COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

DOCKET NO. 23-P-0295

COMMONWEALTH OF MASSACHUSETTS,

Appellee,

v.

ROBERTO LOPEZ-ORTIZ,

Appellant.

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Mass. R. App. P. 17(a), Lawyers for Civil Rights, Massachusetts Association Of Hispanic Attorneys, The Jewish Alliance For Law And Social Action, and Citizens For Juvenile Justice (together, "Amici") respectfully move this Court for leave to file an amici curiae brief in the above captioned matter.

Amici's Motion is timely filed. Mass. R. of App. P. 17(b) ("[A]n amicus curiae shall file its brief no later than 21 days before the date of oral argument for that case unless the appellate court or a single justice for cause shown shall grant

leave for later filing."). Oral argument is currently scheduled for March 12, 2024. Dkt. 22.[1]

In support of this Motion, Amici state as follows:

1. The Amici have an interest in the issues presented within this case and are well-situated to offer a brief amici curiae. For example, Lawyers for Civil Rights ("LCR") is a nonprofit, nonpartisan, membership organization dedicated to fostering equal opportunity and fighting discrimination on behalf of people of color and immigrants. LCR has a strong interest in ending identity-based disparities in the criminal justice system. LCR has frequently appeared in the appellate courts of the Commonwealth, both as counsel and as amicus, in cases to address such concerns. *See*, *e.g.*, *Commonwealth v. Dew*, 492 Mass. 254 (2023) (advocating for the right to effective assistance of counsel when the appointed counsel has been discovered to be racist); *Commonwealth v. Long*, 485 Mass. 711 (2020) (establishing a standard for assessing discriminatory motor vehicle stops). Thus, the LCR is uniquely situated to assist this court in considering issues concerning the Commonwealth's peremptory strike of a Hispanic juror. This topic is one of the

[1] The Court originally scheduled oral argument for March 1, 2024. Dkt. 19. LCR, on behalf of Amici, moved on February 9, 2024 for an extension of time to file an amicus brief from February 9, 2024 to February 19, 2024, Dkt. 20, which the Court granted on February 12, 2024. When the Court postponed oral argument until March 12, LCR timely moved clarification that Amici's brief would be due 21 days before oral argument, which is February 20, 2024, as well as for suspension of the February 19 deadline. Dkt. 23. Therefore Amici's Motion is timely.

organization's particular areas of expertise and involves issues that affect the citizens of the Commonwealth, as a whole, in addition to the parties central to this case.

2. LCR is joined by Massachusetts Association of Hispanic Attorneys ("MAHA"), The Jewish Alliance For Law And Social Action ("JALSA"), and Citizens For Juvenile Justice ("CfJJ").

3. MAHA promotes service and excellence in the Hispanic legal community and seeks to provide opportunities for professional growth to its members. MAHA's mission includes seeking to elevate the standard of integrity, honor, and courtesy in the legal profession.

4. JALSA is a membership-based non-profit organization based in Boston working for social and economic justice, civil and constitutional rights, and civil liberties for all. JALSA has a long history of supporting racial justice, and supports the efforts of those who seek to advance these important causes.

5. CfJJ is the only independent, statewide, nonprofit organization working exclusively to reform and reimagine the juvenile justice and other youth serving systems in Massachusetts. CfJJ's mission is to advocate for statewide systemic reform that achieves equitable youth justice. CfJJ believes that both the needs of young people and public safety are best served by fair and effective systems that recognize the ways children are different from adults and that focus

primarily on rehabilitation rather than an overreliance on punitive approaches. Core to these ideas of fairness and equity is CfJJ's work to illuminate and address racial and ethnic disparities that impact Massachusetts youth at multiple decision points in the juvenile and criminal legal system.

6. Therefore, the expertise of Amici will be useful to the Court. Amici aims to provide this Court with information regarding the importance of disallowing peremptory strikes on the basis of one's race or ethnicity.

7. It is well-documented that juries in Massachusetts have historically marginalized prospective jurors on the basis of their race. Katy Naples-Mitchell & Haruka Margaret Braun, *Inequitable and Undemocratic: A Research Brief on Jury Exclusion in Massachusetts and a Multipronged Approach to Dismantle It*, Roundtable on Racial Disparities in Massachusetts Criminal Courts, Criminal Justice Policy and Management Program at the Harvard University Kennedy School Malcolm Wiener Center for Social Policy, at 1, (June 2023).[2] Amici are concerned with ensuring that peremptory strikes are not allowed when they occur on the basis of one's race. Consequentially, these implicated issues could profoundly affect the constituents served by Amici.

8. Amici therefore respectfully submit that their amici curiae brief,

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[2] https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/Felony-Jury-Exclusion-in-Massachusetts.pdf (last accessed Feb. 19. 2024).

attached hereto at Exhibit A, which is limited to the peremptory strike issues implicated in this case, would be useful and desirable to this Court.

9. Amici further respectfully request, pursuant to Rule 17(e), that they be permitted oral argument[3] regarding the peremptory strike issues implicated in this case and respectfully submit that good cause to allow Amici oral argument exists as discussed herein and in the accompanying brief.

WHEREFORE, Amici, through the undersigned counsel, respectfully request that this Court grant them leave to file the accompanying amici curiae brief and grant Amici oral argument on this issue, together with any and all other relief that the Court deems necessary and desirable.

Respectfully submitted,

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Dated: February 20, 2024

[3] Amici request to be allowed time for oral argument only to the extent that it would not impinge on or reduce the time currently allowed to the parties.

Certificate of Service

I hereby certify that on February 20, 2024, a copy of the within Motion For Leave to File Amici Curiae Brief was served upon the following counsel of record through the Tyler e-file system:

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Exhibit A

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

DOCKET NO. 23-P-0295

COMMONWEALTH OF MASSACHUSETTS,

Appellee,

v.

ROBERTO LOPEZ-ORTIZ,

Appellant.

