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Via Electronic Mail and Electronic Filing

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Re: Letter of *Amici Curiae* in support of Defendant-Appellant's Request for Further Appellate Review in *Commonwealth v. Martinez-Peguero* (FAR-27993)

To whom it may concern:

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School ("Houston Institute"), the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law ("Korematsu Center"), the Center on Race, Inequality, and the Law at NYU School of Law, and Fordham Law School's Center on Race, Law, and Justice respectfully submit this letter to urge the Court to allow the pending Application for Further Appellate Review in *Commonwealth v. Martinez-Peguero*, FAR-27993 (the "Application").[1] The Houston Institute and the Korematsu Center also filed a brief before the Appeals Court. The undersigned anticipate that, if this Court were to grant the Application, we would submit a merits brief.

Seven months ago, this 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 deserves fresh eyes is how courts treat peremptory challenges that disparately exclude defendants of color from jury service. This case—involving a prosecutor's peremptory strike of the sole Hispanic juror in the venire during the trial of a Hispanic defendant—raises significant questions regarding the scope of the Article 12 right to the "judgment of [one's] peers," as well as how judges should apply disparate impact analysis when evaluating the adequacy and genuineness of a proffered rationale during step three of a *Batson-Soares* challenge. 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 more than a thousand miles away—is allowed to justify a peremptory strike, this Court will have reinforced and legitimized a method to disparately exclude Black and Hispanic citizens from

[1] Statements of interest from the proposed *amici* are enclosed in an addendum.
[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.

juries. The undersigned urge this Court to allow the Application and reverse the Appeals Court, which erred in its analysis of the peremptory strike under federal and state constitutional law.

The importance of this question, wholly aside from this Court's crucial error-correction role, is evident in the attention discrimination in jury selection is garnering in other jurisdictions. Other jurisdictions are recognizing that existing processes are insufficient to ensure that criminal prosecutions and convictions are proceedings free from the taint of racial discrimination. Review is warranted so that this Court can examine if courts in Massachusetts are applying *Batson-Soares* in a way that ensures that defendants are able to receive fair trials free from explicit and implicit bias.

The Peremptory Strike at Issue

The strike in question targeted Juror no. 11, the sole Hispanic juror in the venire. In a proper colloquy, the trial judge evaluated the juror and determined he was sufficiently impartial to be seated despite his brother's arrest, charge, and incarceration for murder in Wisconsin. Application at 9–10. The prosecutor did not challenge the juror for cause, instead exercising a peremptory strike against this lone Hispanic juror. When Mr. Peguero's trial counsel flagged the peremptory strike as improperly racially motivated since it would exclude the only juror of color, and only Hispanic juror, from jury service, *see* Application at 10, the prosecutor justified the strike on the basis of the juror's brother's arrest and charge for murder in Wisconsin because the prosecutor was "just not comfortable based on the charges in this hearing"—charges regarding intent to distribute Class B drugs. Application at 9–10. In response, and without further inquiry or explanation, the trial judge summarily concluded, "The Court finds that the p[ere]mptory was properly exercised and it was not motivated by any attempt to remove a juror of like race from the panel." Application at 10 n.7.

The Appeals Court Erred in Evaluating Adequacy and Genuineness Under *Batson-Soares*

The Appeals Court held that, though the defendant established a *prima facie* case of discrimination, the judge did not err "in concluding that the prosecutor's explanation for her peremptory challenge was both adequate and genuine." *Commonwealth v. Martinez-Peguero*, 20-P-157, at 8 (Mass. App. Ct. Nov. 25, 2020) [hereinafter Slip Op.]. This formulation re-writes the record below, where the trial judge failed to make any specific findings on the adequacy or genuineness of the proffered rationale, itself error. *See Commonwealth v. Maldonado*, 439 Mass. 460, 465–66 (2003). The trial judge and the appellate panel accepted the prosecutor's exclusion of the sole Hispanic juror because of a familial tie to the criminal legal system as if it were a group-neutral reason for a peremptory strike. Both the adequacy and genuineness of this proffered rationale are suspect and require reversal.

The Explanation for the Peremptory Strike Was Not Adequate

As the Appeals Court recounted, an explanation is adequate if it is "clear and reasonably specific, personal to the juror and not based on the juror's group affiliation . . . and related to the particular case being tried." *Maldonado*, 439 Mass. at 464–65. The prosecutor's feeling of being "just not comfortable based on the charges in this hearing" fails to meet this standard. Indeed, the Appeals Court conceded that "the prosecutor's proffered reason was not tied to the specifics of

the defendant's case," failing the third prong of the adequacy analysis, and yet still the Appeals Court found the reason was adequate. This was error.

