COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO. SJC-13756

COMMONWEALTH,

Appellee,

v.

DARYEN TRENT ROBINSON

Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF THE TAUNTON DISTRICT COURT

BRIEF OF AMICI CURIAE NEW ENGLAND INNOCENCE PROJECT AND FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21 and Massachusetts Rule of Appellate Procedure 17(c)(1), amici curiae state that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae submit this brief in response to the Court's solicitation of amicus briefs on the issue of "[w]hether the judge erred in permitting the prosecutor to exercise a peremptory strike on a Black juror, purportedly based on his employment as an engineer, only after the prosecutor agreed also to strike a white engineer he had not intended to challenge." Amici have an interest in how the Court resolves this question, as well as a broader interest in minimizing discrimination in jury selection. Amici further submit this brief in support of Defendant-Appellant Daryen Trent Robinson's appeal from the trial court's denial of his challenge, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Commonwealth v. Soares*, 377 Mass. 461 (1979), to the prosecutor's peremptory strike of Juror Nine from Mr. Robinson's jury. *See* Appellant's Brief, Dkt. No. 3, at 31–41.

The **New England Innocence Project** ("NEIP") is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New

England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for legal and policy reforms that will reduce the risk of wrongful convictions. This includes ensuring that the presumption of innocence applies robustly and equally to all people and at all stages of the criminal process, from the moment of their first encounter with police through trial. In recognition of the grossly disproportionate number of members of communities of color who have been wrongfully convicted, NEIP's mission includes ensuring that explicit or implicit racial biases do not operate to undermine the presumption of innocence or other rights guaranteed by the United States Constitution and the Declaration of Rights.

The **Fred T. Korematsu Center for Law and Equality** ("Korematsu Center") is based at the University of California, Irvine School of Law and advances justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of over 120,000 Japanese Americans. The Korematsu Center, inspired by his example, works to advance his legacy by promoting racial and social justice. It played a key role in reforms relating to the exercise of peremptory challenges in Washington.[1] It

[1] *E.g.*, Wash. Gen. R. 37; *State v. Jefferson*, 192 Wash. 2d 225 (2018); *City of Seattle v. Erickson*, 188 Wash. 2d 721 (2017).

has engaged in amicus advocacy with regard to jury venires and peremptory strikes in Louisiana, New York, North Carolina, Colorado, and the United States Court of Appeals for the Ninth Circuit. Its advocacy in New York led to a historic decision when its high court recognized that color discrimination was cognizable as a *Batson* violation.[2]

RULE 17 DECLARATION

Pursuant to Massachusetts Rule of Appellate Procedure 17(c)(5), amici curiae state that:

(A) no party or party's counsel authored this brief in whole or in part;

(B) no party or party's counsel or any other person or entity, other than amici curiae, its members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief; and

(C) neither amici curiae nor their counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

SUMMARY OF ARGUMENT

The trial judge erred in permitting the prosecutor to strike Juror Nine purportedly based on his employment as an engineer only after the prosecutor

[2] *People v. Bridgeforth*, 28 N.Y.3d 567 (2016).

reluctantly agreed to also strike a white engineer it had not intended to challenge.

First, the record shows that the prosecutor's reasoning for striking Juror Nine was not genuine (and that the trial judge also reached that conclusion). *Infra* Section I, at 12–33. Among other relevant facts: the prosecutor initially *refused* to strike Juror Eight even though he was also an engineer, and only reluctantly agreed to do so after the trial court made clear that it would otherwise deny the prosecutor's strike of Juror Nine; the prosecutor did not ask Juror Nine questions during voir dire designed to elicit whether his employment as an engineer might impact his thinking as a juror, especially in light of Juror Nine's recent prior service as a juror; despite initially saying that he *never* seats engineers on juries, once it came to light that Juror Eight, a white juror, was also an engineer, the prosecutor claimed that he *almost* never seats engineers; and the prosecutor displayed a defensive demeanor during the *Batson-Soares* colloquy with the court, including offering a wholly inconsistent explanation for why he did not initially strike Juror Eight. This should have ended the inquiry, and the peremptory strike of Juror Nine should have been denied.

Instead, however, the trial court allowed the prosecutor to "moot" the *Batson-Soares* violation by using a peremptory on Juror Eight. In so doing, the trial court improperly injected itself into the *Batson-Soares* framework; abdicated the court's role as an independent referee; elevated a concern for superficial

consistency over the constitutional concern about discrimination in jury selection; and failed to safeguard the rights animating *Batson*, *Soares*, and their progeny. Only by denying the challenge to Juror Nine could the trial court have complied with this Court's directives on *Batson-Soares* challenges, vindicated the rights of Mr. Robinson and the prospective juror, and fostered integrity in the judicial system.

Second, the trial court's abandonment of its responsibilities at step three of the *Batson-Soares* analysis illustrates a longstanding problem among trial courts: judges are loathe to confront repeat players, such as prosecutors and defense attorneys, with accusations of being racist or lying. *Infra* Section II, at 33–37. This Court's intervention is necessary to ensure that judges are able to faithfully discharge their duties to ensure a fair trial. Guidance from this Court can remind system actors about the persistent role that implicit bias plays in animating impermissible peremptory challenges and that the denial of a peremptory strike need not be seen as a scarlet letter.

Finally, this case provides this Court with the opportunity to consider an alternative framework—the "Objective Observer" approach—which focuses on whether an objective observer could view race or ethnicity as a factor in the use of a peremptory challenge. *Infra* Section III, at 38–40. This alternative, adopted by several other states, would mitigate judges' concerns about labeling counsel as

bigoted when upholding a *Batson-Soares* challenge and would guard against the infiltration of implicit bias in the exercise of peremptory strikes.

