COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
No. 2020-P-0157

COMMONWEALTH OF MASSACHUSETTS,

APPELLEE,

V.

LUIS MARTINEZ-PEGUERO,

DEFENDANT-APPELLANT

ON APPEAL FROM THE
LAWRENCE DISTRICT COURT

BRIEF OF *AMICI CURIAE* THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AT HARVARD LAW SCHOOL AND THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF THE DEFENDANT-APPELLANT AND REVERSAL

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STATEMENTS OF INTEREST

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, one of the twentieth century's most significant legal scholars and litigators. Houston engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing, criminal sentencing, and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed by these policies. Given the racial disparities that characterize the entire criminal legal system, there are few issues as critical to our mission as reversing the persistent exclusion of people of color from juries.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a non-profit organization based at the Seattle University School of Law. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of over 120,000 Japanese

Americans, the Korematsu Center works to advance social justice for all. It has a special interest in ensuring fair treatment in our nation's courts. It has filed amicus briefs addressing discrimination in jury selection in state courts in Louisiana, New York, North Carolina, and Washington. It was a member of the workgroup tasked by the Washington Supreme Court to assist it in acting on proposed changes to rules governing the exercise of peremptory challenges.[1] The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

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Amici declare that (a) no party or party's counsel authored the brief in whole or in part, (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; (c) no person or entity—other than the

[1] Proposed New GR 37 – Jury Selection Workgroup, *Final Report*, https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf.

amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief; and (d) neither *amici* nor their counsel represent or have represented any of the parties to the present appeal in another proceeding involving similar issues, or were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

INTRODUCTION

On June 3, 2020, the Supreme Judicial Court implored the Commonwealth's judiciary to "look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms."[2] One area that requires fresh eyes is how courts treat peremptory challenges. Despite the U.S. Supreme Court's recognition that peremptory strikes by their nature invite "those to discriminate who are of a mind to discriminate," *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)), and despite its efforts to fashion safeguards against, at least, intentional discrimination, *id*. at 97–98, judges, advocates, and scholars have been deeply skeptical as to whether existing safeguards sufficiently prevent intentional, let alone unconscious, discrimination.[3]

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[2] Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar, June 3, 2020, https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and.

[3] *See, e.g.*, *Batson*, 476 U.S. at 105 (Marshall, J., concurring) ("Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level."); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31

Consider the peremptory strike in question here. During the trial of a Hispanic defendant, the Commonwealth struck the sole Hispanic juror in the venire, whose "brother was arrested and charged with murder" in Wisconsin, because the prosecutor was "just not comfortable based on the charges in this hearing"—charges of intent to distribute Class B drugs. Def. Br. at 30 (citing Tr. at 23). If a prosecutor's discomfort at a prospective Hispanic juror's family member's involvement with the criminal legal system—for dramatically different charges in a state hundreds of miles away—is allowed to justify the peremptory strike, this Court will have reinforced and legitimized a method that can be used to disparately exclude Black and Hispanic citizens from juries.

The inescapable, uncomfortable truth is that Black and Hispanic people are overrepresented at every phase of criminal suspicion, investigation, prosecution, and punishment around the country and in the Commonwealth. As a result, Black and Hispanic people are far more likely to have loved ones with histories of entanglements with the criminal legal system. Even if a prosecutor were equally uncomfortable whenever any juror has a family member with a criminal history, this facially-neutral discomfort too easily becomes the legal basis to disproportionately exclude prospective Black and Hispanic jurors. In addition to

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Am. Crim. L. Rev. 1099, 1113 (1994) ("It is precisely the type of conscious and unconscious racism that has been exhibited in *Batson* and *Hernandez* that must be cured . . . .").

infringing the constitutional rights of defendants such as Mr. Peguero, it denies to Black and Hispanic citizens their constitutional right to be free of discrimination when they seek to fulfill their civic duty in jury service.

Amici urge this Court to heed the call of the Supreme Judicial Court and take steps to root out conscious and unconscious bias that operates in the courtroom with regard to the use of peremptory strikes.

SUMMARY OF ARGUMENT

The proffered justification for the peremptory strike used to eliminate the sole Hispanic juror must be viewed against the reality of over-incarceration and over-prosecution of Black and Hispanic people. Nationally, Black people are 50 percent more likely than white people to experience family incarceration, and three times as likely to have had a family member incarcerated for more than one year.[4] Latinx people experience family incarceration at rates slightly higher than white people, but they are nearly twice as likely to have a family member in jail or prison for more than one year.[5] Thus, a prosecutor's decision to employ a peremptory strike against a Black or Hispanic person on the basis of familial connections to criminal prosecution is inherently suspect—a facially neutral yet racially

[4] *Half of Americans Have Family Members Who Have Been Incarcerated*, Equal Justice Initiative (Dec. 11, 2018), https://eji.org/news/half-of-americans-have-family-members-who-have-been-incarcerated.

[5] Racial Disparities in Incarceration and Coronavirus, Fwd.US (2020), https://www.fwd.us/news/coronavirus-disparity.

discriminatory proxy, whether consciously intended or not. Empirical research further shows that one of the most common justifications prosecutors use to challenge Black and Hispanic jurors is a history of arrest, prosecution, or incarceration among their close contacts.[6] Allowing peremptory strikes of Black and Hispanic people for purportedly group-neutral reasons that disproportionately affect Black and Hispanic people, and which are disproportionately used to strike Black and Hispanic citizens from jury service, is odious to our constitution. This practice allows prosecutors to compound systemic racism in our criminal legal system—including racial disparities driven in large part by prosecutorial decision-making.