ON APPEAL FROM THE MIDDLESEX DIVISION
OF THE SUPERIOR COURT DEPARTMENT

BRIEF OF AMICI CURIAE LAWYERS FOR CIVIL RIGHTS, MASSACHUSETTS ASSOCIATION OF HISPANIC ATTORNEYS, THE JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION, AND CITIZENS FOR JUVENILE JUSTICE

CORPORATE DISCLOSURE STATEMENT

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21, Amici Curiae Lawyers for Civil Rights, Massachusetts Association of Hispanic Attorneys, The Jewish Alliance for Law and Social Action, and Citizens for Juvenile Justice make the following disclosures: They are each non-profit corporations with no parent corporations, with no stock, and therefore with no publicly held company owning 10% or more of their stock.

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INTERESTS OF AMICI CURIAE

This brief is submitted by Lawyers for Civil Rights ("LCR"); Massachusetts Association of Hispanic Attorneys ("MAHA"); The Jewish Alliance for Law and Social Action ("JALSA"); and Citizens for Juvenile Justice ("CfJJ") as amici curiae (collectively, the "Amici Curiae") urging the Court to reverse the conviction of Roberto Lopez-Ortiz and remand for a new trial.

Pursuant to Massachusetts Rule of Appellate Procedure 17(c)(5), Amici Curiae declare that: (A) no party or party's counsel had any part in authoring this brief; (B) no person other than the Amici Curiae contributed any money intended to fund the preparation or submission of this brief; and (C) none of the Amici Curiae represents or has represented any of the parties in this appeal or any similar proceeding involving similar issues or any similar 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.

LCR is a nonprofit, nonpartisan, membership organization dedicated to fostering equal opportunity and fighting discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. LCR has a strong interest in ending identity-based disparities in the criminal justice system.

MAHA promotes service and excellence in the Hispanic legal community and seeks to provide opportunities for professional growth to its members. MAHA's mission includes seeking to elevate the standard of integrity, honor, and courtesy in the legal profession.

JALSA is a membership-based non-profit organization based in Boston working for social and economic justice, civil and constitutional rights, and civil liberties for all. JALSA has a long history of supporting racial justice, and supports the efforts of those who seek to advance these important causes.

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I. INTRODUCTION

If not properly scrutinized and monitored, peremptory challenges allow bias to infect the criminal justice system, impinging upon the constitutional rights of both defendants and prospective jurors. For that reason, courts have developed a prophylactic system to prevent racially motivated peremptory challenges during voir dire. However, the success of this system depends on the trial court rigorously scrutinizing the motivation for a peremptory strike, and decision-making regarding this issue must be supported by and reflected in the record. In this case, the trial court's analysis was insufficient to safeguard the constitutional rights of both the defendant and the juror.

The Supreme Court and Massachusetts courts have long recognized that it is unconstitutional for a prosecutor to exercise a peremptory challenge based on a juror's race or ethnicity. If a peremptory strike is challenged and the challenging party can articulate an inference of discriminatory intent for the strike, the party exercising the strike must articulate a "race-neutral" justification for the challenge. Then the trial court must then make a finding that the proffered justification(s) are both "genuine" and "adequate."

The judge in this case erred at each step of this analysis: first by considering only whether a "pattern" existed, without any consideration of whether the Defendant-Appellant had otherwise articulated "an inference of discriminatory

purpose," then by accepting the Commonwealth's justifications for exercising its peremptory challenge as "race-neutral" when they were not, and finally by finding that the Commonwealth's justifications, which were the product of inherent bias and thinly-veiled proxies for race, were both "genuine" and "adequate."

II. FACTUAL BACKGROUND

Defendant-Appellant Lopez-Ortiz is of Hispanic descent, as is the juror at issue, Juror No. 3. During the voir dire portion of Appellant's trial, the Court questioned Juror No. 3 regarding his responses to certain questions during voir dire and in the juror questionnaire:

> THE COURT: You indicated that the nature of the case might affect your ability to be fair; can you tell me why you raised your hand please?
>
> JUROR No. 3: Because I looked at the jury pool and I don't feel that he has his peers out there. I don't see any Spanish people out there or anything like that and I feel that he should be, if he's going to be, life and death like that there should be some of his people out there.
>
> THE COURT: The question though was there anything about the nature of the case as I described it that would affect your ability to be a fair and impartial juror, that was the question.
>
> JUROR No. 3: Oh, no, no, not at all.

Mar. 1, 2017 Tr. at 27:16-28:6.

> THE COURT: So, on Question 18, Question 18 asks, "Do you believe that Dominicans or Puerto Ricans are more likely to than other members of ethnic groups to commit crimes?" You checked, "No. I do not approve of this question."

JUROR No. 3: Yeah, I don't like those questions, I never did, I don't think they're proper at all. Just like asking –

THE COURT: Well, let me explain, sir. The reason we ask that question is to make sure that who are seated on this jury can be fair to both sides of this case. So, questions are designed to help us learn whether anyone may have some personal biases or prejudices that might make them unqualified to serve, that's the reason for the question. Does that help you understand the reason for the question?

JUROR No. 3: Sure.

Id. at 33:8-34:1.

THE COURT: . . . And going back to your confidential juror questionnaire that you filled out for the Court; you had a DUI, sir?

JUROR No. 3: Correct.

THE COURT: When was that?

JUROR No. 3: I had gone to Florida, that was maybe four years ago and one in Maine around '13.

THE COURT: And how were you treated by the police and the prosecutors who were involved in handling your matters?

JUROR No. 3: Down in Florida very disgusting.

THE COURT: And how about in Maine?

JUROR No. 3: Very nice.

THE COURT: Would your experiences with either of those cases affect your ability to be fair to both sides in this case?

JUROR No. 3: Not at all because I'm in Massachusetts.

Id. at 34:11-35:6. The Court also asked the juror to explain the extent of his contact with persons of Hispanic descent.