ARGUMENT

I. The Lower Court Erred Under *Batson-Soares* By Trying To Moot—Rather Than Rejecting—The Prosecutor's Discriminatory Strike Of Juror Nine.

This case presents a classic *Batson-Soares* step-three violation. *See generally Batson*, 476 U.S. at 98; *Soares*, 377 Mass. at 490-91. The prosecutor used a peremptory challenge to strike Juror Nine, a Black juror, from Mr. Robinson's jury. (T1:115.) When asked to give a race-neutral reason for the strike, the prosecutor claimed that it was because he "do[es] not seat engineers on [his] juries ever." (T1:116.) This I-never-seat-engineers assertion was immediately proven untrue; Mr. Robinson's counsel noted that Juror Eight, the immediately preceding (white) juror, was a retired engineer, but the prosecutor did not strike him. (T1:117.) Faced with this discrepancy, the prosecutor not only initially *refused to strike Juror Eight*, but he then launched into a series of arguments, none persuasive, and all of which revealed that the prosecutor *did not wish to strike Juror Eight at all*, let alone based on his occupation as an engineer. (T1:117–123.)

Faced with the prosecutor's "inconsistent . . . reasoning," which it expressly found was cause for "concern" (T1:120), the trial court—per its duty to conduct a "critical evaluation" of the "genuineness" and "adequacy" of the prosecutor's

purported race-neutral reasoning, *Commonwealth v. Maldonado*, 439 Mass. 460, 464–66 (2003)—should have rejected the peremptory strike of Juror Nine as violating *Batson-Soares*. But that is not what the trial court did. Rather, the court offered the prosecutor the opportunity to "*change [his] mind*" as to whether he would be "using [his] other peremptory" on Juror Eight, notwithstanding his earlier refusal to do so. (T1:121 (emphasis added).) The court clearly signaled that without such a change-of-mind, it was prepared to deny the strike of Juror Nine as discriminatory. (T1:120-121.) After the prosecutor predictably struck Juror Eight, the court reversed course, accepting the prosecutor's reluctant strike of Juror Eight and denying Mr. Robinson's *Batson-Soares* challenge, thereby striking both Jurors Eight and Nine. (T1:121-122.) In doing so, the trial court never made an explicit finding of genuineness on the record, only noting, thirty minutes later, that she was "satisfied . . . in light of the fact" that the prosecutor also struck Juror Eight. (T1:160.)

As explained below, the trial court committed reversible error in inviting and accepting the prosecutor's strike of Juror Eight in a bid to avoid finding that the prosecutor's strike of Juror Nine violated *Batson-Soares*.

A. The record amply supports the trial court's implicit conclusion that the prosecutor's I-never-seat-engineers reasoning for striking Juror Nine was <u>not</u> genuine.

The trial record easily shows that the prosecutor's reasoning for striking

Juror Nine was not genuine, a conclusion the trial court itself implicitly reached. (T1:115–123.)[3]

1. *The prosecutor's initial refusal to strike Juror Eight on the same reasoning he offered for striking Juror Nine was sufficient to show the pretextual nature of his reasoning.*

The prosecutor's initial refusal to strike Juror Eight based on his occupation as an engineer is alone justification for finding that the prosecutor's reason for striking Juror Nine (that he is an engineer) was not genuine. Massachusetts courts have reiterated that purportedly race-neutral reasons are pretextual when applied to strike jurors solely of one race but not of others. *See, e.g.*, *Commonwealth v. Jones*,

[3] Nor was this reasoning adequate, an independent reason the trial court should have granted Mr. Robinson's *Batson-Soares* challenge. A key requirement for adequacy is that the strike must be *specific to the case at hand*. *See Soares*, 377 Mass. at 485 ("Peremptory challenges may be used to eliminate prospective jurors whose *unique relationship to the particular case* raises the spectre of individual bias." (emphasis added)). Here, however, the prosecutor never made any attempt to tie his broad characterizations of engineers—as engaging in "black-and-white" thinking and unable to render a judgment based on "what the law requires" or "what the facts suggest" (T1:117)—to any specific issue in this case, or to Juror Nine's actual thought process. Without such specificity, this Court has stated that "a juror's occupation alone may be facially insufficient to rebut a *prima facie* showing that a peremptory challenge was improperly exercised." *Commonwealth v. Garrey*, 436 Mass. 422, 429 (2002). Thus, this Court and others have often rejected peremptory strikes nominally based on occupation where the excluded juror's occupation had no connection to the issues at play in the case. *See, e.g.*, *Commonwealth v. Fruchtman*, 418 Mass. 8, 15 (1994); *Commonwealth v. Burnett*, 36 Mass. App. Ct. 1, 5, *aff'd*, 418 Mass. 769 (1994); *see also Commonwealth v. Prunty*, 462 Mass. 295, 310 n.22 (2012) ("The connection between Juror 16's occupation and his purported bias, as described by defense counsel, is tenuous at best. . . . None of Juror 16's answers during voir dire suggested that his occupation would affect his ability to be impartial." (citations omitted)).

477 Mass. 307, 324 (2017) ("It is . . . telling that the prosecutor did not strike prospective [non-African-American] jurors with characteristics similar to those of Juror No. 143 . . . ."); *Commonwealth v. Prunty*, 462 Mass. 295, 300, 310 n.22 (2012) (upholding trial judge's decision to deny a peremptory challenge purportedly based on juror's employment as a teacher and having young children when "two seated jurors were retired teachers, and three other jurors had minor children"); *Commonwealth v. Harris*, 409 Mass. 461, 467 (1991) ("If this purported basis for the challenge was more than a pretext, however, the prosecutor should have used one of his remaining peremptory challenges to remove a white male, also a Cambridge resident, whom he allowed to remain on the jury."). Federal courts rule the same way. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 241, 248 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.").