Some states have responded, recognizing that strikes based on a juror's familial entanglement in the criminal legal system have historically been used to exclude jurors of color. Washington, first by court rule, General Rule 37, and then constitutionalizing this approach in *State v. Jefferson*, 429 P.3d 467 (Wash. 2018), and California, by legislation,[7] have deemed having a close relationship with people who have been stopped, arrested, or convicted of a crime a presumptively

[6] Elisabeth Semel et al., Berkeley Law Death Penalty Clinic, Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

[7] Assemb. B. 3070 (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3070.

invalid reason for a peremptory strike. Stated differently, such a reason is presumptively inadequate.

Against this backdrop, the *Batson-Soares* framework requires a finding that the strike here was invalid. Even if the discomfort were genuinely felt, the proffered reason is "a proxy for a discriminatory practice," *Commonwealth v. Prunty*, 462 Mass. at 313 (2012) (quoting *Hernandez v. New York*, 500 U.S. 352, 379 (1991) (Stevens, J., dissenting)), and therefore an inadequate basis under the *Batson-Soares* test, which requires that the justification be both adequate and genuine. *See Commonwealth v. Robertson*, 480 Mass. 383, 391 (2018) ("Only if it is both [adequate and genuine] may the peremptory challenge be allowed."). Further, art. 12 of the Massachusetts Declaration of Rights affords an independent pathway for this Court to safeguard the rights of defendants and jurors of color.

ARGUMENT

Though the *Batson* Court offered its now-familiar three-part test to address the problem of race discrimination in the exercise of peremptory strikes, in an often-overlooked sentence near the end of the opinion, it declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." 476 U.S. at 99. In an accompanying footnote the Court disclaimed any "attempt to instruct these courts how best to implement our holding today." *Id*. at 99 n.24. The Court understood that each state must be free to

determine how best to address and remedy discrimination in jury selection. The Supreme Judicial Court has already used this power to imbue new life into *Batson*'s procedural safeguards by requiring that reasons offered for a strike be both adequate and genuine. *E.g.*, *Commonwealth v. Maldonado*, 439 Mass. 460, 464–65, 465 n.7 (2003) (rejecting U.S. Supreme Court's acceptance of "silly" or "superstitious" reasons so long as they are facially race-neutral) (citations omitted). Consistent with the Supreme Judicial Court's admonition that a "juror's looks or gestures, or a party's 'gut' feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination," *id*. at 465 (citations omitted), having a close relationship with people who have been stopped, arrested, or convicted of a crime should likewise rarely be accepted because such explanations can easily be used as pretexts for discrimination.

I. Striking jurors on the basis of a close relationship with someone who has been arrested, prosecuted, or incarcerated is an unlawful proxy for racial discrimination in light of the historical and ongoing disparate policing and incarceration of Black and Hispanic people.

Having a loved one with a history of involvement in the criminal legal system is not a race-neutral reason for a peremptory strike when Black and Hispanic people are disproportionately policed, arrested, prosecuted, and incarcerated, both in Massachusetts and throughout the country.[8] From street stops

[8] *See, e.g.*, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, New Yorker (June 5, 2015), https://www.newyorker.com/news/news-

and frisks to vehicle stops and searches, from arrests and charges to pretrial detention, conviction, and sentencing, the disparate treatment of Black and Hispanic people in the gears of criminal punishment is irrefutable. The Supreme Judicial Court has repeatedly taken notice of this reality. *See, e.g.*, *Commonwealth v. Williams*, 481 Mass. 443, 451 n.6 (2019) (collecting studies showing "ample empirical evidence" to support a conclusion that "African-American males receive disparate treatment in the criminal justice system"); *Commonwealth v. Warren*, 475 Mass. 530, 539–40 (2016) ("[B]lack men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. Black men were also disproportionally targeted for repeat police encounters."); *Commonwealth v. Evelyn*, 485 Mass. 691, 708 (2020) ("[T]his pattern of racial profiling has been confirmed by more recent FIO reports."); *Commonwealth v. Buckley*, 478 Mass. 861, 876–77 (2018) (Budd, J., concurring) ("Years of data bear out what many have long known from experience: police stop drivers of color disproportionately more often than Caucasian drivers

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desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors ("[B]lack people are more likely to have been targeted or abused by police; to be affected by the extreme racial disparities in arrests, incarceration, and the death penalty; and to understand that crimes against black victims are prosecuted less vigorously than those against whites."); Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System is Racist. Here's the Proof*, Wash. Post, (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system.

for insignificant violations (or provide no reason at all)."); *Commonwealth v. Laltaprasad*, 475 Mass. 692, 702 (2016) ("[D]ata concerning convictions for drug offenses in Massachusetts raise a serious concern about the disparate impact of mandatory minimum sentences on defendants who are part of racial or ethnic minority groups."); *Commonwealth v. Lora*, 451 Mass. 425 (2008); *Commonwealth v. Feyenord*, 445 Mass. 72, 88 (2005), *cert. denied*, 546 U.S. 1187 (2006) (Greaney, J., concurring) (discussing "humiliating, painful, and unlawful" nature of some police encounters targeting African-American and Hispanic individuals); *Commonwealth v. Arriaga*, 438 Mass. 556, 571 (2003) ("Racial and ethnic bias in the Massachusetts courts is an issue of long-standing concern."); *Commonwealth v. Gonsalves*, 429 Mass. 658, 670 (1999) (Ireland, J., concurring) (collecting studies on disparate policing of Black and Hispanic people in traffic stops); *Commonwealth v. Phillips*, 413 Mass. 50, 53 (1992) (describing informal Boston Police "search on sight" policy which enacted "martial law" for young Black people in Roxbury).

A. Black and Hispanic people are over-represented at every stage of criminal investigation and prosecution in the Commonwealth.