> JUROR No. 3: Well, I'm 100 percent Puerto Rican and I try, you know, it's, I grew up here as a young kid so I'm kind of, how would you say, not pro this or pro that because now I don't appear to be Hispanic, but I've gone through my life having to deal with something like that so. . . . I try to stay into the community still.

Id. at 32:20-33:7.

The Commonwealth then asked just two questions of this Juror:

> THE COMMONWEALTH: If you were seated on the jury and you felt that the rest of the panel did not adequately make up a jury of the defendant's peers; would that affect your ability to be fair and impartial as a juror in this case?
>
> JUROR No. 3: No, not at all, I'd put that aside.
>
> THE COMMONWEALTH: So, you would be able to put aside any beliefs that you had?
>
> JUROR No. 3: Yes, I would, correct.

Id. at 36:5-14.

After this colloquy, the Court ruled that the juror was both competent to serve and indifferent. *Id*. at 37:1-6. The Commonwealth then requested to remove this juror for cause, stating:

> THE COMMONWEALTH: The fact that he had what he described as a disgusting experience when he had an incident in Miami, as well as his initial reaction to the make-up of the jury pool. While he did answer a question saying that he could put that aside, he had to think about it for a while. That gives the Commonwealth pause about whether he really can be fair and impartial to both sides in this case given what he came in with. Clearly some distain [*sic.*] about even the question that is on the questionnaire. And even when you explained to him the reason for the question, I believe it was No. 18, his response was just,

> "Sure," it didn't seem to the Commonwealth that he was satisfied with the reasons why that question was there.

Id. at 37:12-38:2. The Court refused to remove Juror No. 3 for cause. *Id.* at 38:3-15.

The Commonwealth then exercised a peremptory strike, and the Court stated multiple times that it found no "pattern" of discrimination.

> THE COURT: . . . I am not prepared to find that there is a pattern of exclusion of individuals within the ethnic category of persons who are Hispanic based on the exercise of this challenge. I'm not persuaded this is a pattern, although I do recognize a pattern can be demonstrated with a single challenge.

Id. at 40:16-23.

> THE COURT: . . . I have not asked the Commonwealth to justify their exercise of a peremptory because I have not found that a pattern has been established. . . [O]n the record that is before me based on my observations of this juror and the entire course of this empanelment, I am not persuaded that there is a pattern.

Id. at 42:19-43:5.

Despite repeatedly stating that it found no pattern of discrimination, on Defendant's request, the Court asked the Commonwealth to articulate its "race-neutral" reasons for the challenge.

> THE COURT: I'm not persuaded there is a pattern but in an abundance of caution I will ask the Commonwealth to state its reasons for the record.

Id. at 44:2-4.

The Commonwealth then stated:

> THE COMMONWEALTH: [T]he reason for the Commonwealth's objection and use of the peremptory, is that the Commonwealth does not believe that this juror can be fair to the Commonwealth. It has nothing to do with this juror's race particular to him, it is based on the answers to the questions that he came in here and stated and indicated his issues that he had with police previously, his beliefs that he feels that the defendant cannot get a fair trial. And while he said that he could put that aside, the Commonwealth does not believe that he is in a position to give the Commonwealth a fair trial based on his beliefs. Again, going back to the questionnaire where he was, he seemed upset or offended in some way about the particular question, No. 18, "Do you believe that Dominicans or Puerto Ricans are more likely than members of other ethnic groups to commit crimes?" And even upon your explanation, it is the Commonwealth's opinion that he did not seem satisfied by saying very flippantly, "Sure". And that his attitude coming into this trial, again, having nothing to do with his race, gives the Commonwealth concern and pause and that is why the Commonwealth has exercised a peremptory.

Id. at 44:8-45:6.

The Court accepted these reasons as "genuine" and "adequate" without any further questioning and without any specific factual findings. *Id.* at 45:7-11. The trial court also noted that "the Commonwealth is entitled to make a decision on the basis of body language and other observable characteristics of a potential juror, that they may interpret differently from the Court." *Id.* at 46:2-6.

III. STATEMENT OF THE LAW

"'The Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights prohibit a party from exercising a peremptory challenge on the basis of race' or other protected classes."

Commonwealth v. Sanchez, 485 Mass. 491, 493 (2020) (quoting *Commonwealth v. Jones*, 477 Mass. 307, 319 (2017)). A single improper peremptory challenge is structural error, requiring that a defendant's conviction be overturned. *Commonwealth v. Harris*, 409 Mass. 461, 465 (1991).

A three-step burden-shifting analysis is triggered when evaluating a challenge to a peremptory strike. *Commonwealth v. Carter*, 488 Mass. 191, 195-96 (2021) (quoting *Commonwealth v. Ortega*, 480 Mass. 603, 606 (2018)). First, the party objecting to the peremptory challenge must raise an "inference of discriminatory purpose" given the totality of the facts. *Sanchez*, 485 Mass. at 512 (identifying non-exhaustive factors relevant for making a valid challenge to a peremptory strike) (quoting *Batson v. Kentucky*, 476 U.S. 79, 94 (1986)); *Commonwealth v. Soares*, 377 Mass. 461, 490 (1976) ("[T]he trial judge must determine whether to draw the reasonable inference that peremptory challenges have been exercised so as to exclude individuals on account of their group affiliation"). This is a low burden. *Commonwealth v. Robertson*, 480 Mass. 383, 391 (2018).

The Supreme Judicial Court has emphasized that it is not necessary for a trial court to find a pattern of exclusion. "[C]hallenge of a single prospective juror within a protected class [can be made], . . . where there is a likelihood that [a prospective juror is] being excluded from the jury solely on the basis of . . . group membership." *Commonwealth v. Issa*, 466 Mass. 1, 8 (2013) (citations omitted). Trial courts are

"strongly encouraged" to probe into the propriety of strikes that are questioned, and have "the broad discretion to do so 'without having to make the determination that a pattern of improper exclusion exists.'" *Commonwealth v. Lopes*, 478 Mass. 593, 598 (2018) (citations omitted).