And this discrepancy was not lost on the trial court in the moment. Indeed, *in direct response to the prosecutor's initial refusal to also strike Juror Eight*, the trial court stated that this refusal was flatly "inconsistent" with the prosecutor's "reasoning" for striking Juror Nine, and this inconsistency was "of concern" to the court. (T1:120.) Such a statement—coupled with the trial court's apparent refusal

to uphold the strike of Juror Nine *unless* the prosecutor also struck Juror Eight (T1:120–123, 160)—reveals the court's view that the prosecutor's reason for striking Juror Nine was, in fact, not genuine. *See Commonwealth v. Curtiss*, 424 Mass. 78, 82 n.4 (1997) (holding that "the judge's statements that defense counsel's explanations were 'inappropriate' meets the standard of pretext or a sham which is entitled to deference").

Critically, the Commonwealth, while noting that the trial court "never used the word genuine" (*see* CW Br. 36), fails to address the trial court's statement that the prosecutor's "inconsistent" reasoning was "of concern" to the court; or that the trial court appeared prepared to reject the strike of Juror Nine *unless* the prosecutor also struck Juror Eight; or that the trial court only accepted the strike of Juror Nine because the prosecutor ultimately did, in fact, strike Juror Eight. The trial court's statements and positions cannot be ignored; they are clear signs that the trial court did not consider the prosecutor's reasoning to be genuine (because it was not).

2. *The prosecutor's statements when confronted by the trial court reinforce the conclusion that his reasoning for striking Juror Nine was not genuine.*

Any lingering doubts this Court might have that the prosecutor's reasoning for striking Juror Nine was not genuine should be dispelled by the prosecutor's *other* statements—or lack thereof—during jury selection.

First, despite broadly contending that engineers, like Juror Nine, could think

only in "black and white" (T1:117), the prosecutor, during voir dire, did not ask Juror Nine whether, in fact, *he* saw the world in "black and white," nor did the prosecutor ask any questions otherwise designed to elicit whether Juror Nine would be rigid in his approach to evaluating the factual and legal issues. (T1:97–98.)[4] Moreover, the prosecutor failed entirely to contend with the fact that Juror Nine had recently served on a jury a few years earlier. (T1:97–98.)[5] The prosecutor's notable failure to ask questions to ascertain whether *this* engineer would be rigid in his thinking—especially given his recent "good experience" as a

[4] The prosecutor's blanket assertion that engineers engage in "black and white" thinking is highly suspect. A cursory internet search reveals just the opposite: employers hiring engineers—including *software* engineers, whose job responsibilities include coding, much like Juror Nine—regularly state that they value creative thinking and problem-solving abilities. *See, e.g.*, Software Engineering Jobs at Mastercard, Mastercard, https://careers.mastercard.com/us/en/c/software-engineering-jobs (last visited Sept. 16, 2025) (stating that Software Engineer "will design, build, and optimize high-performing, highly scalable software solutions" and noting that "creativity thrives, curiosity is celebrated, and bold ideas are embraced"); Software Engineer – University Graduate (US), Citadel Securities, https://www.citadelsecurities.com/careers/details/software-engineer-university-graduate-us/ (last visited Sept. 16, 2025) (emphasizing "[i]ntellectual curiosity and passion for solving challenging problems" as important qualities in software engineers). The Commonwealth's citation to prosecutors (outside Massachusetts) sharing a similar, unsupported gut instinct about engineers is thus unavailing. (CW Br. 39–41.)

[5] The prosecutor also did not challenge Juror Nine's repeated affirmations that he could render a true and just verdict in *this* case based solely on the evidence and the law (T1:45, 97), nor did the prosecutor ask *Juror Eight* any questions about his occupation as a manufacturing engineer (T1:86–90).

juror (T1:97)—should have elevated the trial court's concerns about the genuineness of the prosecutor's proffered explanation. *See Batson*, 476 U.S. at 97 ("[T]he prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose."); *cf. Jones*, 477 Mass. at 324 ("Like all of the jurors who had been seated, Juror No. 143 gave brief, straightforward, and appropriate answers to the voir dire questions, and no issues of bias or competence were raised.").

Second, the prosecutor's failure to inquire as to the purported rigidity of Juror Nine's thinking was magnified when, upon the first hint of pushback from the court, the prosecutor backtracked from his absolutist position that he "do[es] not seat engineers on [his] juries *ever*" to a far more amorphous statement that he "*almost never* seat[s] an engineer" on a jury. (T1:116–117 (emphases added).) Tellingly, the prosecutor never explained *when* an engineer might be an exception to his modified I-almost-never-seat-engineers rule, or *why* he did not believe Juror Nine, specifically, could be such an exception.