Further, the Appeals Court offered an adequacy explanation unmoored from logic. This Court has previously found a judge did not err in accepting a prosecutor's peremptory strikes based on a family member's prosecution by the *same prosecuting office* conducting the trial for which the jury was being empaneled. *See Commonwealth v. Lopes*, 478 Mass. 593, 601 (2017) (no error in Suffolk County case where juror no 217 was struck because his cousin had been prosecuted by the Suffolk County District Attorney's Office and convicted of murder, and juror no. 129 was struck because his brother had been prosecuted by the Suffolk County District Attorney's Office and was incarcerated for that conviction and the juror himself had an out-of-state probation sentence). The Appeals Court approvingly cited that precedent here, writing: "A family member's involvement with the criminal justice system may provide a group-neutral reason for exercising a peremptory challenge. This is especially true where, as here, the family member's involvement is of utmost seriousness." Slip Op. at 8–9 (citing *Lopes*, 478 Mass. at 601). The Appeals Court ignored how prosecution by the *same prosecuting office* is dramatically distinguishable from the facts of this case—prosecution in Wisconsin, many hundreds of miles away. Further, the Appeals Court asserted but did not explain why the seriousness of the charge would "especially" enhance the adequacy of this justification, where the relative seriousness creates more distance from, not more similarity to, the facts in the case at bar. The prospective juror's brother's murder charge is entirely distinct and unrelated to charges concerning possession with intent to distribute Class B drugs, failing to meet the adequacy threshold.

Finally, having a loved one with a history of arrest or conviction may fairly be considered a proxy for race "based on the juror's group affiliation" given the disturbing overrepresentation of Black and Hispanic people in our criminal courts, jails, and prisons. It is an empirical fact that Black and Hispanic people are disparately policed, prosecuted, sentenced to incarceration, and sentenced to longer terms of incarceration around the country and in the Commonwealth. In 2016, the Massachusetts Sentencing Commission released snapshot statistics illustrating that Black people are incarcerated at nearly eight times the rate of white people and Hispanic people are incarcerated at nearly five times the rate of white people in Massachusetts.[3] In response, Chief Justice Ralph Gants commissioned a study by the Harvard Law School Criminal Justice Policy Program to evaluate racial disparities in sentencing.[4] The final report, released in September 2020, 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 have their cases resolved with leniency, such as pretrial probation or a continuance without a finding; and when sentenced to incarceration, Black and Latinx people receive sentences that are on average at least five months longer than their white counterparts.[5] The report further found that initial charging decisions account for 70% of the racial disparities in sentence length in the Commonwealth.

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[3] Mass. Sentencing Comm'n, Selected Race Statistics 2 (Sept. 27, 2016), https://www.mass.gov/files/documents/2016/09/tu/selected-race-statistics.pdf.

[4] 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.

[5] 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.

The fact of disparate incarceration and disparate prosecution of Black and Hispanic people has significant community effects. 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.[6] 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.[7] Thus, a prosecutor's discretionary 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 racist proxy, whether consciously intended as such 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—illustrating that this purportedly neutral justification is utilized to effectuate discriminatory exclusion.[8] Against this backdrop, the prosecutor's choice to exercise a peremptory against a Hispanic juror because of his brother's unrelated out-of-state arrest, charge, and incarceration must be seen as intrinsically entangled with the juror's group affiliation, failing to meet the adequacy threshold and requiring reversal.

The Explanation for the Peremptory Strike Was Not Genuine

As to genuineness, in determining whether the strike was pretextual at step three, the U.S. Supreme Court has held that 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. Massachusetts has adopted more robust consideration of disparate impact than federal case law 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. 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."

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[6] *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.

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

[8] 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.

Id. The record in Mr. Peguero's case calls into question the boundaries of a 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 not the genuine reason for conducting the peremptory strike.

The Appeals Court confirmed that disparate impact "may bear on pretext," but stated that "it is not conclusive especially where, as here, no evidence of disparate impact was placed before the judge." Slip. Op. at 9. But where the trial judge made no findings on this issue, the Appeals Court should have addressed it for itself. *Maldonado*, 439 Mass. at 465–66. Further, the Appeals Court erred in suggesting that the defendant was required to introduce evidence of the disparate impact of arrest, prosecution, and incarceration on Hispanic people in order for the trial judge to have considered disparate impact. This Court's own precedents reveal that disparities in arrests, prosecution, and incarceration are well-documented—common knowledge meriting judicial notice. Even without introducing any specific evidence on the scope of the disparate impact, the trial judge could have evaluated the disparate impact. Further, both the Defendant-Appellant's brief on appeal and our *amicus* brief would have allowed the Appeals Court to undertake a disparate impact analysis directly, since the trial judge's lack of specific findings were entitled to no deference. The Appeals Court's out-of-hand dismissal of disparate impact in this case was error.

