this Court explained that courts "cannot perform a fair comparative juror analysis as required by *Batson*" without "potentially crucial information about certain individuals who were neither the subject of [the] *Batson* challenge nor ultimately served as jurors." *Ayala*, 2014 WL 707162, *15 (Reinhardt, J). Here, however, the panel conducted no comparative analysis; and when the issue came up below, Judge Wilken found the record insufficient for any such analysis, stating that there is "no real way to analyze" the *Batson* issue without knowing "who is gay and who isn't." ASER-320. That should have led the panel to reject GSK's *Batson* challenge. Instead, the panel suspended the usual rules, creating a whole new *Batson* standard—in direct conflict with binding precedent.

Citing *People v. Garcia*, 92 Cal. Rptr. 2d 339, 347 (Cal. Ct. App. 2000)—which extended California's version of *Batson* to sexual orientation—the panel purported to find support in California's experience. Op. 34-35. But the U.S. Supreme Court first required comparative juror analysis in 2005—after *Garcia*. And the California Supreme Court's only relevant decision found no "prima facie case of discrimination" because, "[e]ven assuming [the two struck jurors] are lesbians … , *the record does not establish how many other lesbians went unchallenged*."

People v. Bell, 151 P.3d 292, 304 (Cal. 2007) (emphasis added). Here too, the record does not reveal how many gay jurors "went unchallenged." Yet the panel erroneously found discrimination without conducting *any* fair comparison—as *Batson* requires.

Worse, the panel chose a singularly inappropriate case to make new law. Believing *Batson* did not apply—consistent with every decision that had reached the issue—Judge Wilken did not require Abbott's counsel to explain the strike, and counsel simply stood on the judge's ruling. Yet the record reveals powerful neutral reasons for the strike—reasons that defeated any prima facie case of discrimination even *without* a full comparative juror analysis.

Juror B, an employee of *this Court*, was the *only* panelist who had heard about any of the drugs at issue. ASER-222, 308. GSK's central claim is that Abbott unlawfully raised the wholesale price of Norvir, Abbott's patented HIV drug. The price increase was justified and Abbott had numerous programs to ensure that it was not passed on to consumers lacking insurance, but it was highly controversial in the HIV community. It should hardly be surprising, therefore, that Abbott struck "the only potential juror who testified that he had heard of [Abbott's HIV drug Kaletra]." Op. 13 & n.4. Yet the panel found a *Batson* violation while acknowledging that this basis for the strike *would not be pretextual*. *Id.*

The panel's decision to erase comparative juror analysis from the *Batson* framework will govern thousands of jury trials—criminal and civil, federal and state—conducted annually in this Circuit. That decision deserves the attention of the full Court—not just that of one panel whose decision conflicts with the precedents of this Court, the Supreme Court, and other circuits.

BACKGROUND

Abbott is the inventor of a powerful patented HIV drug, Norvir, which dramatically boosts the effect of other HIV drugs. GSK says Abbott violated federal antitrust law and state law by substantially raising the price of Norvir, which Abbott licensed GSK (a direct competitor) to market with GSK's own drug (Lexiva).

According to GSK, this price increase effectively raised Lexiva's price, thus allegedly "forcing" HIV patients to take an allegedly inferior Abbott drug (Kaletra). But the agreement said nothing about price. And in a companion case brought by HIV patients, this Court rejected an *identical* antitrust challenge to the *same* Abbott price increase. *John Doe 1 v. Abbott Labs.*, 571 F.3d 930, 933 (9th Cir. 2009). Yet the court below erroneously let GSK's antitrust claim proceed to trial, and the panel here ordered a retrial—without addressing the antitrust claim or citing *Doe*.

There were 30 prospective jurors. Judge Wilken conducted her own voir dire, allowing each side just 20 minutes of follow-up—*40 seconds per juror*.

ASER-362. Conducting voir dire in this environment requires counsel to juggle numerous responsibilities—listening, taking notes, analyzing rapid-fire information, formulating individualized follow-up questions, and comparing panelists based on their quick responses. Not surprisingly, details are sometimes misheard, misinterpreted, forgotten, or outright missed.

Abbott's questioning of Juror B was similar to its questioning of other prospective jurors, and neither the court nor counsel asked any juror about sexual orientation. In response to one of the court's questions, Juror B referred to his "partner" as "he." ASER-223. Asked whether he was "close to someone … with H.I.V.," Juror B stated: "I've had friends in the past." ASER-224. That response fairly suggested that these friends had died of AIDS. No other jurors suggested they were "close" to any HIV patients, much less that any friends had died.