Black and Hispanic people are policed more heavily;[9] arrested and prosecuted at higher rates, especially for minor crimes;[10] disparately charged with offenses carrying mandatory minimum sentences;[11] jailed pretrial at starkly

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[9] Jeffrey Fagan et al., Final Report, *An Analysis of Race and Ethnicity Patterns in Boston Police Department and Field Interrogation, Observation, Frisk, and/or Search Reports* 2 (June 15, 2015), https://www.issuelab.org/resources/25203/25203.pdf; ACLU of Massachusetts, Black, Brown and Targeted (2014), https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf.

[10] *See, e.g.*, Naomi Martin, *Mass. still has no clue how many people's marijuana records should be cleared*, Bos. Globe (May 3, 2019), https://www.bostonglobe.com/news/marijuana/2019/05/03/two-years-after-legalization-mass-has-clue-how-many-people-marijuana-records-have-been-cleared/uAAsVHea0TG0a0HzJ6EZIL/story.html (50% of people charged with marijuana possession in Suffolk County were Black over five years, more than double population representation). As compared to white people, Black people are three times more likely to be charged with trespass; three times more likely to be charged with drug possession with intent to distribute; three times more likely to be charged with resisting arrest; four times more likely to be charged with a motor vehicle offense. ACLU of Massachusetts, Facts over Fear (2019), https://www.aclum.org/sites/default/files/20180319_dtp-final.pdf.

[11] Black and Latinx residents make up 22% of the population ages 17 and over, but 33% of all convicted defendants, 45% of people convicted of drug offenses, and 74% percent of people convicted of mandatory minimum drug offenses. Mass. Sentencing Comm'n, Selected Race Statistics 3, 7 (2016), https://www.mass.gov/files/documents/2016/09/tu/selected-race-statistics.pdf; Mass. Sentencing Comm'n, Survey of Sentencing Practices FY 2013 iv (2014), https://www.mass.gov/files/documents/2016/08/oo/fy2013-survey-sentencing-practices.pdf; Council of State Governments Justice Center, Research Addendum - Working Group Meeting 3 Interim Report 34–35 (July 12, 2016), https://csgjusticecenter.org/wp-content/uploads/2020/01/MA-Interim-Report-3-Research-Addendum.pdf.

disparate rates;[12] and subject to higher median bail amounts.[13] Data compiled by the Massachusetts Sentencing Commission in 2016 confirmed that people of color are overrepresented at each increasing metric of punishment as well, measured by rates of conviction, indictments in superior court, incarceration-based sentences, and sentences to prison instead of jail.[14] In Massachusetts, Black people are incarcerated at roughly eight times the rate of white people; Hispanic people are incarcerated at roughly five times the rate of white people.[15] Perhaps most

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[12] *See* Alexander Jones & Benjamin Forman, Exploring the Potential for Pretrial Innovation in Massachusetts 3–6, MassINC (2015), https://massinc.org/wp-content/uploads/2015/09/bail.brief_.3.pdf
(gaping racial disparities in pretrial jail populations across all counties, from 165% rate of population representation to 1000% rate of population representation); *see also* Council of State Governments Justice Center, *supra* note 11, at 25 (in 2014, in Middlesex County Black people were 5% of the population but 16% of people jailed and Hispanic people were 7% of the population but 19% of people jailed; in Hampden County, Black people were 8% of the population but 21% of men jailed and Hispanic people were 22% of the population but 54% of men jailed).

[13] Jones & Forman, *supra* note 12. In every county that produced data for this study, the median bail for Black and Hispanic defendants was two-and-a-half to five times higher than for white defendants.

[14] Mass. Sentencing Comm'n, Selected Race Statistics (2016), https://www.mass.gov/files/documents/2016/09/tu/selected-race-statistics.pdf. In Massachusetts, people of color are more likely to be convicted of a crime than rate of representation in the population (33% vs. 22%); a greater share in superior court, reflecting higher rates of indictments (68% white in district court vs. 48% white in superior court); a higher rate of sentences to incarceration (38% of sentences to incarceration are for people of color, compared to 33% of convictions); a higher rate of sentences to prison than jail (57% of state prison population, compared to 38% of sentences to incarceration).

[15] Mass. Sentencing Comm'n, Selected Race Statistics 2 (2016), https://www.mass.gov/files/documents/2016/09/tu/selected-race-statistics.pdf.

alarming: our Commonwealth's prisons are 58% Black and Hispanic,[16] in a state that is 71.4% non-Hispanic white.[17] Overall, Massachusetts has the gravest sentencing disparities between Hispanics and whites in the country and ranks among the worst in Black-white sentencing disparity.[18]

In 2016, Chief Justice Gants commissioned a report by Harvard Law School's Criminal Justice Policy Program to study racial disparities in sentencing in Massachusetts.[19] The final report, released last month, confirmed that Black and Latinx people are overrepresented in criminal caseloads compared to their population representation; that they are less likely than white people to receive

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[16] Mass. Dep't of Corr., January 2020 MA DOC Institutional Fact Cards (2020), https://www.mass.gov/doc/institutional-fact-cards-january-2020/download.

[17] Of all defendants sentenced to incarceration in 2013, the last year of available data, 88% were sentenced to a house of correction, with a median sentence length of 5 months. Mass. Sentencing Comm'n, Survey of Sentencing Practices FY 2013 iii (2014), https://www.mass.gov/files/documents/2016/08/oo/fy2013-survey-sentencing-practices.pdf. Within houses of correction, Black and Hispanic people are substantially over-represented compared to the general population—by a factor of 3:1 among Black people and roughly 2:1 among Hispanic people. Council of State Governments Justice Center, *supra* note 11, at 26–27.

[18] Nancy Gertner, Op-Ed, *DA Rollins is on the right path in criminal justice reform*, Bos. Globe (Apr. 8, 2019), https://www.bostonglobe.com/opinion/2019/04/08/rollins-right-path-criminal-justice-reform/rba5oplGordySac4ws3lOM/story.html; *see also Massachusetts Profile*, Prison Policy Initiative, https://www.prisonpolicy.org/profiles/MA.html (finding based on 2010 data that the imprisonment rate for black people in Massachusetts is seven times higher than that of white people).