Third, the prosecutor's flip-flopping and defensive "demeanor" upon being confronted with his failure to strike Juror Eight, who was also an engineer, provide further "valuable clues" that—far from professing a genuine belief that engineers are rigid in their thinking and unsuitable for jury service—the prosecutor was simply searching for a "post hoc justification for an impermissibly motivated

challenge." *Maldonado*, 439 Mass. at 466. After first denying that there was "any other engineer" in the venire beyond Juror Nine (T1:117), the prosecutor then claimed he simply overlooked that Juror Eight was an engineer (T1:118). From there, the prosecutor pivoted to a claim that Juror Eight was a "manufacturing engineer," and, thus, the prosecutor did not "take it"—meaning Juror Eight's self-description as an "engineer"—as Juror Eight actually "being an engineer." (T1:119.) The prosecutor then shifted to arguing *both* that the prosecutor "missed" Juror Eight's employment as an engineer *and*—contradictorily—that the prosecutor *affirmatively* sat Juror Eight based on his self-identification as a manufacturing engineer (without explaining why a manufacturing engineer would be an exception to his I-never-seat-engineers rule). (T1:120–21.) Finally, after floundering through increasingly outlandish and unpersuasive excuses for the discrepancy in striking Juror Nine but not Juror Eight, and out of other arguments to press, the prosecutor resorted to accusing Mr. Robinson's counsel of simply calling him "a racist" (T1:121), in a last-ditch attempt to characterize Mr. Robinson's *Batson-Soares* challenge as "absurd" (T1:119). This entire colloquy with the trial court is highly suggestive of pretext.

Fourth, given a last chance to "change [his] mind" by the court (which, as discussed at Section I.B, *infra*, constituted reversible error), the prosecutor agreed to bargain away his other peremptory challenge to strike Juror Eight, allowing him

to preserve his strike of Juror Nine. (T1:118.) His plain reluctance in doing so makes clear that the prosecutor's strike of Juror Eight, the white juror, was *never* motivated by any genuine I-never-seat-engineers rule but instead solely by his desire to preserve his strike of Juror Nine at all costs. Indeed, the Commonwealth all but concedes this point, calling the strike of Juror Eight "performative" and a "sacrifice[]" to ensure that Juror Nine stayed struck. (CW Br. 38.)

These facts *do not* present a close call. The prosecutor's own "inconsistent" reasoning, failures to inquire, and shifting and contradictory positions simply cannot support any conclusion other than that urged by the defendant: the prosecutor's I-never-seat-engineers reasoning was pretext for a discriminatory strike of Juror Nine and should have been rejected under *Batson-Soares*.

B. The trial court committed reversible error by allowing the prosecutor to "moot" the *Batson-Soares* violation by striking Juror Eight after the fact.

Because the prosecutor's purported justification for striking Juror Nine plainly failed to withstand the "critical evaluation" that the trial court was obligated to conduct, *Maldonado*, 439 Mass. at 464–66, and the court was not going to let the prosecutor strike Juror Nine alone, the *Batson-Soares* inquiry should have ended there. Both the United States Constitution and the Massachusetts Constitution "forbid striking even a single prospective juror for a discriminatory purpose." *Commonwealth v. Sanchez*, 485 Mass. 491, 493 (2020)

(cleaned up). And if "the evil meant to be prevented by the whole *Batson-Soares* schema is the discriminatory use of peremptory challenges," *id.* at 501, then a trial court's perception of a peremptory strike as discriminatory, amply supported by the record, mandates denial of that strike.

Instead, the trial court offered the prosecutor the opportunity to "change [his] mind" about exercising his other peremptory strike on Juror Eight, having made clear that the prosecutor's refusal to do so would result in the court denying the strike of Juror Nine. (T1:120–121.) Making (let alone inviting) a bargain with the prosecutor, pursuant to which the trial court allowed the strike of Juror Nine as conditional on the prosecutor simultaneously striking Juror Eight so as to effectively "moot" the *Batson-Soares* violation arising from the strike of Juror Nine, constituted reversible error for at least four reasons.

1. *Inviting the prosecutor to change his mind impermissibly abdicated the trial court's role as an <u>independent</u> evaluator of a striking party's race-neutral reasons.*

By inviting the prosecutor to change his mind about striking Juror Eight as a condition of upholding the strike of Juror Nine, the trial court squarely violated its responsibility to "make an *independent* evaluation of the prosecutor's reasons" for the strike. *Commonwealth v. Calderon*, 431 Mass. 21, 26 (2000) (emphasis added). A trial court is *not* empowered to intervene to help a prosecutor "fix" a discriminatory peremptory strike. Rather, the "judge's role is to determine whether

the reason, proffered by" the prosecutor, "is a bona fide reason or a sham excuse belatedly contrived to avoid admitting facts of group discrimination." *Commonwealth v. Fryar*, 414 Mass. 732, 739 (1993) (cleaned up).

To enforce this separation of roles, this Court has admonished that any race-neutral reason "must come from the prosecutor, not the judge." *Id.* And Massachusetts courts repeatedly have rejected attempts to "help" counsel come up with a defensible race-neutral reason. *See, e.g.*, *Sanchez*, 485 Mass. at 513 n.17 (warning that trial judges "should be careful not to conflate the second and third steps by volunteering a possible group-neutral reason on behalf of the party attempting to exercise the strike"); *Commonwealth v. Douglas*, 75 Mass. App. Ct. 643, 650 n.9 (2009) ("A judge may not supply her own reasons to justify a prosecutor's peremptory challenge.").

Here, the prosecutor's explanation for striking Juror Nine but not Juror Eight either was sufficient, or it was not. The trial court clearly considered the explanation to be insufficient, since she would *not* accept the explanation *unless* the prosecutor also struck Juror Eight. Given that, the trial court's conduct in helping the prosecutor set a record to justify the strike of Juror Nine is effectively no different from cases in which a trial court itself offers a possible neutral reason to sustain counsel's peremptory challenge. In such cases, the trial court has been found to improperly overstep its role and commit reversible error. *See supra*. The

same result should follow here.