Juror B was also the only juror who "testified that he had heard of Kaletra." Op. 13 & n.4; ASER-307-08. Further, he alone worked *for this Court*—which had already heard the *Doe* appeal—and he knew "a lot of people in the legal field from [his] job." ASER-222-24.

When Abbott struck Juror B, GSK raised a *Batson* challenge, asserting that Juror B "is or appears to be, could be homosexual." ASER-319-20. The court denied the challenge. First, it questioned "whether *Batson* applies in civil [trials]." ASER-320. Second, it questioned "whether *Batson* ever applies to sexual orienta-

tion." *Id.* Third, it explained that "there is no way for us to know who is gay and who isn't here, unless somebody happens to say something. There would be no real way to analyze it." *Id.*

The court offered Abbott a choice: Explain the strike or stand on the court's reasons for denying the challenge. *Id.* Counsel stated: "I will stand on the first three, at this point Your Honor. I don't think any of the challenge[s] applies. I have no idea whether he is gay." *Id.* The court permitted the strike.

After a 15-day trial, the jury rejected all of GSK's claims except its theory that the price increase breached the license's implied covenant of good faith and fair dealing. It also rejected GSK's claim for $1.7 billion in damages (after trebling), awarding only $3.4 million. Abbott appealed that award; GSK cross-appealed the entire verdict, invoking *Batson*.

The panel reversed. After concluding that *United States v. Windsor*, 133 S. Ct. 2675 (2013), required applying "heightened scrutiny," the panel extended *Batson* to sexual orientation. Op. 3, 26-35. The panel acknowledged the "privacy interests at stake," but stated that juror privacy could be protected by "prudent courtroom procedure" and by limiting *Batson* to situations where "a prospective juror's sexual orientation was established[] voluntarily." Op. 33, 34. The panel never mentioned the required comparative juror analysis.

The panel did, however, conduct a truncated *Batson* inquiry.[1] It acknowledged that "Juror B was the only potential juror who testified that he had heard of [Kaletra]," and that striking him on this basis would *not* be pretextual. Op. 13 n.4. Nonetheless, it deemed this reason insufficient, reasoning that Juror B had "no personal experience with [the drug]." *Id*. The panel then declared the other possible neutral grounds for the strike "pretextual," calling counsel's denial that he knew Juror B was gay "far from credible." Op. 13 & n.4, 11.

In finding a *Batson* violation, the panel frequently mischaracterized the record and Abbott's positions. For example, the panel criticized Abbott for "fail[ing] to ask … whether Juror B could decide the case fairly" (Op. 4), ignoring that Judge Wilken *herself* had done so (ASER-224). And when dismissing as "pretext[]" Juror B's employment with *this Court*, the panel reasoned that he could not have influenced the jury any more than "the two lawyers who remained on the panel." Op. 13 n.4. But Abbott's point was that Juror B's job "suggest[s] he interacts with counsel, staff attorneys, law clerks, or even judges on this Panel" (Abbott Third Br. 25)—two of whom had heard a related appeal. *Doe*, 571 F.3d at 931. By contrast, the other two "lawyer" jurors—again, neither of whom was asked if he was gay or

[1] If *Batson* applies, the party challenging the strike must first make a prima facie showing of discrimination, and then if the other party responds with a neutral basis for the strike, the court must decide whether the strike amounted to purposeful discrimination. *United States v. Collins*, 551 F.3d 914, 919 (9th Cir. 2009).

bisexual—were an individual with a French law degree who had never practiced, and a former lawyer who had not practiced in 20 years.

REASONS FOR REHEARING THIS CASE EN BANC

The panel's decision directly conflicts with the precedents of this Court, the Supreme Court, and other circuits—all of which prohibit courts from finding discrimination if not supported by a "comparative juror analysis." That analysis "involves comparing the characteristics of a struck juror with the characteristics of other potential jurors, particularly those jurors whom the [party] did not strike." *Collins*, 551 F.3d at 921. In other words, to identify discrimination, it is essential to have a "control group." But the panel here had none. So it simply rewrote the *Batson* standard to omit the control group requirement, which is contrary to settled law and, absent correction, leaves the law in disarray on an issue affecting thousands of jury trials annually. En banc review is warranted.

I. By discarding comparative juror analysis—which is mandatory under *Batson*—the panel's decision conflicts with decisions of the Supreme Court, this Court, and other circuits.