Overall, the prosecutor's invocation of the "charges in this hearing" rings false, as Mr. Peguero was charged with three offenses concerning possession with intent distribute drugs, prosecuted in Massachusetts, while the juror's brother was charged with murder in the state of Wisconsin, some 1,100 miles away. How this out-of-state murder charge relates to the drug "charges in this hearing" stretches comprehension and strains credulity. 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 that the strike was motivated, at least in part, by an improper racial motivation—requiring reversal.

This Court's Post-*Soares*, Pre-*Batson* Precedent Establishes that Art. 12 Protects Against the Disparate Exclusion of Jurors from Protected Classes

The Defendant-Appellant separately argues that the art. 12 right to a jury of one's peers prohibits peremptory strikes which disparately exclude protected classes, and *amici* agree. This Court has repeatedly recognized that art. 12 prohibits discriminatory outcomes in jury selection more broadly than the federal equal protection clause.[9] *See Commonwealth v. Fryar*, 425 Mass.

[9] This is consistent with this 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, this Court recently reaffirmed that implicit or unconscious discrimination against groups protected by art. 1 offends the Massachusetts Declaration of Rights. *See Commonwealth v. Long*, 485 Mass. 711, 720, 731 (2020).

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 defendants broader protection than does the Federal Constitution under similar provisions.").[10]

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))). Further, longstanding precedent in this Court finds that "minorities" or "nonwhites" is a cognizable art. 1 group for the purposes of art. 12. *See Smith*, 420 Mass. at 298; *see also Commonwealth v. Alves*, 96 Mass. App. Ct. 540, 547 (2019), *review denied*, 484 Mass. 1103 (2020) (reversing for-cause exclusion of jurors "of color"). 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.

This Court decided *Soares* seven years before the U.S. Supreme Court decided *Batson*. The rights these two decisions protect are distinct, and though their tests are often applied together, this Court's early post-*Soares* precedent is instructive in understanding the contours of the right to a jury of one's peers. 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, this 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 this 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[.]'"). All of these precedents preceded *Batson*.

This 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, 547 n.6 ("Actions by the court system can of course violate a defendant's fair cross section right even if they are done without discriminatory intent." (citing *Commonwealth v. Tolentino*, 422 Mass. 515, 524 (1996) (selection of jury venires))). Given that

[10] The art. 12 fair cross-section right also extends beyond the Sixth Amendment to the U.S. Constitution. *See, e.g., Smith*, 420 Mass. at 293; *id.* at 295 n.6.

art. 12 is interpreted separate and apart from federal constitutional law, there is no reason why the 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. Therefore, this Court should find that peremptorily challenging a juror based on a loved one's arrest, prosecution, or incarceration violates art. 12.

Washington, California, and Connecticut Have Already Begun to Curb the Use of This Unlawful Pretext

Other jurisdictions have recognized that the disparate impact of the particular justification offered in this case, and others like it, requires intervention.[11] In 2018, the Washington Supreme Court adopted General Rule 37,[12] 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.[13]

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.[14] In January 2020, the California Supreme Court announced a working group to address *Batson*'s practical shortcomings and "to better ensure that

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[11] *See, e.g.*, Beth Schwartzapfel, *A Growing Number of State Courts Are Confronting Unconscious Racism In Jury Selection*, The Marshall Project (May 11, 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.

[12] *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.

[13] *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).

[14] 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.

juries represent a cross-section of their communities."[15] Although neither has yet produced a final report, in September 2020 the California legislature passed a law which updated the standard for peremptory strikes, modeled after Washington General Rule 37.[16]

Now is the Time for this Court to Act

In view of this Court's June letter and repeated acknowledgments of the way unconscious bias and systemic racism shape our criminal legal system, now is the moment for this Court to act. As Mr. Peguero has carefully shown, this Court faces two avenues by which to allow the law to conform to reality. On the one hand, the Court may find the proffered rationale for the peremptory strike was not adequate or genuine, or both, requiring reversal. Alternatively, to realize the right to a jury of one's peers, our courts must embrace that certain justifications which disproportionately affect Black and Hispanic people, and which have demonstrably been used to target Black and Hispanic citizens for exclusion from jury service, are invalid justifications under *Commonwealth v. Soares*, 377 Mass. 461, 486–87 (1979), and art. 12 of the Massachusetts Declaration of Rights. The failure to understand this kind of pretextual explanation as motivated by discrimination insulates discriminatory decisions from review and rebuke. It enacts a double discrimination—barring Black and Hispanic people from jury service on the basis of entanglements with the criminal legal system which are themselves borne of racial prejudice, implicit bias, and structural racism.