If there is an inference of discrimination, the burden shifts to the party seeking the strike to offer a non-discriminatory explanation that is "genuine" and "adequate." *Commonwealth v. Gonzalez*, 99 Mass. App. Ct. 161, 165 (2021) (quoting *Commonwealth v. Mason*, 485 Mass. 520, 530 (2020)). To be considered "genuine," the explanation must reflect the actual reason for bringing the challenge; "adequacy" is found when the explanation is "'clear and reasonably specific,' 'personal to the juror and not based on the juror's [race]'. . . , and related to the particular case being tried." *Commonwealth v. Maldonado*, 439 Mass. 460, 464-65 (2003) (quoting *Batson*, 476 U.S. at 98 n.20 (1986), and *Commonwealth v. Young*, 401 Mass. 390, 401 (1987)).

Furthermore, subjective observations (*i.e.*, a juror's looks or a "gut feeling") are "rarely" adequate grounds for a valid challenge "because such explanations can easily be used at pretexts for discrimination." *Id.* at 465 (citing *Commonwealth v. Calderon*, 431 Mass. 21, 27 (2000)) (a juror's alleged smile toward defense counsel was not a sufficient basis for a peremptory strike).

IV. ARGUMENT

A. Peremptory Challenges Provide Fertile Ground For Conscious And Unconscious Bias.

"[T]he State denies a . . . defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. . . . " *Batson*, 476 U.S. at 85.

> Enforcing that constitutional principle, *Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants. By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system.

Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019).

Both the United States and Massachusetts constitutions prohibit striking "even a single prospective juror for a discriminatory purpose." *Robertson*, 480 Mass. at 393. As Massachusetts and federal courts have consistently recognized, peremptory challenges, if not scrutinized carefully, can provide fertile ground for bias to infect the judicial system. *See, e.g. Flowers*, 139 S. Ct. at 2250-51 (finding that the trial court erred in concluding that the strike of a black juror was not motivated by discriminatory intent); *Snyder v. Louisiana*, 552 U.S. 472, 479 (finding that the trial court erred in not corroborating justifications of peremptory strike based on demeanor); *Robertson*, 480 Mass. at 397 (finding that the trial court erred in not finding a pattern of exclusion of black men from the jury); *Maldonado*, 439 Mass.

at 467 (finding that the trial court should not have accepted inconsistently applied justification as support for peremptory strike). Proper scrutiny of peremptory strikes, therefore, "entails a critical evaluation of both the soundness of the proffered explanation and whether the explanation . . . is the actual motivating force behind the challenging party's decision." *Maldonado*, 439 Mass. at 464.

Decades of social science research supports requiring a continued critical evaluation of the justifications for peremptory challenges because peremptory strikes result from "seat-of-the-pants" decisions. *Batson*, 476 U.S. at 106 (Marshall, J. concurring). The attorney exercising the challenge is making a judgment, which is inherently imbued with the attorney's own beliefs and biases, including those regarding race, that the juror at issue is somehow more hostile to their position. Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 158 (2005). "At best, a peremptory challenge is an educated guess, whereas at worst it is merely the expression of naked prejudice." *Id.*

Moreover, social science research makes clear that bias is often implicit, yet still profoundly influences how decisions are made. Racial stereotypes "can lead to a peremptory challenge by altering the way an attorney unconsciously sees and uses information." *Id.* at 207-208. A stereotype that people of color are inherently anti-prosecution may lead a prosecutor to make a peremptory challenge that improperly relies on this stereotype.

An ambiguous situation where there is a strong motivation to predict the juror's potential biases is precisely where individuals are most likely to fall back on unconscious stereotypes. *Id*. at 210, 212. "When a lawyer sees a potential juror, she will almost instantaneously categorize that person, likely on the basis of race or sex. This categorization activates stereotypes, or schemas, so that the lawyer will tentatively assign the attributes contained in the stereotype to the potential juror." *Id.* at 228. Therefore, when exercising a peremptory challenge, a prosecutor's own biases have almost certainly affected their observation and interpretation of information. *Id.*

Cognitive researchers call this phenomenon "priming"—the activation of stereotypes and trait associations by a situational context. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U.L. Rev. 795, 798 (2012). "[E]ven with minimal contact with an arrestee (such as seeing the arrestee's name, racial or ethnic classification, or photograph), racial stereotypes can be immediately and automatically activated in the mind of a prosecutor, without the prosecutor's awareness." *Id.* Indeed, simply seeing a person from a certain group can awaken harmful stereotypes and can affect decision-making, even without a person's awareness. *Id.* at 799.

Priming of negative stereotypes is particularly problematic for persons of color because studies have shown that the majority of Americans have implicit

negative reactions and stereotypes of persons of color. *Id*. at 802. It should come as no surprise that such implicit biases have broad effects on prosecutorial decision-making. *Id.* at 804. The pervasive effects of societal stereotypes and implicit biases suggest that prosecutors associate jurors of color with lack of respect for law enforcement, for example, and voir dire results in the activation of these (and other) negative stereotypes. *Id*. at 819. "Thus, even accurate race neutral behavior descriptions might stem from racialized assessments (albeit, without conscious thought) of the characteristics of individual jurors." *Id*.

Social science research thus corroborates the direct impact of implicit bias on peremptory strikes, and "[i]t is now both unrefuted and widely acknowledged that 'powerful and pervasive' implicit biases affect the exercise of peremptory challenges as well as how judges rule on the lawfulness of those challenges." Elisabeth Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (2020), 1, 30.[1] Further, research suggests that decision-makers rarely admit the influence of race on their decisions and it is very easy, even natural, for them to manufacture race-neutral justifications for decisions that are actually based on race. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examinations of*

[1] https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf (last accessed Feb. 19, 2024).

Peremptory Use and the Batson Challenge Procedure, 31 Law & Hum. Behav., 261, 263-64 (2007).