Since the Supreme Court decided *Miller-El*, it has been settled that a court deciding whether *Batson* has been violated "must conduct a comparative juror analysis"—that is, it "must 'compare … panelists [in the protected class] who were struck with … panelists [outside the protected class] who were allowed to serve.'" *Jamerson*, 713 F.3d at 1224. Comparative analysis enables the court to assess

whether a "reason for striking" the challenged juror "applies 'just as well' to a [juror of another race, gender, or class] who is selected"—and thus to determine whether there is "purposeful discrimination." *Id*. (quoting *Miller-El*). This mandatory "side-by-side comparison[]" is "[m]ore powerful than … bare statistics." *Miller-El*, 545 U.S. at 241.

Applying *Miller-El*, this Court has repeatedly held that "comparative analysis is required" (*Kesser*, 465 F.3d at 361 (en banc)), calling that rule "clearly established Supreme Court law" (*Green*, 532 F.3d at 1030). As this Court reiterated just weeks ago, courts "cannot perform a fair comparative juror analysis as required by *Batson*" without "potentially crucial information about certain individuals who were neither the subject of [the] *Batson* challenge nor ultimately served as jurors." *Ayala*, 2014 WL 707162, *15 (Reinhardt, J.). The court can "only serve its function" if the challenging party's counsel "preserve[s] for the record" these "crucial facts." *Id*. at *24.

The problem in *Ayala* was that defense counsel's exclusion from the *Batson* hearing, compounded by the fact that the trial court "lost" certain "questionnaires," left this Court without "many of the facts material to whether the prosecution's stated reasons were false, discriminatory, or pretextual" and thus "unable to evaluate … the prosecution's proffered reasons." *Id*. The problem here is that sexual orientation is not self-evident, and GSK did not solicit information allowing Judge

Wilken to compare jurors based on sexual orientation. Under controlling *Batson* precedent, that should have been the end of GSK's discrimination claim.

Instead, the panel applied a hollowed-out version of "*Batson*"—one that did *not* require a comparative analysis. Worse, the panel proceeded to find discrimination, judging counsel's motives for striking Juror B in isolation, declaring neutral grounds for the strike "pretextual," and deeming counsel's denial of discrimination "far from credible." Op. 13 & n.4, 11. That credibility finding was patently unfair. Plaintiffs' own counsel was apparently unsure of Juror B's sexual orientation, initially stating only that he "*could be* homosexual." ASER-319-20 (emphasis added). Further, the panel assumed—unreasonably—that Abbott's counsel caught every word in an avalanche of details during rapid-fire questioning of 30 people. This was no *Batson* inquiry. It was an adverse *credibility* determination made on an incomplete appellate record. By ignoring comparative juror analysis, the panel both reached the wrong conclusion and invited future courts to make the same mistake.

The panel's decision also conflicts with other circuits' holdings. As the Fourth Circuit has explained, *Miller-El* "explicitly rejected" the "rule that comparative juror analysis was not a critical element of a *Batson* claim." *Barnette*, 644 F.3d at 205. Likewise, the Fifth Circuit has held that "*Miller-El* [] requires a comparative juror analysis." *Stevens*, 618 F.3d at 497. Review is warranted.

II. Legitimate privacy concerns should be addressed by this Court sitting en banc, not by a single panel decision creating a new "*Batson*" standard that discards binding precedent.

Because "any notion of discrimination assumes a comparison of substantially similar [parties]" (*GMC v. Tracy*, 519 U.S. 278, 298-99 (1997)), a finding of discrimination *necessarily* requires comparing the struck juror with those who remained. Apparently driven by practical difficulties, however, the panel abandoned this requirement—creating a whole new *Batson* standard. Abbott stresses to the Court the importance of juror privacy, and that extending *Batson* in cases involving sexual orientation—as California has done under state law—raises important questions. But those questions require a sensible solution designed by this Court sitting en banc, not a hollowed-out legal standard created by one panel in violation of precedent.

1. Jurors' sexual orientations are rarely self-evident. A juror's race or gender may be uncertain, but those cases are the exception. By contrast, not knowing a juror's sexual orientation is the norm. As Judge Wilken put it: "there is no way for us to know who is gay and who isn't here, unless somebody happens to say something." ASER-320.

This Court recognized these difficulties in *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996). After the plaintiff there challenged a strike, the court asked counsel why he believed the juror was "gay":

> [COUNSEL]: I believe, that based on my observations, just as I would observe a man to be a man, and a woman to be a woman. I listened to his answers. I watched his mannerisms.
>
> * * *
>
> [COUNSEL]: I base this on the following: the way he is—his affect; the way he projects himself, both physically and verbally indicate to me that he is gay. The place where he lives is potential evidence of that. His marital status [single] is potential evidence of that. What he has done for a living [freelance screen writer] is potential evidence of that.