2. *The trial court impermissibly evaded its obligation to make explicit findings on the record respecting its critical evaluation of the prosecutor's race-neutral reasoning.*

The trial court's bargain with the prosecutor further violated the court's obligation under this Court's longstanding *Batson-Soares* jurisprudence to make express findings on the record concerning the adequacy and genuineness of counsel's proffered race-neutral justification. *See, e.g.*, *Maldonado*, 439 Mass. at 465–66; *Calderon*, 431 Mass. at 26; *Commonwealth v. Garrey*, 436 Mass. 422, 428 (2002); *Commonwealth v. Burnett*, 36 Mass. App. Ct. 1, 3–4, *aff'd*, 418 Mass. 769, 771–73 (1994).

Here, once an inconsistency appeared between the prosecutor's reasoning for striking Juror Nine and his failure to strike Juror Eight, the trial court should have critically evaluated, on the record, the prosecutor's incongruous attempts to explain away the inconsistency. Doing so would have *confirmed* that the prosecutor's reasoning for striking Juror Nine was *not* "the actual motivating force behind" his strike of Juror Nine but was instead "merely a post hoc justification for an impermissibly motivated challenge." *Maldonado*, 439 Mass. at 465–66; *see supra* at 18–19.

Yet, by inviting and then permitting the prosecutor to strike Juror Eight, the trial court *ignored* the prosecutor's flip-flopping explanations as to his inconsistent

reasoning by acting as *if no inconsistency had ever existed*. (T1:122–123 (stating that, specifically because of the strike of Juror Eight, the trial court would "move on").) Indeed, in inviting the prosecutor to "change [his] mind" and strike Juror Eight after initially refusing to do so, the trial court manufactured a way to *erase* the inconsistency of the prosecutor's position such that the weakness of the prosecutor's stated reasoning for striking Juror Nine ultimately faced *no judicial scrutiny at all*.

The trial court's abdication of its duty to specifically and expressly evaluate on the record the prosecutor's attempt to explain away his inconsistent reasoning likewise violates this Court's precedent. *See, e.g.*, *Calderon*, 431 Mass. at 26 (holding that *Batson-Soares* step three "involves more than a rubber stamping of the proffered reasons" and "requires meaningful consideration whether the challenge has a substantive basis or is impermissibly linked to race").

3. *The prosecutor's strike of Juror Eight was <u>itself</u> pretextual and thus does not and cannot support the genuineness of the prosecutor's reasoning for striking Juror Nine.*

The logic of the trial court's reasoning—that because the prosecutor later struck Juror Eight, an engineer, the trial court could have no concern about the prosecutor saying that he struck Juror Nine for being an engineer—is also deeply flawed. The record shows that the trial court was clearly concerned about the prosecutor's explanation, and with good reason. In fact, the record squarely reveals

that the prosecutor's strike of Juror Eight was *not motivated by Juror Eight being an engineer at all* but instead was the price to pay to secure the strike of Juror Nine. *See supra* at 19-20.

This Court should *not* allow pretext to be protected by even more pretext. If a trial court allows counsel to exercise a subsequent peremptory strike against a non-minority juror as a condition of permitting a prior peremptory strike of a minority juror, the result is not the erasure of any pretext arising from the initial strike of the minority juror. Instead, the court merely permits *two* pretextual strikes to survive scrutiny. Recognizing that the law "forbids striking even a single prospective juror for a discriminatory purpose," this Court should not allow trial courts to invite and uphold an additional pretextual peremptory as cover for a racially motivated peremptory challenge. *Sanchez*, 485 Mass. at 493 (citation omitted).

4. *This Court should make crystal clear that trial courts cannot moot* Batson-Soares *violations by inviting or permitting subsequent peremptory strikes.*

Ultimately, amici soundly reject the bottom-line proposition implied by the trial court's approach: that even after a *Batson-Soares* violation has been identified based (at least in part) on inconsistent application of a pretextual justification across jurors of different races, the court can "moot" the violation simply by allowing counsel to "give up" a peremptory strike to retroactively remove this

inconsistency. The *Batson-Soares* framework is founded on the recognition that the discriminatory use of peremptory strikes delegitimizes the judicial process, impugns the integrity of the legal system, diminishes the effectiveness and fairness of juries, precludes citizens from a key means of direct participation in government, and denigrates excluded jurors. Forcing or soliciting counsel to use additional strikes to enforce consistent application of pretextual race-neutral reasoning does *not* vindicate the rights that are supposed to be secured by *Batson*, *Soares*, and their progeny.

a. Striking Juror Eight did nothing to protect Mr. Robinson's right to be tried by a jury representative of a fair cross-section of the community.

One critical purpose underlying *Batson-Soares* is to safeguard a defendant's right to be tried by a jury representative of a fair cross-section of the community. *See, e.g.*, *Calderon*, 431 Mass. at 25. A violation of this right arising from a discriminatory peremptory strike *cannot* be remedied by striking another juror in the name of superficial consistency. Only by preventing an illegitimate peremptory strike can the defendant's rights be vindicated. *See, e.g.*, *J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994).

This Court has long recognized that, under Article 12 of the Massachusetts Declaration of Rights, a criminal defendant is entitled to a jury that "represents a cross section of community concepts," is "a body truly representative of the

community," and is selected "free of discrimination against [a defendant's] grouping in the community." *Soares*, 377 Mass. at 478 (citations omitted). "The right to be tried by a jury drawn fairly from a representative cross-section of the community is critical for a variety of reasons," including "to guard against the exercise of arbitrary power to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor," and to assure "a diffused impartiality." *Id*. at 479–80 (cleaned up). Likewise, Massachusetts courts (and federal courts) have confirmed the "widely recognized" understanding that diverse juries pulled from a representative cross-section of the community are critical to reaching fair, unbiased verdicts. *E.g.*, *id.* at 481 & n.20; *see also Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

Social science research amply supports these conclusions. *See, e.g.*, Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 Law & Hum. Behav. 232, 243 (2019) ("[D]iversity helps jurors perform better during a complex, group deliberation setting. Specifically, jury diversity reduced the disparity in deliberation quality between cases involving White or Black defendants."); Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017 (2012) (analyzing data that "imply that juries resulting from all-white jury pools require weaker standards of evidence to convict black versus white

defendants"); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psych. 597 (2006) (identifying "specific advantages of racial heterogeneity for group decision making" and identifying when "racial diversity is likely to lead to improved group performance" in jury deliberations).