The difficulty in determining whether a justification for a peremptory challenge is in fact race-neutral is exacerbated by the fact that prosecutors across the country know that the law does not permit race-based strikes and "have been explicitly trained to provide 'race neutral' reasons for strikes against people of color." Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (2021), 1, 43.[2] *See also* Semel et al., *supra*, at 36, 49-50 (listing ways that prosecutors have been trained to articulate race-neutral justifications for striking jurors of color). Litigation guides continue to advise prosecutors to avoid jurors who are the same race as the defendant and encourage reliance on racial stereotypes in jury selection. Equal Justice Initiative, *supra*, at 43 (citing "Jury Selection: The Law, Art and Science of Selecting a Jury" § 14:14 (Jan. 2020 Update)) (highlighting the importance of choosing jurors who can identify with the client, and noting that "[t]here are any number of possible common grounds that may lead a juror to identify with a key figure in a trial [including] race").

It is undeniable that race continues to have a pervasive influence on jury selection and that prosecutors are more likely to exclude people of color with

[2] https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf (last accessed Feb. 19. 2024.)

peremptory challenges. Sommers et al., *supra*, at 262-263, 267 (finding study participants challenged black jurors). *See also* Equal Justice Initiative, *supra*, at 42 ("Numerous studies analyzing prosecutors' use of peremptory strikes reach the same conclusion—peremptory strikes are unquestionably used in a racially discriminatory manner."); Whitney DeCamp & Elise DeCamp, *It's Still about Race: Peremptory Challenge Use on Black Prospective Jurors*, 57(1) Journal of Research in Crime and Delinquency 3, 3 (2020).[3] (finding black venire members are 4.51 times more likely to be excluded from a jury due to peremptory challenges from the prosecution than white venire members). *See also Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J. concurring) (noting that "studies and anecdotal reports suggest[ed] that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem").

Peremptory challenges pose a particular risk of injecting bias into the process, distorting justice. This bias is often subtle, but that does not mean that it cannot be challenged. "In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process." *Flowers*, 139 S. Ct. at 2243. Given the pervasive and persistent discrimination involved in the peremptory challenge system, even now nearly 40 years post-*Batson*, trial courts must be consistently vigilant, must undertake the

[3] https://doi.org/10.1177/0022427819873943 (last accessed Feb. 19. 2024.)

entire analysis, and their choices at each step of the process must be closely scrutinized.

B. The Trial Court Erred In Failing to Find That Defendant-Appellant Stated A *Prima Facie* Case

The first step of the inquiry requires the objecting party to establish a *prima facie* case that the strike was "impermissibly based on race or other protected status by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Commonwealth v. Kozubal*, 488 Mass. 575, 580 (2021) (quoting *Commonwealth v. Jackson*, 486 Mass. 763, 768 (2021). "[R]ebutting the presumption of propriety is not an onerous task." *Jones*, 477 Mass. at 321.

The trial court concluded that Defendant did not state a *prima facie* case that the strike was improper because she failed to find a pattern. Tr. 40:13-41:9; 42:19-43:18; 44:1-2; 47:8-13. The trial court committed two errors. First, the trial court improperly focused on whether there was a pattern of improper challenges instead of whether the Commonwealth's "challenge is based impermissibly on a juror's membership in a protected group." *Maldonado*, 439 Mass. 460, 463 n.3.

Second, the trial court did not "consider 'all relevant circumstances' for [the] challenged strike." *Jones,* 477 Mass. at 322 n.24 (citing *Batson*, 476 U.S. at 96). Rather, the court focused only on one factor: the number and percentage of group

members who have been excluded.[4] Tr. 42:23-43:13. While this factor "provides a prism through which to determine discriminatory intent" (*Ortega*, 480 Mass. at 607), "to place undue weight on [it] not only would run counter to the mandate to consider all relevant circumstances, *see Batson*, 476 U.S. at 96-97, but [it] also would send the 'unmistakable message that a prosecutor can get away with discriminating against some [Hispanics] . . . so long as a prosecutor does not discriminate against all such individuals.'" *Jones*, 477 Mass. at 325 (quoting *Sanchez*, *supra*, at 299 (stating that five African-Americans had already been seated was not, by itself, dispositive)).

These errors, which were an abuse of the trial court's discretion, impacted the court's analysis of the second and third factors, as discussed in Sections IV.C and D below.

C. The Prosecutor's Justifications Were Not Race-Neutral

In attempting to explain its peremptory challenge of Juror No. 3, the Commonwealth cited his response to the juror questionnaire regarding whether Dominicans or Puerto Ricans were more likely to commit crimes, his statements regarding the racial makeup of the jury pool, his "flippant" response to certain

[4] The trial court erroneously concluded that defendant failed to state a *prima facie* case to rebut the peremptory challenge presumption because the Commonwealth did not use a peremptory challenge on the other two Hispanic panel members who preceded Juror No. 3. Tr. 42:23-43:13.

questioning, and his past history with the criminal justice system. Tr. 44:7-45:6. The trial court erred in accepting these justifications without any meaningful analysis. None of these reasons, when evaluated in context, are race-neutral, and therefore they cannot satisfy the second step of the analysis.

As a preliminary matter, a trial court evaluating whether a justification is race-neutral must be cognizant of the fact that the attorney's conscious truthfulness is not dispositive. Page, *supra*, at 160. Subtle forms of bias inevitably affect judgment and decision-making. *Id.* at 161. In fact, facially race-neutral justifications that mask discriminatory motives were exactly the problem anticipated by Justice Marshall in *Batson*. *Batson*, 476 U.S. at 105-106. "Trial courts are ill equipped to second-guess those reasons." *Id*. at 106. Without an evaluation by the trial court that considers the potential for (and indeed probability of) inherent biases, the *Batson* framework, "which depends upon the subjective judgments of the parties and judges, [is] incapable of ferreting out invidious unconscious biases and stereotypes." Semel et al., *supra*, at 31.