[19] Chief Justice Ralph D. Gants, Massachusetts Supreme Judicial Court, Annual Address: State of the Judiciary 5 (Oct. 20, 2016), https://www.mass.gov/files/documents/2017/10/10/state-of-judiciary-speech-sjc-chief-justicegants-2016_0.pdf.

leniency, such as pretrial probation or a continuance without a finding; and when sentenced to incarceration, Black and Latinx people receive sentences that are, respectively, on average 168 days longer and 148 days longer than their white counterparts.[20] The report further found that initial charging decisions account for more than 70% of the racial disparities in sentence length in the Commonwealth.[21]

Black and Latinx people are more likely to have their cases resolved in Superior Court and thereby face longer sentences both because they are more likely to be charged with offenses with exclusive jurisdiction in Superior Court and because prosecutors are more likely to exercise their discretion to indict their cases when there is concurrent jurisdiction.[22] Black and Latinx people charged with drug offenses and weapons offenses are more likely to be incarcerated and receive longer incarceration sentences than white people charged with similar offenses, even after controlling for charge severity and additional factors. Comparing the statutory penalties for offenses concerning operating under the influence and offenses concerning possessing a firearm without a license, the report notes that the policy decisions undergirding differential access to leniency for certain types of

[20] Elizabeth Tsai Bishop et al., Criminal Justice Policy Program, Harvard Law School, Racial Disparities in the Massachusetts Criminal System (2020), http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf.
[21] *Id.* at 2.
[22] *Id.* at 2, 39, 41.

offenses may not be rooted in a defensible public safety rationale but rather "driven by racial stereotypes about the people who are most often subject to the charges."[23] Finally, the report concludes that Black and Latinx people charged with offenses carrying mandatory minimum sentences are substantially more likely to be incarcerated and receive longer sentences than white people facing charges carrying mandatory minimum incarceration sentences.

B. Black and Hispanic people are significantly more likely than white people to be related to someone who has personal experience in the criminal legal system.

According to a national survey conducted by FWD.us and Cornell University involving a representative sample of more than 4000 people, Black people are 50 percent more likely than white people to have a family member who is currently or formerly incarcerated, and three times more likely than white people to have a family member who has spent a decade or more in prison.[24] Latinx people experience family incarceration at rates slightly higher than white people, but are almost twice as likely to have a family member incarcerated for more than a year. In terms of raw numbers, more than six in ten Black people—63 percent—have had an immediate family member incarcerated, and nearly one-third—31 percent—have had an immediate family member incarcerated for at least a year.

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[23] *Id.* at 49; *see also id.* at 51.
[24] FWD.us, Every Second: The Impact of the Incarceration Crisis on America's Families (2018), https://everysecond.fwd.us/downloads/EverySecond.fwd.us.pdf.

Almost five in ten Latinx people—48 percent—have had an immediate family member incarcerated and nearly two in ten—17 percent—have had an immediate family member incarcerated for more than a year. This survey only queried incarceration; other involvement in the criminal legal system, from arrests to probation, also disproportionately affects Black and Latinx people.[25]

These patterns are compounded by longstanding residential racial segregation and the geography of incarceration. Throughout the Commonwealth, incarceration is clustered in specific neighborhoods that bear the brunt of overlapping forces of poverty, deprivation, and structural racism.[26] People who live in certain majority-Black and majority-Hispanic neighborhoods are much more likely to have a close relationship with someone with a criminal record than people from other neighborhoods or communities.

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[25] *See, e.g.*, Alexi Jones & Wendy Sawyer, Prison Policy Initiative, Arrest, Release, Repeat: How police and jails are misused to respond to social problems (2019), https://www.prisonpolicy.org/reports/repeatarrests.html; The Sentencing Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities.

[26] *See, e.g.*, Benjamin Forman et al., MassINC, The Geography of Incarceration: The Cost and Consequences of High Incarceration Rates in Vulnerable City Neighborhoods 12 (2016), https://massinc.org/wp-content/uploads/2016/11/The-Geography-of-Incarceration.pdf; Benjamin Forman & Lindiwe Rennert, MassINC, The Geography of Incarceration in a Gateway City: The Cost and Consequences of High Incarceration Rate Neighborhoods in Worcester 6 (2017), https://massinc.org/wp-content/uploads/2017/09/geography.crime_.report.8.pdf.

C. Evidence abounds that having a loved one with a criminal record is a common pretext disparately used to exclude Black and Hispanic people from jury service.

Excluding jurors of color based on a relative with a criminal history is a common practice. The examples of courts allowing peremptory strikes of Black and Hispanic jurors justified based on their relationship to someone with a criminal record are legion.[27] *See, e.g.*, *United States v. Beverly*, 369 F.3d 516, 517 (6th Cir. 2004) (upholding strike of Black juror who had a brother and nephew who had spent time in prison); *United States v. Bartholomew*, 310 F.3d 912, 920 (6th Cir. 2002) ("beyond highlighting the allegedly disparate impact, the defendants made no showing that the prosecutor's motives were discriminatory"); *Ellis v. Newland*, 23 Fed. App'x 734, 736 (9th Cir. 2001) (upholding strike of two African-American jurors based on "their having relatives currently serving in penitentiaries"); *Devoil-El v. Groose*, 160 F.3d 1184, 1186 (8th Cir. 1998) (upholding strike of all potential Black jurors, including because of a relative in jail or charged with a crime). Courts have upheld such strikes even when unchallenged white jurors also had loved ones convicted of crimes, strongly suggesting that the proffered justification was pretextual and the true motive discriminatory. For example,

> The circuit court in *United States v. Houston* affirmed the denial of a *Batson* claim relating to the prosecution's proffered justification for dismissing three African

[27] *See generally* Vida B. Johnson, *Arresting* Batson: *How Striking Jurors Based on Arrest Records Violates* Batson, 34 Yale L. & Pol'y Rev. 387, 412–14 (2016).