Judges are often wary to second-guess what they consider facially "neutral" explanations that may nevertheless be pretextual,[17] such as striking people whose loved ones have been arrested, prosecuted, or incarcerated. As Chief Justice Budd recently disclaimed in her concurrence in *Commonwealth v. Long*, "judges traditionally are reluctant to reject race-neutral explanations . . . . the *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." *Commonwealth v. Long*, 485 Mass. 711, 751–52 (2020) (Budd, J., concurring).[18] This practice necessarily has a discriminatory impact on Black and Hispanic individuals, and counsels strongly in favor of this Court adopting a bright line presumption that will empower lower court judges to act.

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[15] 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.

[16] Barry, *supra* note 11.

[17] Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of* Batson, 45 U.C. Davis L. Rev. 1359, 1385–86 (2012) ("[R]eviewing judges frequently see themselves as unable to second-guess the denial of a *Batson* claim because of deference considerations, even when something appears very amiss.").

[18] *See also, e.g.*, Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092, 1098–99, 1127 (2011) (analyzing federal court opinions and orders evaluating race-based *Batson* challenges between 2000 and 2009 and finding "[a] broad subset of reasons [accepted by courts to justify a challenged strike], while not race-based per se, seem to correlate with race, suggesting that an attorney seeking to eliminate all the members of a certain race from the jury could achieve much of that goal by focusing on purportedly 'race-neutral' factors that happen to correlate with race"); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 Wis. L. Rev. 501, 545 (1999) ("The savvy litigator can succeed with the most blatant discriminatory purpose by a simple manipulation of the neutral explanation coupled with a dose of disingenuousness.").

This Court can find that, under art. 12, "'purposeful discrimination' can be established by evidence that is consistent with a lack of conscious bias."[19] Discrimination need not be admittedly consciously intended to nevertheless be invidious; a "mind to discriminate," *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)), may include the unconscious mind, evidenced by disparate impact.

Allowing a link to the criminal legal system to be a valid reason for a peremptory challenge transforms the *Batson-Soares* process into a mere ritual that "perpetuates a veneer of racial inclusion that is substantively false."[20] All agree that denying membership and participation on juries to Black and Hispanic people because of their race or ethnicity denies them the rights and privileges of full citizenship. Accordingly, striking a Black or Hispanic juror because they are Black or Hispanic is constitutionally proscribed, violating the prospective juror's right to the equal protection of the law, and the defendant's right to be judged by a jury of their peers, a critical component of the right to a fair trial and an impartial jury. But 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 no less odious to our constitutional commands. This practice allows prosecutors to take advantage of the structural racism built into our system of laws and their enforcement—including racial disparities that are in large part driven by prosecutorial decision-making.

For all the reasons stated herein, the Houston Institute, the Korematsu Center, the Center on Race, Inequality, and the Law at NYU School of Law, and Fordham Law School's Center on Race, Law, and Justice respectfully submit that further appellate review is warranted in this case to reverse the Appeals Court's significant errors in evaluating this peremptory strike.

Sincerely,

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[19] Roberts, *supra* note 17, at 1417 (citing *Hernandez*, at 376 (Stevens, J., dissenting) ("disparate impact is itself evidence of discriminatory purpose")); Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter? Law, Politics, & Racial Inequality*, 58 Emory L.J. 1053, 1058 (2009) ("Neither statutory nor constitutional antidiscrimination law turns on the distinction between [conscious and unconscious bias].")).

[20] Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 Mich. J. Race & L. 57, 61 (2009).

ADDENDUM

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 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 and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed. Given the racial disparities that characterize the 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.[21] The Korematsu Center does not, in this letter or otherwise, represent the official views of Seattle University.

The **Center on Race, Inequality, and the Law** at NYU School of Law was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. Accordingly, the Center uses public education, research, advocacy, and litigation to highlight and dismantle structures and institutions that have been infected by racial bias and plagued by inequality. The Center focuses, in part, on the intersection of race, bias, and the criminal legal system. In keeping with that focus, the Center supports efforts to eradicate racial discrimination in the selection of jurors as an essential part of the work needed to ensure the fair administration of criminal justice.

As part of its mission Fordham Law School's **Center on Race, Law, and Justice** is committed to generating "innovative responses to racial inequality and discrimination." In support of that mission, we work to eradicate race and ethnicity discrimination in all forms, including in the criminal justice system. Given well-documented racial disparities in policing, prosecuting, and sentencing, we urge the court to reconsider the adequacy of strike explanations under Batson based solely on a juror's family member's arrest or conviction, given the racially disparate effects such strikes have.

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