Trial courts, therefore, must carefully consider whether a facially race-neutral justification is actually a proxy for race, *i.e.*, whether the prosecutor is improperly relying on characteristics that apply disproportionately to members of a protected group (*e.g.*, "less educated" or "ex-felons"). *See id*. at 45. It is imperative that trial courts are mindful of the fact that "[a]ny basis for a peremptory strike that correlates

with racism or racial exclusion perpetuates discrimination in jury selection." Katy Naples-Mitchell & Haruka Margaret Braun, *Inequitable and Undemocratic: A Research Brief on Jury Exclusion in Massachusetts and a Multipronged Approach to Dismantle It*, Roundtable on Racial Disparities in Massachusetts Criminal Courts, Criminal Justice Policy and Management Program at the Harvard University Kennedy School Malcolm Wiener Center for Social Policy, at 24 (June 2023);[5] *see also Jackson*, 486 Mass. at 779 n.27 (acknowledging the need for extreme care when evaluating strikes of jurors who have past records of minor offenses, especially when the prospective juror is African-American since it is likely that hypothetical juror has been "subject to disparate treatment in the criminal justice system").

The Supreme Court has explained that a "neutral explanation . . . means an explanation based on something other than the race of the juror," where there is not a discriminatory intent inherent in the justification. *Hernandez v. New York*, 111 S. Ct. 1859, 1866 (1991). Considering the overwhelming research regarding inherent bias and the fact that facially-neutral justifications are both implicitly and explicitly used to strike jurors of color, the trial court's analysis at step 2 must carefully evaluate whether, for even a facially race-neutral explanation for a peremptory strike, "a discriminatory intent is inherent." *See Commonwealth v. Cavotta*, 48 Mass. App.

5 https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/Felony-Jury-Exclusion-in-Massachusetts.pdf (last accessed Feb. 19, 2024)

Ct. 636, 638-640 (2000) (finding a challenge based on the juror's accent and juror questionnaire answers could not be assumed to be race-neutral).

1. Proffered justifications based on Juror No. 3's concerns regarding the racial makeup of the jury and questions regarding race on the juror questionnaire were not "race-neutral."

The Commonwealth justified its peremptory strike of Juror No. 3 in part based on Juror No. 3's concern that there were no other Hispanics on the panel and his reaction to the question regarding the commission of crimes by Dominican and Puerto Rican defendants. Tr. 44:7-45:6. A critical evaluation of the prosecutor's justifications, however, shows that they were based on Juror No. 3's identification of himself as the same race as the defendant and thus were not race-neutral.

Juror No. 3's expressions of concern regarding the makeup of the jury and the juror questionnaire are necessarily understood through the juror's own experience of race, which the Court specifically questioned him about. The juror discussed in detail his own Puerto-Rican heritage and his connection to the Hispanic community, and also discussed his feelings about the questions that related to Puerto-Ricans and the lack of Hispanics on the jury. *Id*. at 29:19-28:1. Juror No. 3's expressions of concern regarding the racial makeup of the jury and his commentary regarding the juror questionnaire were inherently intertwined with his race and his experience of race in the Hispanic community. *Id*. The irony of accepting Juror No. 3's expression of concern regarding representation as a "race-neutral" justification is that this

further decreased that representation. *Id*. at 44:7-15. These justifications were not, therefore, based on "something other than the race of the juror," but rather, were directly based on his race.

Additionally, concerns about racial bias in the legal system are commonly used as purportedly race-neutral reasons for systematically removing people of color from juries and should be considered inherently suspect. For example, studies in California found that 26.8% of challenges to Hispanic jurors involved an expression of distrust of the system or a belief that the system is racially biased. Semel et al., *supra*, at 20. Considering the disproportionate involvement of people of color in the criminal justice system, there may be a sound reason to doubt the fairness of the system; therefore, using this reason for striking jurors of color necessarily has a disproportionate impact on their representation in the jury. *Id*. at 37.

Therefore, it was error for the court to accept Juror No. 3's statements regarding the makeup of the jury and the juror questionnaire as race-neutral explanations for the Commonwealth's peremptory strike. *See Commonwealth v. Pierre*, 103 Mass. App. Ct. 1119, at *4 n.11 (2024) (noting that the trial court had found that a juror's expression about being concerned with how few Black people were in the venire was not "a basis for excluding [them]").

2. The Commonwealth's justifications based on the juror's demeanor were not "race-neutral."

The Commonwealth also stated that it was striking Juror No. 3 because of his attitude or demeanor, characterizing his one word voir dire response ("sure") as "flippant," which the court also accepted as a race-neutral justification. Tr. 44:16-45:6.

A juror's demeanor is a commonly used justification for striking jurors of color, and social science research and empirical evidence "all but draws a direct line between prosecutors' reliance on body language, facial expressions, or eye contact and racially discriminatory strikes." Semel et al., *supra*, at 48. For example, studies in California found that prosecutors used racial stereotypes about demeanor to justify peremptory strikes in more than 40% of cases. *Id.* For Hispanic jurors in particular, prosecutors most often offered demeanor-based reasons for strikes, including frowning, seeming confused, not being friendly, and being "flippant." *Id*. at 19.

The assumption that the demeanor of the individual juror is race-neutral ignores the inherent bias that all prosecutors bring to their decision-making. Justice Marshall anticipated this problem in *Batson*:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen' or 'distant' a characterization that would not have come to mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

476 U.S. at 106.

Here, the trial court made no attempt to objectively evaluate the Commonwealth's unsupported, subjective demeanor justification (*i.e.*, Juror No. 3 was "flippant" because he answered "sure" in response to the trial court's questioning). The trial court made this determination even though it apparently disagreed with the Commonwealth's characterization of the juror's demeanor. *See* Tr. at 46:2-6 (noting that "the Commonwealth is entitled to make a decision on the basis of body language and other observable characteristics of a potential juror, **that they may interpret differently from the Court**") (emphasis added). Because demeanor justifications are so susceptible to bias, it was error for the trial court to accept the Commonwealth's race-neutral justification without any analysis.