> American jurors—that they had family members who had been convicted of crimes—even though it was undisputed that four of the white jurors, whom the prosecution had left unchallenged, also had family members who had been convicted of crimes.[28]

In sheer numbers, the fact of a family member's incarceration could exclude roughly two-thirds of Black people and half of all Hispanic people from juries, while shielding the prosecutor's motives behind a veil of race-neutral pretext. A prosecutor consciously or unconsciously looking to strike a Black or Hispanic person from a jury may effectuate the peremptory by invoking a connection to a loved one who has been arrested or prosecuted.[29]

This summer, the Berkeley Law Death Penalty Clinic published empirical research on jury selection in California which found that "a juror's close relationship with people who had been stopped, arrested, or convicted of a crime" was the second most common rationale prosecutors offered for striking Black and Latinx jurors.[30] The researchers reviewed 683 decisions of the California courts of appeal involving *Batson* claims between 2006 and 2018; 670 of those cases—

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[28] Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of* Batson, 45 U.C. Davis L. Rev. 1359, 1409 (2012) (citing *United States v. Houston*, 456 F.3d 1328, 1338 (11th Cir. 2006)).

[29] *Batson*, 476 U.S. at 106–07 (Marshall, J., concurring) (noting how both conscious and unconscious racism affect prosecutors and judges, and that the *Batson* task requires them to confront and overcome their own racism, which may be difficult to meet).

[30] Semel et al., *supra* note 6.

98%—involved defense counsel objecting to prosecutors' strikes, which disproportionately targeted Black jurors (480 cases, or 71.6%) and Latinx jurors (190 cases, or 28.4%). The researchers coded the qualitative responses offered by prosecutors. "Prosecutors' reasons for striking jurors correlate with racial stereotypes. . . . In 35% of the cases, prosecutors relied on a juror's close relationship with people who had been stopped, arrested, or convicted of a crime."[31] With respect to Black jurors, prosecutors averred strikes were justified by a close relationship with someone who had been stopped, arrested, or convicted of a crime in "33.3% (160) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors."[32] With respect to Latinx jurors, "Nearly as often as demeanor-based reasons, prosecutors based their strikes on a Latinx juror's close relationship with someone who had a negative experience with law enforcement, including having been stopped, arrested, or convicted of a crime . . . in 33.7% (64) of cases."[33]

D. Courts and legislatures have begun to curb this unlawful pretext.

Other jurisdictions have recognized that the disparate impact of this particular justification, and others like it, requires intervention.[34] In 2018, the

[31] *Id.* at 15.
[32] *Id.* at 18.
[33] *Id.* at 20.
[34] *See, e.g.*, Beth Schwartzapfel, *A Growing Number of State Courts Are Confronting Unconscious Racism In Jury Selection*, The Marshall Project (May 11,

Washington Supreme Court adopted General Rule 37,[35] which requires trial courts to evaluate the reasons for peremptory challenges under a totality of the circumstances framework, and deny them if "an objective observer could view race or ethnicity as a factor" in their use. Wash. Gen. R. 37(e); *Jefferson*, 429 P.3d at 477. Most significantly, the rule specifies certain presumptively invalid reasons for a peremptory strike—reasons which disproportionately affect or historically have been associated with improper discrimination against a particular racial or ethnic group, including "having a close relationship with people who have been stopped, arrested, or convicted of a crime[.]" Wash. Gen. R. 37(g)(iii). Thereafter, the Washington Supreme Court formally adopted General Rule 37's standard to modify the *Batson* test. *See Jefferson*, 429 P.3d at 470.[36]

2020), https://www.themarshallproject.org/2020/05/11/a-growing-number-of-state-courts-are-confronting-unconscious-racism-in-jury-selection; Kyle C. Barry, *California Adopts New Laws to Fight Racism in Jury Selection*, The Appeal (Sept. 30, 2020), https://theappeal.org/politicalreport/california-jury-selection-racial-discrimination; Taryn Luna, *California lawmakers approve bills to address racism in criminal charges and jury selection*, L.A. Times (Aug. 31, 2020), https://www.latimes.com/california/story/2020-08-31/california-lawmakers-approve-bills-to-limit-racism-in-criminal-charges-and-jury-selection.

[35] *Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, Wash. ACLU (Apr. 9, 2018), https://www.aclu-wa.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection.

[36] *See generally* Annie Sloan, Note, *"What to do about* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Calif. L. Rev. 233 (2020).

Other courts with less protective state constitutional provisions than Massachusetts have recognized their own precedential limitations and moved to remedy *Batson*'s blind spots through other means. Within the last year, and despite vociferous concerns about *Batson*'s limits, courts in Connecticut and California declined to find that striking a juror due to a loved one with a criminal record violated federal equal protection principles under *Batson* and *Hernandez*. *See State v. Holmes*, 221 A.3d 407, 434, 438 (Conn. 2019); *People v. Bryant*, 253 Cal. Rptr. 3d 289 (Cal. Ct. App. 2019), *review denied* (Jan. 29, 2020). However, both jurisdictions resolved to redress the limitations of their case law through alternative means. In December 2019, the Connecticut Supreme Court announced a task force to study "the effects of disparate impact and unconscious bias" in *Batson*'s application.[37] In January 2020, the California Supreme Court announced a working group to address *Batson*'s practical shortcomings and "to better ensure that juries represent a cross-section of their communities."[38] Although neither has yet produced a final report, the California legislature just passed a law which updated

[37] Dave Altimari, *State Supreme Court calls for commission to study whether jury selection system is unfair to minorities*, Hartford Courant (Dec. 28, 2019), https://www.courant.com/news/connecticut/hc-news-supreme-court-jury-review-20191228-kg7iiay7ujfudifyeaw4o7inem-story.html.