Accordingly, "excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). And the wrongful removal of a Black juror to deny a defendant a representative cross-section of the community from his jury pool cannot possibly be remedied by the further pretextual removal of a non-Black juror. In fact, permitting the removal of both jurors, Black and non-Black, is likely to result in a jury that is *even less representative* of the community given the already-existing underrepresentation of people of color on Massachusetts juries. *See* Geraldine S. Hines et al., *What happens when jurors are disproportionately white? Not justice.*, Bos. Globe, Apr. 12, 2022 ("[D]ata from trial courts show that seated jurors are not only predominantly white; they are *disproportionately* white.").

Blessing the trial court's approach would only entrench the existing underrepresentation of people of color on juries because each strike against a person of color has an especially detrimental effect given the overall pool of

potential replacement jurors. *See State v. Saintcalle*, 178 Wash. 2d 34, 100 (2013) (González, J., concurring) ("Each peremptory challenge leveled against a member of a minority group has a relatively greater exclusionary effect because each such challenge removes a greater percentage of that minority group from jury service."). Such a result exacerbates, rather than alleviates, the harm to the defendant, and should be—as it has been before—rejected by this Court. *See Soares*, 377 Mass. at 488 ("The party identified with the majority can altogether eliminate the minority from the jury, while the defendant is powerless to exclude majority members since their number exceeds that of the peremptory challenges available."). To that end, this Court should instruct trial courts that if there is *any* doubt as to the genuineness of counsel's proffered neutral reason, the court should side in favor of empaneling *both jurors*—minority and non-minority—to whom the reasoning applies.

b. Striking Juror Eight did nothing to protect Juror Nine's rights to participate in jury service.

A defendant is not the only one harmed by virtue of a race-based peremptory strike; "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror." *Batson*, 476 U.S. at 87. "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 588 U.S. 284, 293 (2019). And "striking individual jurors on the assumption that they hold particular views simply because of their [protected

characteristic] is practically a brand upon them, fixed by the law, an assertion of their inferiority." *J.E.B.*, 511 U.S. at 142 (cleaned up); *see also Prunty*, 462 Mass. at 308 ("Ensuring nondiscriminatory use of peremptory challenges is 'intended . . . to protect the right of each person to have the opportunity to serve on a jury without fear of exclusion due to invidious race-based discrimination.'" (citation omitted)).

Permitting a prosecutor, in the name of consistency, to strike a white juror to retroactively justify the initial strike of a Black juror does nothing to undo the harm to the Black juror whom the trial court believed, and the record supports, was struck because of his race. *See Batson*, 476 U.S. at 95 ("A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." (cleaned up)). Only seating the Black juror cures this violation.

c. Striking Juror Eight did nothing to foster integrity in the judicial system.

Finally, the *Batson-Soares* framework, faithfully applied, seeks to instill integrity in the judicial system, for "[w]hen persons are excluded from participation in our democratic processes solely because of race or gender, th[e] promise of equality [under the law] dims, and the integrity of our judicial system is jeopardized." *J.E.B.*, 511 U.S. at 146. But enforcing consistency for consistency's sake, as the trial court did here, does nothing to promote "public confidence in the

fairness of the criminal justice system." *Prunty*, 462 Mass. at 308 (citation omitted).

The inconsistency in the prosecutor's application of his proffered reasoning, as demonstrated by his initial decision to not strike Juror Eight—and the prosecutor's inability to explain this inconsistency—was not itself a harm to be remedied, but was instead *evidence* of the prosecutor's discriminatory motivation for striking Juror Nine. *See, e.g.*, *Miller-El*, 545 U.S. at 241 (describing inconsistent application of a proffered justification as "evidence tending to prove purposeful discrimination to be considered at Batson's third step"); *Soares*, 377 Mass. at 491 (describing it as "relevant" whether the prosecutor could "demonstrate that . . . he also challenged similarly situated members of the majority group on identical or comparable grounds" (citation omitted)). As such, striking Juror Eight did not remedy or "moot" any harm; it simply permitted the trial court to blind itself to the evidence of the prosecutor's discriminatory peremptory strike. *Batson-Soares* is not concerned with requiring the prosecutor to uniformly enforce his purported rule so that every engineer is excluded from the jury; this framework gives the trial court tools to evaluate whether the prosecutor impermissibly sought to strike Juror Nine based on his race. The self-blinding exercise undertaken by the trial court did nothing to further the integrity-enhancing purpose that *Batson-Soares* was supposed to advance.

The trial court's approach here, if affirmed by this Court, will further create the absurd outcome in which the finding of a *Batson-Soares* violation at step three will turn *not* on the court's actual critical evaluation of counsel's race-neutral reasoning, but rather on the fortuity of whether counsel has an extra peremptory strike available to "moot" a potential violation. Moreover, such a regime fundamentally distorts incentives; counsel will know to exercise their most problematic peremptory strikes first, knowing that they could always "trade in" or "sacrifice" an additional peremptory strike as a backstop if their argument goes poorly. Nothing in *Batson*, *Soares*, or their progeny countenances such a horse-trading regime when it comes to the critical rights secured by those cases. Nor does such a regime instill any confidence whatsoever in the integrity of the criminal justice system.

