COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11517

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

ANTWAN CARTER,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF *AMICUS CURIAE* OF THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, BLACK AND PINK MASSACHUSETTS, GLBTQ LEGAL ADVOCATES & DEFENDERS, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF THE DEFENDANT-APPELLANT

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STATEMENT OF INTEREST OF AMICI CURIAE

Black and Pink Massachusetts

Black and Pink Massachusetts is a prison abolition organization rooted in the experiences of LGBTQI+ and/or those living with HIV who are affected by that system through advocacy, support and organizing. We have a radical view of the fight for justice: We are feminist. We are anti-racist. We want queer liberation. And we are against capitalism. By building a movement and taking action against this system of violence, we will create the world we dream of. Abolition is our goal, and our strategy for action. Any advocacy, services, organizing, and direct action we take will remove bricks from the system, not put up more walls.

The Charles Hamilton Houston Institute for Race and Justice

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, one of the twentieth century's most significant legal scholars and litigators. Houston engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, Brown v. Board of Education. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks

to eliminate practices or policies which compound the excessive policing, criminal sentencing, and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed by these policies. Given the racial disparities that characterize the entire criminal legal system, there are few issues as critical to our mission as reversing the persistent exclusion of people of color from juries.

GLBTQ Legal Advocates & Defenders

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete protection of their civil rights in the workplace. GLAD has served as counsel of record or amicus curiae in seminal cases regarding the rights of LGBT people. See, e.g., Goodridge v. Department of Pub. Health, 440 Mass. 309 (2003); Opinion of the Justices, 440 Mass. 1201 (2004); United States v. Windsor, 570 U.S. 744 (2013); Massachusetts v. Department of Health & Human Services, (1st Cir. 2019); Obergefell v. Hodges, 576 U.S. 644, 661 (2015).

Lambda Legal Defense and Education Fund, Inc.

Amicus curiae Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is the nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or amicus curiae in seminal cases regarding the rights of LGBT people. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 661 (2015); United States v. Windsor, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Bragdon v. Abbott, 524 U.S. 624 (1998); and Romer v. Evans, 517 U.S. 620 (1996). Lambda Legal has also appeared as amicus curiae in cases addressing issues of jury selection and anti-LGBT bias including in the Eleventh Circuit Court of Appeals in Berthiaume v. Smith, 875 F.3d 1354 (11th Cir. 2017) (specific voir dire regarding bias based on sexual orientation required where sexual orientation is inextricably bound up with the issues at trial) and the Ninth Circuit Court of Appeals in SmithKline Beecham Corp. v. Abbott Lab., 740 F.3d 471 (9th Cir. 2014) (classifications based on sexual orientation are subject to heightened scrutiny and equal protection prohibits peremptory strikes based on sexual orientation).

CORPORATE DISCLOSURE STATEMENT

The Amici GLBTQ Legal Advocates & Defenders and Lambda Legal Defense and Education Fund, Inc. are each non-profit organizations. None has a parent corporation and none issues stock. The Charles Hamilton Houston Institute for Race and Justice is an entity that is fiscally sponsored by Harvard University, a non-profit corporation that does not have a parent corporation and does not issue stock. Black and Pink Massachusetts is an entity that is fiscally sponsored by Families for Justice As Healing which does not have a parent corporation and does not issue stock.

DECLARATION OF COUNSEL

Undersigned counsel hereby makes the following declaration pursuant to Rule 17 (5) of the Massachusetts Rules of Appellate Procedure: Neither a party to this appeal nor counsel to any party to this appeal has authored this brief in whole or in part. No party to this appeal; no counsel to any party to this appeal; and no person or entity other than the amici curiae, its members, and/or its counsel have contributed money intended to fund the preparation or submission of the brief. None of the amici curiae or their counsel represents or has represented a party to this appeal in another proceeding involving similar issues. None of the amici

curiae or their counsel was a party to or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

SUMMARY OF ARGUMENT

The trial court committed structural error requiring reversal by repeatedly declining to review strikes of Black jurors based primarily on the fact that the empaneled jury already had Black members. (pp. 17 - 24).

Article 12 of the Declaration of Rights and the Equal Protection Clause of the federal constitution forbid the use of peremptory challenges based on sexual orientation, a defined class meriting protection within Amendment Article 106 and subject to heightened scrutiny. (pp. 24 - 36).

The trial court committed structural error requiring reversal in failing to apply Batson-Soares to challenges based on sexual orientation and in failing to allow a proper step one Batson-Soares analysis when a proper objection was raised. (pp. 36 - 45).

ARGUMENT

In 1979, this Court interpreted the right under art. 12 of the Massachusetts Declaration of Rights "to be tried by an impartial jury of peers" to encompass a prohibition on peremptory strikes of prospective jurors "solely by virtue of their membership in, or affiliation with, particular, defined groupings in the

community." Commonwealth v. Soares, 377 Mass. 461, 486, 492 (1979). At the time, this Court viewed "the Equal Rights Amendment [the second sentence of art. I as amended by art. 106] as definitive in delineating those generic group affiliations which may not permissibly form the basis for juror exclusion: sex, race, color, creed or national origin." Id. at 488-489. This Court has noted that "we have since expanded the scope of this protection." Commonwealth v. Prunty, 462 Mass. 295, 305 n.13 (2012).