[38] Supreme Court of California, *Supreme Court Announces Jury Selection Working Group* (Jan. 29. 2020), https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selectionwork-group.

the standard for peremptory strikes, modeled after Washington General Rule 37. As in Washington, the new California law "establishes a presumption that certain reasons for excluding jurors are improper prox[ie]s for racial discrimination, and targets implicit or unconscious bias in jury selection—something that the *Batson* ruling did not prohibit and may have actually invited."[39]

The wisdom and necessity of these developments cannot be overstated. Striking a juror due to their incarcerated loved one is a proven proxy for racial discrimination. But the concerns are practical as much as ethical. Including jurors who have familiarity with the criminal legal system enhances, rather than undermines, the functioning of a jury:

> Reflexively allowing these strikes compounds institutional discrimination by excluding more minorities than non-minorities from juries, diminishes public confidence in the fairness of our justice system, and undermines the value of having juries that represent a fair cross-section of the community, as it risks "losing perspectives that may be essential to the ideal of a jury made up of diverse experiences and viewpoints."[40]

The fact of over-representation of Black and Hispanic people as the targets of criminal punishment weighs strongly in favor of ensuring their equal membership and participation on juries. Barring peremptory justifications that, by design, disproportionately result in their exclusion, is a necessary step toward achieving

[39] Barry, *supra* note 34.
[40] *Bryant*, 253 Cal. Rptr. 3d at 308–09 (Humes, P.J., concurring) (citation omitted).

impartial juries. "It is this very diversity of opinion among individuals, some of whose concepts may well have been influenced by their group affiliations, which is envisioned when we refer to "diffused impartiality." . . . Nowhere is the dynamic commingling of the ideas and biases of such individuals more essential than inside the jury room." *Commonwealth v. Soares*, 377 Mass. 461, 486–87, *cert. denied*, 444 U.S. 881 (1979).

II. Massachusetts courts have created material protections for the rights of Black and Hispanic defendants and jurors by applying disparate impact analysis at step three of a *Batson-Soares* challenge.

In 1986, the U.S. Supreme Court recognized a right not to be excluded from jury service on the basis of membership in a protected class under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution in *Batson*. Seven years earlier, the right in the Commonwealth to a "jury of one's peers" was interpreted to encompass a prohibition on peremptory challenges used to strike prospective jurors solely because of their membership in or affiliation with particular, defined groupings in the community. *See Soares*, 377 Mass. at 488–90. The commonly termed *Batson-Soares* test requires three steps. First, "the party challenging the strike [must meet] the relatively low bar of a prima facie showing" of discrimination. *Commonwealth v. Jones*, 477 Mass. 307, 322 (2017); *Commonwealth v. Sanchez*, 485 Mass. 491, 511 (2020) (clarifying step one standard). If this inference of discriminatory purpose is met, the burden shifts to

the party exercising the strike "to provide a group-neutral explanation." *Maldonado*, 439 Mass. at 463. Finally, at step three, the judge must determine "whether the explanation is both adequate and genuine." *Id.* at 464. The explanation must be "bona fide," requiring "a critical evaluation of both the soundness of the proffered explanation and whether the explanation [no matter how 'sound' it might appear] is the actual motivating force behind the challenging party's decision." *Id.*[41] "[A] generic description falls below the type of 'bona fide' explanation that 'must be both adequate (i.e., clear and reasonably specific, personal to the juror and not based on the juror's group affiliation) and genuine (i.e., in fact the reason for the exercise of the challenge)." *Commonwealth v. Carvalho*, 88 Mass. App. Ct. 840, 844 (2016) (quoting *Prunty*, 462 Mass. at 309 (quotations omitted)). "On appeal, the appellate court must be able to ascertain that the judge considered both the adequacy and the genuineness of the proffered explanation, and did not conflate the two into a simple consideration of whether the explanation was 'reasonable' or 'group neutral.'" *Maldonado*, 439 Mass. at 465. Massachusetts observes a more onerous standard than federal courts:[42] the rationale must be more than plausible—it must be adequate and genuine.

[41] This formulation under *Batson-Soares* differs markedly from how federal courts apply *Batson*. *Cf. Bartholomew*, 310 F.3d at 920 ("[W]e are mindful that the prosecutor's articulated reason need not be 'persuasive, or even plausible,' so long as it is nondiscriminatory." (quoting *Purkett v. Elem*, 514 U.S. 765, 767 (1995))).
[42] Roberts, *supra* note 28, at 1385–86.

In determining whether the strike was pretextual at step three, a proffered justification's disparate impact on a certain race "should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent." *Hernandez*, 500 U.S. at 362. And yet in federal courts, the disparate impact protection *Hernandez* created has more often been used to protect white jurors, not Black or Hispanic jurors, from discrimination. In a study of thirty-six post-*Hernandez* decisions "involving allegedly discriminatory strikes of jurors of color and/or female jurors, none ended in a finding of purposeful discrimination. Of three published decisions involving allegedly discriminatory strikes of white jurors, all ended in a finding of purposeful discrimination."[43]

By contrast, Massachusetts has adopted more robust consideration of disparate impact to diagnose pretext at step three. *See Prunty*, 462 Mass. at 313 ("disproportionate impact" is "evidence" of pretext). The guiding Massachusetts precedent on this question quotes the *Hernandez* dissent, evidencing a broader read of the relevant equal protection principles. In Massachusetts, "[a]n explanation that is 'race neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice." *Prunty*, 462 Mass. at 313 (quoting *Hernandez*, 500 U.S.