***

Under this Court's teachings, when a purportedly neutral justification for a peremptory challenge is revealed to be pretext based on a comparison to other jurors against whom counsel did not exercise a peremptory strike, the trial court must *deny the discriminatory peremptory strike*. The trial court should *not* permit (let alone invite) counsel thereafter to strike every other member of the jury that meets the same pretextual criteria for the sake of avoiding inconsistency or as a means for the trial court to avoid engaging in the mandated critical evaluation of

the initial strike. The trial court's failure to deny the strike here constituted reversible error, and Mr. Robinson should be granted a new trial.

II. This Court Should Reaffirm That Practical Concerns Of Accusing Attorneys Of Being Racist Should Not Trump The Trial Court's Duty To Follow The *Batson-Soares* Framework.

The Commonwealth argues that "[n]o logical judge, acting in good faith," could have done what the trial judge evidently did here—invite and accept the later strike of Juror Eight as a condition of permitting the strike of Juror Nine. (CW Br. 38.) But that is incorrect. Amici understand—and this Court has long acknowledged—that a practical challenge regularly faced by trial courts is that making an explicit finding that a purportedly neutral explanation is not "genuine" (as the trial court should have done here) invokes the "harsh judgment" that the exercising attorney improperly permitted race or some other discriminatory intent to taint his judgment. *E.g.*, *Curtiss*, 424 Mass. at 85 (Fried, J., dissenting) ("If the judge is willing to *face the music and make the harsh judgment* that the reason given is a pretext for an improper racial reason, we shall defer to him." (emphasis added)).

Accordingly, trial court judges may seek to avoid—including through the mooting process that the trial court improperly engaged in here—delivering a finding that the judge believes brands an attorney, many of whom are repeat players in the judge's courtroom, as racist or bigoted. This phenomenon—far from

"bel[ying] all logic" (CW Br. 37)—is in fact well understood by courts. *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."); *Saintcalle*, 178 Wash. 2d at 53 ("Imagine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism."). Indeed, the prosecutor acknowledged such a dynamic here, noting that his reluctant strike of Juror Eight was made to avoid being called "a racist," which, in his view, is "what a *Batson* challenge is." (Tr. 1:121.)

In response to this issue, amici have two responses.

First, amici respectfully submit that a trial court's worry about interpersonal awkwardness should *not* trump a court's constitutional duty to root out discrimination in the jury selection process, including by, when the record calls for it, expressly finding that a purportedly neutral explanation is not "genuine."

This Court repeatedly has had to implore trial courts to put such express findings on the record. *See supra* Section I.B.2 (collecting cases); *see also* Peter W. Agnes Jr., *Peremptory Challenges in Massachusetts: Guidelines to Enable the Bench and the Bar to Comply with Constitutional Requirements*, 94 Mass. L. Rev. 81, 90 (2012) ("In numerous cases, however, the Supreme Judicial Court has faced

difficulties in evaluating records on appeal where the trial judge . . . allowed or rejected the challenge without making any findings that it was based on neutral and sufficient reasons."). This Court has also reminded trial courts of their duty to reject a striking attorney's generalized denials that he is a racist or was motivated by race. *See Maldonado*, 439 Mass. at 465 ("The mere denial of an improper motive is inadequate to establish the genuineness of the explanation."); *cf. Long*, 485 Mass. at 734 ("Because implicit bias may lead an officer to make race-based traffic stops without conscious awareness of having done so, such a simple denial [of being motivated by race] is insufficient to rebut the reasonable inference."). These are longstanding legal principles; this Court should affirm them again here.

Second, this Court should again reiterate that discriminatory peremptory strikes are driven as much by implicit or unconscious bias as they are by "racism" or "bigotry," *i.e.*, express animus against a minority or protected group.

Jurists regularly acknowledge that implicit bias affects the decision-making of everyone. *See Long*, 485 Mass. at 751 (Budd, J., concurring) ("In addition to well-disguised proxies for conscious racial bias, unconscious bias is also at play and by definition may not be easily identified." (collecting sources)); *Commonwealth v. McCowen*, 458 Mass. 461, 499 (2010) (Ireland, J., concurring) ("Many . . . studies have reached the same conclusion—that implicit biases are real, pervasive, and difficult to change . . . . [R]acial attitudes and stereotypes are

both automatic and implicit. That is, that people possess attitudes and stereotypes over which they have little or no 'conscious, intentional control.'" (quoting Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 351–54 (2007))). This Court's model jury instructions reflect this understanding, as well, explaining that there is a "near consensus among experts" that "implicit bias" exists, operates "without effort or intent," and "can affect human behavior, including decision-making." Model Jury Instruction – Be Fair (Implicit Bias): *Preliminary Charge*, Commonwealth of Massachusetts, at 1 n.1, https://www.mass.gov/doc/sjc-model-jury-instructions-on-implicit-bias-preliminary-charge-pdf-sept-29-2021/download (last visited Sept. 16, 2025).

Significant academic and social science research have likewise demonstrated that implicit or unconscious bias plays a serious role in the continued discriminatory use of peremptory challenges. *See, e.g.*, Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure,* 31 Law & Hum. Behav. 261, 269 (2007) ("[T]his investigation provides clear empirical evidence that a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence . . . ."); Michael I. Norton et al., *Mixed Motives*

and Racial Bias, 12 Psychol. Pub. Pol'y & L. 36, 50-51 (2006) ("Whether the use of race in peremptory challenge decisions is conscious and strategic or completely unintentional, there is little chance that attorneys will acknowledge it.").