3. Justifications based on Juror No. 3's prior experience with law enforcement were not "race-neutral."

Finally, the Commonwealth asserted that its peremptory challenge of Juror No. 3 was based in part on his prior history with law enforcement. Tr. 44:7-15. Given the disparate impact of the criminal justice system on persons of color, the history of prosecutorial use of criminal records to justify strikes against persons of color, and Juror No. 3's expression of both positive experiences with police in Maine and neutrality regarding the police in Massachusetts, it was error for the court to accept the Commonwealth's justification here as "race-neutral."

It is common for prosecutors to justify strikes based on prior arrests by citing a presupposed inherent bias against the prosecution. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 Minn. L. Rev. 592, 601-02 (2013) ("a link to the criminal justice system ranks second only to ambivalent views on the death penalty as the most frequently cited reason for using peremptory challenges to remove African American jurors."). This presumption of bias has been debunked. Naples-Mitchell et al., *supra*, at 15. Assuming that people with criminal records are so embittered that they cannot be relied upon to be fair ignores the fact that most people have relationships with the criminal justice system that are complex, rather than purely oppositional. Roberts, *Casual Ostracism*, *supra*, at 629. "Automatic, cost-free exclusions on the basis of assumed embitterment permit the state to avoid the consequences of something potentially very wrong with the state." *Id.* at 632.

Juror No. 3 expressed nothing more than a "complex" relationship with law enforcement, having had a bad experience in Florida, but a good experience in Maine. Tr. 34:11-35:1. He also explained that his experiences would not "at all" affect his ability to be fair here, "because I'm in Massachusetts." *Id.* at 35:2-6. Nevertheless, the Commonwealth cited his prior experience with law enforcement as a supposedly race-neutral justification for exercising the peremptory challenge. *Id.* at 44:7-15.

When prosecutors cite to criminal records, or some other relationship with the criminal justice system as a supposedly race-neutral justification for a peremptory strike, "this results in racial disparities in seated juries, as people of color . . . are more likely to experience arrest, prosecution, or conviction."[6] Naples-Mitchell et al., *supra*, at ii; *see also* Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 Yale L. & Pol'y Rev. 387, 389 (2016) (the significantly higher percentage of arrest records for people of color results in disproportionate exclusion of jurors of color). "In practice . . . prosecutors use this reason to strike jurors to achieve the very end that *Batson* sought to prevent—a deliberately whiter jury." Johnson, *supra*, at 390. Therefore, the trial court erred in concluding that the Commonwealth's justification based on Juror No. 3's history with the criminal justice system was race-neutral.

D. The Prosecutor's Justifications Were Not Genuine or Adequate

Even if the Commonwealth's justifications were facially race-neutral, which they were not, step three of the analysis requires the trial judge to make a finding that the Commonwealth's justifications were both "genuine" and "adequate."

[6] This perpetuates a vicious cycle that has an ongoing discriminatory effect on both defendants and jurors of color because the disproportionate arrest and incarceration of people of color would then result in the disproportionate exclusion of jurors of color.

Sanchez, 485 Mass. at 493 (citations omitted). The trial record does not support this finding.

The role of the trial court in protecting the constitutional rights of both the defendant and the juror cannot be overstated, including also "preventing the harm that redounds to the entire community when public confidence in the justice system is lost." Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. Davis L. Rev. 1359, 1386-87 (2012). *See also Johnson v. California*, 125 S. Ct. 2410, 2418 (noting that the rights of criminal defendants, the rights of jurors, and the harm caused to the entire community by discrimination in jury selection are each a constitutional issue).

It is well known in social science literature, and should come as no surprise, that it is unlikely that an attorney exercising a peremptory strike would admit to discriminatory motives. For that reason, it is insufficient for a challenged attorney to simply state that their strike is not race-based. *Purkett v. Elem*, 514 U.S. 765, 768-769 (1995). The Commonwealth's repeated statements that her justifications had "nothing to do with his race" should have given the trial court pause. Tr. 44:10-15; 45:3-5. The prosecutor was effectively saying "I know how this looks but . . ." But rather than question her further, the Court accepted her justifications. *Id*.; Tr. 47:2-14

The literature is replete with examples of how certain race-neutral justifications for a peremptory strike are, at their core, race-based strikes. At step three, therefore, the trial court must look beyond the proffered reasons to determine whether bias is at work. *Miller-El*, 125 S. Ct. at 2325. The trial court failed to do so here.

Because prosecutors' inherent biases regarding the characteristics of persons of color can act as an implicit assessment of a juror's suitability, this assessment cannot be divorced from that juror's race. Page, *supra*, at 215. This puts an even sharper focus on the importance of the trial court's role. *See* Roberts, *Disparately Seeking Jurors*, *supra*, at 1368 (Supreme Court jurisprudence "has consistently emphasized the importance of the role of the trial judge."). In step 3 of the *Batson* analysis, courts carefully evaluate even facially-neutral justifications for evidence of underlying racial bias. *Id*. at n. 73, (citing *United States v. Canoy*, 38 F.3d 893, 900 (7th Cir. 1994) (considering whether education outside the United States was a pretext for racial discrimination); *Pemberthy v. Beyer*, 19 F.3d 857, 872 (3d Cir. 1994) ("a trial court must carefully assess the challenger's actual motivation" when the challenge is based on language skills); *United States v. Uwaezhoke*, 995 F.2d 388, 394 (3d Cir. 1993) (a challenge that would have a disparate impact on blacks "should be scrutinized with care")). Peremptory strikes should be exercised only "under the careful control of the court" and "close scrutiny is to be employed at all

times during the selection of a jury to ensure that expressions of racial prejudice find no place in the exercise of peremptory challenges." *United States v. Wynn*, 20 F. Supp. 2d 7, 9 (DDC 1997) (finding that challenges based on residence were "nothing more than a proxy for race").