[43] Roberts, *supra* note 28, at 1417. *See Commonwealth v. Long*, 485 Mass. 711, 751–52 (2020) (Budd, J., concurring) ("[T]he *Batson* framework has been criticized for this very reason, i.e., the unwillingness of judges to make a finding that the nondiscriminatory reason proffered to explain a peremptory strike is not the actual reason for the strike.").

at 379 (Stevens, J., dissenting)). In *Prunty*, defense counsel challenged a prospective Black juror based on "an assumption that an individual who had suffered racism would feel subtle biases against an alleged racist." *Prunty*, 462 Mass. at 313. The Court found this assumption was "undoubtedly 'based' on race," and therefore an unlawful peremptory strike:

> [i]t would require a measure of "willful intellectual blindness," *Love v. Yates*, 586 F. Supp. 2d 1155, 1180 (N.D. Cal. 2008), for us to conclude that Juror 16's experience of racism (particularly the race-specific examples described by the judge in his questioning) does not correlate almost perfectly with his race and therefore serve as a "surrogate for race." *Hernandez*, *supra* at 371, 111 S.Ct. 1859.

The record in Mr. Peguero's case calls into question the boundaries of an adequate and genuine "group-neutral explanation" for a peremptory strike. Here, the Commonwealth relied on a juror's brother's criminal history in a different state to exclude the sole Hispanic juror in a criminal prosecution of a Hispanic defendant on charges entirely unrelated to the juror's brother's incarceration. Given that this justification—a close relationship with someone who has been arrested, charged with, or convicted of a crime—is laden with built-in discrimination and has been empirically documented to be one of the most common "race neutral" pretexts prosecutors use to exclude Black and Hispanic people from jury service, it should be presumed a surrogate for race and "a proxy

for a discriminatory practice," *Prunty*, 462 Mass. at 313, and therefore an inadequate reason for conducting a peremptory strike.

As the appellant's brief establishes, the prosecutor struck juror 11, the sole Hispanic juror in a case involving a Hispanic defendant, for the stated reason that the juror's "brother was arrested and charged with murder" and the prosecutor was "just not comfortable based on the charges in this hearing," Def. Br. at 30 (citing Tr. at 23). The alleged relationship between the "charges in this hearing"—possession with intent to distribute Class B drugs—to the homicide arrest of the juror's brother in a jurisdiction many hundreds of miles away strains credulity,[44] but the trial judge appeared to accept this justification without inquiry. The combination of the disparate impact and the prosecutor's "just not comfortable" feeling in seating the sole Hispanic juror cast grave doubt on the genuineness of the articulated reason and suggest instead an improper racial motivation for the strike, requiring reversal.

[44] This situation is markedly different from, for example, an instance in which "the prosecutor will exercise peremptory challenges when he believes he has previously brought criminal charges against a member of the juror's family . . . ." Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. Mich. J. L. Reform 229, 253, 253 n.18 (1993) (collecting cases).

III. The right to a jury of one's peers in art. 12 offers greater protection than the federal equal protection clause, prohibiting even unintentional discrimination evidenced by disparate impact.

The Supreme Judicial Court has repeatedly recognized that the criminal legal system in Massachusetts produces racial disparities that cannot be explained away by race-neutral factors. *See, e.g.*, *Commonwealth v. Lora*, 451 Mass. at 442 n.30 ("[W]e are unaware of any reliable study establishing that motor vehicle violations are more frequently committed by any particular race of driver."). Indeed, members of the Supreme Judicial Court recognize the role that unconscious bias and structural racism play in perpetuating a system that routinely produces disparately harsh consequences for Black and Hispanic people: "If 'systemic racism' is defined as a 'system[or] institution[] that produce[s] racially disparate outcomes, regardless of the intentions of the people who work within [it],' then our criminal justice system is rife with it." *Long*, 485 Mass. at 740 (Budd, J., concurring); *see also Commonwealth v. Larose*, 483 Mass. 323, 341 (2019) (Lenk, J., dissenting) ("We must take what we have learned about implicit bias . . . and 'explore what can be done to mitigate the harm caused by this practice.'"); *Buckley*, 478 Mass. at 878 (Budd, J., concurring) ("[E]ven people who do not believe themselves to harbor implicit bias may in fact act in ways that disfavor people of color."); *Commonwealth v. McCowen*, 458 Mass. 461, 499–500

(2010) (Ireland, J., concurring) ("Courts are aware that unconscious racism could affect the outcome of trials.").

Mr. Peguero compellingly argues that art. 12's protection extends to peremptory strikes that disparately impact a protected class or discrete group, for example a racial or ethnic group, and *amici* agree. The Massachusetts Supreme Judicial Court has repeatedly recognized that art. 12 prohibits discriminatory outcomes in jury selection more broadly than the federal equal protection clause.[45] *See Commonwealth v. Fryar*, 425 Mass. 237, 244 (1997) ("[I]t is apparent that art. 12 affords a defendant *at least as much* protection as the Sixth and the Fourteenth Amendment[.]") (emphasis added); *see also Smith v. Commonwealth*, 420 Mass. 291, 295 (1995) (citations omitted) ("Article 12 entitles the defendant 'to a jury selection process free of discrimination against his grouping in the community.' Under art. 12, 'a fair jury is one that represents a cross section of individuals and ideas in the community.' Our State Constitution often provides to criminal

[45] This is consistent with the Supreme Judicial Court's art. 12 jurisprudence in other domains, which are similarly more protective to individual rights than the federal constitutional floor. *See, e.g.*, *Commonwealth v. Mavredakis*, 430 Mass. 848, 858 (2000), *abrogated by Commonwealth v. Smith*, 471 Mass. 161 (2015); Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 Val. U. L. Rev. 405, 409 (2004). Further, the Supreme Judicial Court recently reaffirmed that implicit or unconscious discrimination against groups protected by art. 1 offends the Massachusetts Declaration of Rights. *See Long*, 485 Mass. at 720, 731.

defendants broader protection than does the Federal Constitution under similar provisions.").