Id. at 952. Not surprisingly, this Court denied the *Batson* challenge. *Id*.

2. Asking every juror whether he or she is gay poses obvious problems. Many might decline to answer—or might answer untruthfully, a potential crime—for fear of losing their privacy or the potential "ramifications" thereof—"job loss, being disowned by friends and family, or even potential physical danger." Op. 33. Others might have principled objections to disclosing highly personal information under courtroom pressures. Still others might be unsure. All of these factors may result in underreporting gay jurors. And even allowing jurors to answer away from other jurors would require divulging sensitive information to strangers. Indeed, "forcing [a juror] to disclose information regarding personal sexual matters" may "invade[] [a] right to privacy … protected by the constitution." *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983).

Courts and commentators have therefore concluded that jurors should *not* routinely be asked about their sexual orientation. That "would be highly impracti-

cal," "would not engender equality," and "would likely cause [gay jurors] frustration and embarrassment." Kathryne M. Young, *Outing* Batson*: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 Willamette L. Rev. 243, 271 (2011). "[P]robing questions" about sexual orientation—which "are not easy to broach"—inevitably "extend[] the jury-selection process," "offend" the venire, and "le[ave] many jurors flustered and resentful," potentially harming one side's case. *Gacy v. Welborn*, 994 F.2d 305, 314-15 (7th Cir. 1993).

3. Apparently aware of these difficulties, the panel never mentioned the required "comparative juror analysis," instead saying that privacy could be protected by "prudent courtroom procedure" and expressly limiting the *Batson* analysis to whatever information about sexual orientation happens to be disclosed "voluntarily." Op. 34. But suspending the ordinary rules for proving a *Batson* violation fundamentally alters the settled framework for identifying discrimination.

In support of its novel approach, the panel noted that that California courts apply a *Batson*-style framework to sexual orientation. But *Garcia*, the state decision that extended California's version of *Batson* (*Wheeler*) to sexual orientation, predates *Miller-El*. California did not then require comparative juror analysis. *See People v. Lenix*, 44 Cal. 4th 602, 662 (2008) (acknowledging that *Miller-El* required such analysis). And no California case explains how courts are to compare

jurors' sexual orientations, let alone finds a violation without conducting a comparative analysis.

To the contrary, in the one relevant California Supreme Court decision, the court "assume[d] lesbians are a cognizable group for *Wheeler-Batson* purposes" and held that the defendant failed to show "a prima facie case of discrimination." *Bell*, 151 P.3d at 304. Why? Principally because, "[e]ven assuming [the two struck jurors] are lesbians … , *the record does not establish how many other lesbians went unchallenged*." *Id*. (emphasis added). As Judge Wilken found, that is the situation here. ASER-320. Thus, if the panel had followed the California Supreme Court's approach, then, even applying *Batson* to sexual orientation, it would have rejected GSK's claim.

4. The panel here extended *Batson*—again, a holding Abbott is not contesting—but it did not grapple with the essential problem of the lack of information. It avoided that problem by holding that *Batson* may be applied based on whatever information happens to be "voluntarily" available—creating a legal standard apparently based on inconclusive clues and stereotypes about each juror's sexual orientation.

Courts have never applied *Batson* in that manner. Precedent requires a "comparative juror analysis," which in turn requires having complete information about which panelists are and are not members of the protected class. Courts

"cannot sustain a *Batson* challenge on conjecture." *United States v. Esparsen*, 930 F.2d 1461, 1466-67 (10th Cir. 1991) (rejecting "the assumption[] that … people with Hispanic surnames are Hispanic").

In *Miller-El*, for example, the Supreme Court found that "10 of the 11 qualified black venire panel members were peremptorily struck" (545 U.S. at 265), and in *Kesser*, this Court found that "three out of three Native Americans were struck." 465 F.3d at 357, 368 n.5. Under existing precedent, a party alleging discrimination based on sexual orientation must present the same kind of thorough record. Indeed, for a proper analysis, it is often critical to know whether even a *single* juror in the same class was permitted to serve. *E.g.*, *Jamerson*, 713 F.3d at 1236 (rejecting *Batson* challenge in part because "the prosecutor never attempted to strike" another "black member of the venire" despite "plenty of opportunities"); *Cook v. LaMarque*, 593 F.3d 810, 818 (9th Cir. 2010) (similar).