Here, the Court erred in its blanket acceptance of the prosecution's proffered reasons. Had the Court more carefully considered the Commonwealth's reasoning, it would have found that they were neither genuine nor adequate, and that, but for Juror No. 3's race, the Commonwealth would not have exercised the strike.

1. The Court erred by failing to evaluate the prosecutor's demeanor justification.

At step 3 of the analysis of a strike based on the demeanor of the juror, "the trial court must evaluate . . . whether the juror's demeanor can credibly be said to have exhibited the basis for the strike." *Snyder v. Louisiana*, 552 U.S. 472, 478-479 (the prosecutor's justification based on the juror's demeanor was allowed without explanation and the trial judge made no independent determination about it, and therefore it could not support the peremptory strike). Here, the trial court conducted no analysis, even though it appeared to disagree with the Commonwealth's characterization of Juror No. 3's demeanor. Tr. 47:2-13.

"Challenges based on subjective data such as a juror's looks or gestures, or a party's 'gut' feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination." *Maldonado*, 439

Mass. at 465. Both the Supreme Court and courts in Massachusetts have routinely found that justifications for peremptory strikes related to the demeanor of the juror are insufficient to justify a peremptory challenge. *See, e.g.*, *Rice v. Collins*, 546 U.S. 333, 341-342 (2006) (finding juror's eye-rolling insufficient); *Commonwealth v. Matthews*, 31 Mass. App. Ct. 564, 567-571 (1991) (finding that a "flaky" appearance was insufficient). Because the Commonwealth's subjective analysis of demeanor was ripe for bias, the trial court should have probed further.

It is particularly important for the trial court to corroborate a justification based on demeanor because this is a subjective evaluation necessarily made through the lens of the attorney's biases. "[S]tereotype activation affects how polite, how rude, how aggressive, how smart, or how dumb people appear." Page, *supra*, at 214-215. Stereotypes not only affect a person's initial reaction to someone, they also create so-called "memory illusions," "recalling stereotype confirming behaviors that never actually transpired." *Id*. at 221. This type of biased recall is precisely what the trial court's analysis at step three must guard against. Here, the prosecution cited a one word answer ("sure") and an apparent pause as grounds for deciding that Juror No. 3's "attitude" was problematic. Tr. 44:7-45:6; 37:16-20. On its face, there is nothing "flippant" about the words transcribed, and no pause is reflected in the

record.[7] The trial court did not corroborate the assessment or probe it further, and even noted that it may not agree with the assessment, but nevertheless accepted it as an adequate justification. Such uncritical acceptance is an abuse of discretion. *See Maldonado*, 439 Mass. at 465; *Rice*, 546 U.S. at 341-342; *Matthews*, 31 Mass. App. Ct. at 567-571.

2. The Court erred by failing to compare the Commonwealth's treatment of other jurors with criminal backgrounds.

Comparative analysis of peremptory strikes with similarly situated jurors can be used to generate evidence of racial discrimination. *See, e.g., Miller-El*, 125 S. Ct. at 2329 (comparing the justification for a strike with the treatment of similar panel members supported a conclusion that race was a factor); *Snyder*, 128 S. Ct. at 1211 (the prosecution's failure to strike white juror with similar issues as a stricken black juror called the justification into question); *Flowers*, 139 S. Ct. at 2250-51 (justifications for striking black juror, while allowing similarly situated white jurors to serve, were a pretext for discrimination); *Maldonado,* 439 Mass. at 467 (strike of a juror of color because she did not have children was unacceptable, because justification was not applied to jurors of other races). "If a prosecutor's proffered reason for striking a [Hispanic] panelist applies just as well to an otherwise-similar [non-Hispanic] who is permitted to serve, that is evidence tending to prove

[7] Indeed, as an objective matter, a response of "sure" and a pause before speaking can just as easily be described as amenable and thoughtful.

purposeful discrimination to be considered at *Batson's* third step." *Miller-El*, 125 S. Ct. at 2325.

The trial court found that the Commonwealth's justification for striking Juror No. 3 on the basis of his interaction with law enforcement was genuinely race-neutral. However, the court did not consider that six other members of the venire had criminal charges, the Commonwealth did not question any of them about their charges, and only one of them was struck. *See* Tr. at 44, 66, 153, 173, and 199. The trial court's failure to properly evaluate the Commonwealth's justification was an abuse of discretion.

V. CONCLUSION

As the Justices of the Supreme Judicial Court recently emphasized, "[a]s judges, we must look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms. . . ." "Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar" (June 3, 2020).[8]

Justifications such as the juror's demeanor or involvement with law enforcement have frequently been used to mask racial discrimination in jury

[8] https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and-the-bar-june-3-2020#:~:text=As%20judges%2C%20we%20must%20look,a%20place%20where%20all%20are (last accessed Feb. 19, 2024).

selection. The trial court should, therefore, have been skeptical of such reasoning when evaluating the Commonwealth's peremptory challenge of Juror No. 3. Instead, the trial court erred first in finding no *prima facie* case because there was no "pattern"; then in accepting the proffered justifications as "race-neutral"; and finally in failing to sufficiently evaluate whether the Commonwealth's justifications were "genuine" or "adequate." For these reasons, Amici respectfully urge the Court to reverse and remand this case for a new trial.

Dated: February 20, 2024 Respectfully submitted on behalf of Amici Curiae,

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Certification of Compliance with
Rules of Appellate Procedure 16(k) Certification

I, Leah R. McCoy, attorney for Amici Curiae, hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs. This brief has been prepared in proportionally spaced Times New Roman font in Microsoft Word and contains seven thousand one hundred ninety-five (7,195) non-excluded words.

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Certificate of Service

I, Lori J. Shyavitz, hereby certify that on February 20, 2024, I caused a true and accurate copy of the foregoing to be served upon the following counsel of record through the Tyler e-file system:

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