Indeed, here, the prosecutor's claim to have overlooked that Juror Eight, a white juror, also was an engineer (T1:117–118), itself may have been an illustration of implicit or unconscious bias. As courts recognize, "an attorney might believe that the basis of her challenge is a prospective juror's answer to a particular question, unaware that she would neither have asked the question nor have brought the challenge against that prospective juror had he been of a different race." *Saintcalle*, 178 Wash. 2d at 88 (González, J., concurring). All the same, "[i]n such circumstances, the challenge is motivated at least in part by underlying racial bias, and thus, is racially discriminatory." *Id.*

The trial court expressly reminded prospective jurors to avoid allowing implicit bias to drive their decision-making. (T1:43 ("COURT: . . . I instruct you that a verdict must not be based on any such bias, including conscious or subconscious bias.").) There is no reason why the trial court should have avoided giving the prosecutor the same reminder by granting Mr. Robinson's *Batson-Soares* challenge.

III. This Court Could Consider An Alternative Framework—The "Objective Observer" Approach—To Aid Trial Courts In Resolving *Batson-Soares* Step Three Cases.

Alternatively, to address the practical problem of trial courts and attorneys treating a successful *Batson-Soares* challenge as akin to branding the striking attorney as "racist"—a problem that persists despite repeated efforts to stamp it out—this Court could consider a different framework to address discrimination in the use of peremptory strikes.

Under the "Washington Rule," "[i]f the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." Wash. Gen. R. 37(e). Importantly, unlike with a *Batson-Soares* challenge, the "court *need not find purposeful discrimination* to deny the peremptory challenge." *Id.* (emphasis added). This is because the "objective observer" under the Washington Rule "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors." *Id.* R. 37(f). Utilizing the objective observer standard thus would not require trial judges to make explicit findings about the genuineness of counsel's neutral justification and would avoid the perception that a sustained *Batson-Soares* challenge is akin to an accusation of racism. It would also ensure that implicit or unconscious bias is considered as part of the trial court's analysis.

Although Washington was the first state to implement the objective observer approach, several states have since followed suit, and by varying paths. For example, whereas California adopted the objective observer approach by statute, Connecticut did so by court rule. *See* Cal. Stats. 2020, Ch. 318 (implemented at Cal. Civ. Proc. Code § 231.7); Conn. Gen. Stat. R. Super. Ct. § 5-12.[6]

In Massachusetts, whether the objective observer rule might be a better approach to root out discrimination in peremptory strikes is a question that already has sparked interest within the legislature. In fact, the "Washington Rule" has been proposed in both the Massachusetts House and Senate and referred for further study as recently as earlier this year. S.B. 918, 192nd Leg. (Mass 2021); H.B. 1651, 193rd Leg. (Mass. 2023); H.B. 1903, 194th Leg. (Mass. 2025).

Adopting—or proposing a study group or task force to further evaluate, *e.g.*, *Commonwealth v. Walker*, 460 Mass. 590, 604 n.16 (2011)—such an approach squarely aligns with this Court's past practice in reacting to practical realities and amending the framework to effectuate individual rights when necessary to alleviate issues that have arisen in the trial courts. *See, e.g.*, *Sanchez*, 485 Mass. at 492 (adopting "the language of the Federal standard for the first step of a challenge

[6] New Jersey also adopted by court rule a close corollary, requiring courts to "determine, under the totality of the circumstances, whether a reasonable, fully informed person would find that the challenge" was used to remove a prospective juror based on actual or perceived membership in a protected group. N.J. R. Gen. App. 1:8-3A.

pursuant to *Batson*" and "retir[ing] the language of 'pattern' and 'likelihood,' which has long governed the first-step inquiry under [*Soares*], because we conclude that this language has resulted in persistent confusion for judges and litigants alike"). Indeed, even this Court's original decision in *Soares*, which predated *Batson*, was itself the product of the Court's decision to look beyond the United States Constitution to the Massachusetts Constitution to identify "an alternate route to relief" and an "alternate basis for examination of the prosecutor's use of peremptory challenges" to strike Black jurors. *Soares*, 377 Mass. at 475–76 & n.10, 477 & n.12, 479 n.17.

Amici thus respectfully submit that, given the practical challenges faced by trial courts that have impeded the faithful application of the existing *Batson-Soares* framework, the objective observer framework may be a more effective means to ensure the continued elimination of discriminatory peremptory challenges in this and future cases.

CONCLUSION

For the foregoing reasons, and those stated by Defendant Robinson, amici respectfully request that this Court find that the trial court's failure to deny the prosecutor's strike of Juror Nine constituted reversible error and order a new trial for Mr. Robinson.

Dated: September 17, 2025

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Massachusetts Rule of Appellate Procedure 17(c)(9), that this brief complies with the applicable Massachusetts Rules of Appellate Procedure pertaining to the filing of *amicus* briefs, including, but not limited to Mass. R. App. P. 17 and 20.

This brief complies with the length limitations in Mass. R. App. P. 20(a) because it is produced in the proportional font Times New Roman at size 14 and contains 7,467 total non-excluded words under Mass. R. App. P. 20(a)(3)(E) as counted using the word count feature of Microsoft Word.

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CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rule of Appellate Procedure 13(e), I, Radha Natarajan, hereby certify, under the penalty of perjury, that on this date of September 17, 2025, I have made service of a copy of the foregoing **Brief of Amici Curiae New England Innocence Project and Fred T. Korematsu Center for Law and Equality**, relating to *Commonwealth v. Daryen Trent Robinson*, Massachusetts Supreme Judicial Court No. SJC-13756, upon all attorneys of record by electronic service through eFileMA.

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