All of these points highlight the tension between the need to conduct a comparative juror analysis and the need to protect juror privacy. The panel never addressed this tension. But however it is resolved, full Court review is needed to tackle the issue and create a workable solution.[2]

[2] In the context of religion, some courts, faced with issues similar to those discussed above, have found that privacy interests outweigh the benefits of applying *Batson*—even though laws targeting religious beliefs "must undergo the most rigorous of scrutiny." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508

III. Review is warranted to confirm that, even for sexual orientation, a comparative juror analysis is required before a court may find that discrimination occurred.

The panel was not free to eliminate the required "comparative juror analysis." Binding *Batson* precedent, including from the Supreme Court, requires such an analysis for GSK's claim to succeed. Yet GSK failed to "preserve for the record" the "crucial facts" needed to conduct that analysis. *Ayala*, 2014 WL 707162, *23. That failure precluded any finding of discrimination: The fact that a struck juror is a member of a protected class—even "the one [protected] member of the venire—"does not, in itself, [even] raise an *inference* of discrimination." *Wade v. Terhune*, 202 F.3d 1190, 1198 (9th Cir. 2000) (emphasis added); *accord United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). Review is needed to make that clear, and to guide parties creating a record in future cases.

Here again, California's experience is instructive. In deciding whether there was discrimination in *Bell*, the court acknowledged that "sexual orientation is usu-

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U.S. 520, 546 (1993); *see, e.g.*, *United States v. DeJesus*, 347 F.3d 500, 510-11 (3d Cir. 2003). Justice Ginsburg, for example, has noted that religious affiliation "is not as self-evident as race or gender," and "[o]rdinarily, inquiry … into a juror's religious affiliation and beliefs is irrelevant." *Davis v. Minnesota*, 511 U.S. 1115 (1994) (Ginsburg, J., concurring in denial of certiorari). The First Circuit likewise observes that "lack of information is one of the essential problems with applying *Batson* to religious groups." *United States v. Girouard*, 521 F.3d 110, 116 (1st Cir. 2008). There are, of course, other balances that could reasonably be struck. Abbott's point is that the panel passed on the issue, leaving great uncertainty.

ally not so easily discerned from appearance," but still applied the usual rules for proving discrimination—concluding that no "prima facie case" or "inference of discrimination has been raised," principally because "the record does not establish how many other lesbians went unchallenged." 151 P.3d at 304.

Here too, GSK did not elicit information to support a "prima facie case," let alone a finding of discrimination under *Batson*'s required comparative juror analysis. The record points the other way: Juror B was "the only potential juror" who (1) "had heard of [Kaletra]," (2) was "close" to people diagnosed with HIV "in the past," and (3) worked for *this Court*. Op. 13 n.4. Any comparative analysis would have to assess *both* Juror B's unique characteristics *and* the sexual orientations of the other panelists. But GSK did not preserve the "crucial facts"—as was its burden (*Ayala*, 2014 WL 707162, *23-24)—precluding a finding of discrimination. *See Esparsen*, 930 F.2d at 1466 ("[t]he burden of creating a record of relevant facts belongs to the defendants"); *Anderson v. Cowan*, 227 F.3d 893, 901-02 (7th Cir. 2000) (rejecting *Batson* challenge where the challenger "failed to preserve … the [panel's] racial composition").

The recurring and wide-ranging importance of these issues further confirms the need for en banc review. Rule 35(b)(1)(B). In a decision that numerous commentators have described as a "landmark" (*e.g.*, Noah Feldman, *California's Gay-Juror Ruling Goes One Step Too Far*, Miami Herald (Jan. 23, 2014); Erin Coe, *Re-*

versal Over Sacked Gay Juror To Guide Jury Selection, Law360 (Jan. 21, 2014)), the panel jettisoned a required element of the *Batson* analysis and effectively re-wrote the rules that will govern thousands of jury trials annually. The full Court's guidance is needed, particularly given the conflict between the panel's analysis and Supreme Court, Ninth Circuit, and other circuit precedent holding that comparative juror analysis is "required." *Kesser*, 465 F.3d at 361 (en banc).

CONCLUSION

The Court should grant review to confirm that comparative juror analysis is mandatory under *Batson*, that the party making the *Batson* challenge must develop the record necessary for such analysis, and to provide clear guidance to judges and litigants on how these requirements may appropriately be balanced against the interest of juror privacy.

Respectfully submitted,

/s/ JAMES F. HURST

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APRIL 17, 2014

STATEMENT OF RELATED CASES UNDER CIRCUIT RULE 28-2.6

No other cases currently pending in this Court are deemed related to the present case under Cir. R. 28-2.6.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Circuit Rules 35-4 and 40-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 4199 words.

In preparing this certificate, I relied on the word count generated by Microsoft Word 2007.

/s/ James F. Hurst
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