For example, art. 12 allows redress for claims of simultaneous race and gender bias. *See, e.g.*, *Commonwealth v. Ortega*, 480 Mass. 603, 605–06 (2018) ("Unlike its Federal counterpart, art. 12 prohibits bias in jury selection not only based on race or gender independently, but also based on a combination thereof." (citing *Commonwealth v. Jordan*, 439 Mass. 47, 62 (2003) (purposeful exclusion based on intersectional status in group defined by race and gender prohibited); *Robertson*, 480 Mass. at 397)). This Court's recent decision in *Commonwealth v. Alves*, a case of for-cause exclusion involving jurors "of color," further illustrates how art. 12 extends beyond the guarantees of the federal equal protection clause. *Commonwealth v. Alves*, 96 Mass. App. Ct. 540, 547 (2019), *review denied*, 484 Mass. 1103 (2020). In that case, a total of eleven jurors, including two who were the only identifiable people of color in the venire,[46] were excluded from the jury for cause because they answered affirmatively the trial judge's question of whether hearing that a witness had used a derogatory racial comment or term would affect their view or ability to weigh the credibility and/or truthfulness of the witness. The Court found the judge's question improper under *Commonwealth v. Williams*, 481

[46] The court describes the two people of color from the first day of empanelment as one of apparent Cape Verdean background, the other having darker skin color. *Alves*, 96 Mass. App. Ct. at 544, 544 n.4.

Mass. 443, 451–52 (2019). *Alves*, 96 Mass. App. Ct. at 547. The court held that "Because only people of color were improperly excluded from the jury, the defendant was deprived of the right to be tried by a jury representing a fair cross section of the community in violation of the Massachusetts Constitution and Declaration of Rights." *Alves*, 96 Mass. App. Ct. at 547. Courts in other jurisdictions have held that "people of color" is not a cognizable group under the federal equal protection clause, but this Court rightly held that art. 12 proscribes blanket discriminatory impact on people who are not white. This is consistent with longstanding Supreme Judicial Court precedent, finding that "minorities" or "nonwhites" is a cognizable art. 1 group for the purposes of art. 12. *See Smith*, 420 Mass. at 298.

This Court further acknowledges that "[a]ctions by the court system can of course violate a defendant's fair cross section right even if they are done without discriminatory intent." *Alves*, 96 Mass. App. Ct. at 547 n.6 (citing *Commonwealth v. Tolentino*, 422 Mass. 515, 524 (1996) (selection of jury venires)). It is the fact of exclusion of discrete groups from jury membership and participation—not only overt, intentional animus against a protected class—that is cognizable under art. 12. The Supreme Judicial Court has noted that the art. 12 fair cross-section right likewise extends beyond the Sixth Amendment to the U.S. Constitution. *See, e.g.*, *Smith*, 420 Mass. at 293; *id.* at 295 n.6.

In dicta in a case decided shortly after *Soares* concerning whether people ages 18 to 34 were unconstitutionally underrepresented on jury lists and on petit juries, the Supreme Judicial Court indicated "As to groups described in art. 1, we would not be concerned solely with whether the discrimination was intentional because even unintentional discrimination against such a group would raise a constitutional question." *Commonwealth v. Bastarache*, 382 Mass. 86, 101 (1980). That language was confirmed four years later in *Commonwealth v. Aponte*, where the Supreme Judicial Court announced that "art. 12 safeguards defendants against systematic, albeit unintentional, discrimination against their protected class." *Commonwealth v. Aponte*, 391 Mass. 494, 506 (1984) (finding process for selecting grand juries in Essex County resulted in substantial underrepresentation of Hispanic persons, in violation of art. 12); *id.* at 508 ("[S]ubstantial, albeit unintentional, discrimination through a jury selection procedure against any group protected under art. 1 would raise a State constitutional question."); *see also Smith*, 420 Mass. at 296–97 ("In *Aponte*, we noted that 'the defendants were entitled ... to a jury selection procedure which precluded the possibility of even an unintentional exclusion of prospective jurors based on national origin[.]'"). The Supreme Judicial Court has repeatedly and expressly acknowledged that unintentional discrimination—evidenced by disparate impact—offers sufficient grounds for a violation of art. 12 as to the membership and participation of art. 1 groups on juries

in the context of selection of the venire, *see Bastarache*, 382 Mass. at 101; *Aponte*, 391 Mass. at 506; *Smith*, 420 Mass. at 296–97, as well as in the context of for-cause exclusions, *see Williams*, 481 Mass. at 451–52; *see also Alves*, 96 Mass. App. Ct. at 547. Given that art. 12 is interpreted separate and apart from federal constitutional law, there is no reason why this protection against unintentional discrimination should not also extend to the context of peremptory strikes as a mechanism of jury selection, also governed by art. 12. Accordingly, *amici* urge this Court to hold that a peremptory strike may violate the defendant's art. 12 right to "the judgment of his peers" if it disproportionately excludes jurors of a particular group protected by art. 1.

CONCLUSION

From its inception, the United States Supreme Court's landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on Black and Hispanic jurors. Too often, courts have said this problem is both undeniable and unavoidable—that existing law is ill-equipped to remedy the problem of implicit bias and structural racism. But here, this Court can follow the Commonwealth's precedent under

either federal or state law standards to disallow the pretextual rationale offered for the strike of the sole Hispanic juror at a trial with a Hispanic defendant.

Respectfully submitted,

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MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including Mass. R. App. P. 16, 17, and 20. It is typewritten in 14-point, Times New Roman font, and complies with the length limit of 20(a)(2)(c) because it was produced with a proportionally spaced font and does not contain more than 7,500 non-excluded words. This document contains 7,450 non-excluded words as counted by the word-processing system used to prepare it.

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CERTIFICATE OF SERVICE

On October 13, 2020, I served a copy of this brief on all parties by e-mail.

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