Seven years after Soares, in Batson v. Kentucky, 476 U.S. 79, 88-89 (1986), the Supreme Court of the United States recognized that the Equal Protection Clause of the federal constitution forbade peremptory challenges based on race. Since Batson, the Supreme Court has repeatedly reaffirmed that "potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128 (1994) (collecting cases). In J.E.B., the court expanded Batson's protection to peremptory challenges on account of a juror's sex, recognizing the prevalence of "invidious group stereotypes" that "reinvoke[] a history of exclusion from political participation." Id. at 140, 142.

The federal protection is broad, and yet, the art. 12 right repeatedly has been interpreted as broader than the corollary Equal Protection right. See, e.g.,

Commonwealth v. Ortega, 480 Mass. 603, 605-606 (2018); Commonwealth v. Smith, 420 Mass. 291, 298 (1995); Commonwealth v. Alves, 96 Mass. App. Ct. 540, 547 (2019), review denied, 484 Mass. 1103 (2020).

The errors in this case involve the first step of the Batson-Soares analysis, where "rebutting the presumption of propriety [of a peremptory challenge] is not an onerous task." Commonwealth v. Jones, 477 Mass. 307, 321 (2017).

I. THE TRIAL COURT COMMITTED STRUCTURAL ERROR REQUIRING REVERSAL BY DECLINING TO EXAMINE THE TOTALITY OF THE RELEVANT FACTS AND PRIMARILY RELYING ON THE PRIOR EMPANELMENT OF BLACK JURORS TO PREVENT INQUIRY INTO THE PROSECUTOR'S SUBSEQUENT PEREMPTORY STRIKES.

Until last fall, Batson and Soares arguably counseled distinct inquiries at step one. In Commonwealth v. Sanchez, 485 Mass. 491 (2020), this Court clarified its common law and formally retired specific language in Soares that inquired about a "pattern of conduct" to clear the low bar of a prima facie showing of discrimination. Id. at 492, 510-514. This Court announced, "we will adopt the Federal language: the presumption of propriety is rebutted when 'the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" Id. at 511, quoting Johnson v. California, 545 U.S. 162, 168 (2005). This totality-of-the-facts test balances a multitude of factors and demands in consideration of "all of the circumstances." Sanchez, supra at 511-514, quoting Snyder v. Louisiana, 522 U.S. 472, 478 (2008). Though these factors are "neither mandatory nor exhaustive," as

some may not be triggered and additional factors may arise from the specific fact-intensive inquiry of each case, Sanchez, supra at 513 & n.18, quoting Jones, 477 Mass. at 322 n.24, trial judges should generally consider:

> "(1) the number and percentage of group members who have been excluded from jury service due to the exercise of a peremptory challenge;
> (2) any evidence of disparate questioning or investigation of prospective jurors;
> (3) any similarities and differences between excluded jurors and those, not members of the protected group, who have not been challenged . . . ;
> (4) whether the defendant or the victim are members of the same protected group; and
> (5) the composition of the seated jury."

Id. at 512.[1] In a footnote to the final factor, the Sanchez court warned,

> "Caution should be exercised in the use of this factor. The bare fact that some members of a protected group were seated on a jury does not immunize future peremptory challenges from constitutional scrutiny. Otherwise, as the First Circuit warned, the challenging party 'can get away with discriminating against some [group members] on the venire: so long as [an attorney] does not discriminate against all such individuals, not only will his strikes be permitted, but he will not even be required to explain them.'"

Id. at 512 n.16, quoting Sanchez v. Roden, 753 F.3d 279, 299-300 (1st Cir. 2014).

See also Holloway v. Horn, 355 F.3d 707, 728 (3d Cir. 2004) ("The final

[1] Sanchez omitted an additional factor listed in Jones, "the possibility of an objective group-neutral explanation for the strike or strikes," Jones, 477 Mass. at 322.

composition of the jury . . . offers no reliable indication of whether the prosecutor intentionally discriminated in excluding a member of the defendant's race.").[2]

To the extent that the Sanchez decision retained any inquiry at step one—despite a concurrence from Justice Lowy arguing that, "upon timely objection to a peremptory challenge made on the basis of race or another protected class, we should conclude that that party has met the first prong of the Batson-Soares test," Sanchez, 485 Mass. at 515 (Lowy, J., concurring)—that burden is not onerous. The defendant need not demonstrate that the challenge was more likely than not the product of discrimination. Declining to advance to step two is structural error such that judges must "think long and hard" before requiring no explanation from a prosecutor and making no findings of fact. Id. at 514 (majority opinion) (quotation omitted). The Sanchez decision crystallized an essential precept: the right to be free from discrimination is personal to each prospective juror. Id. at 511, quoting Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019) ("As the Court has emphasized, '[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'").

[2] Even under the old formulation, a single strike could establish a "pattern" and empaneled jurors in the same discrete group did not insulate a subsequent strike. See, e.g., Ortega, 480 Mass. at 607 (presence of one juror from discrete community group cannot be dispositive); Jones, 477 Mass. at 319.

By eliminating the "pattern" requirement at step one, the rule in Sanchez prohibits trial judges from looking to "composition of the seated jury" as a dispositive factor. See Commonwealth v. Robertson, 480 Mass. 383, 392 (2018). This factor in isolation risks suggesting that there can be "enough" Black jurors to insulate any future peremptory strike from review for racial discrimination, a proposition which smacks of the fear of "too much justice." McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

The Commonwealth inaccurately frames the post-Sanchez inquiry, reviving the "pattern" language this Court squarely "retir[ed]" in Sanchez, 485 Mass. at 511. E.g., Comm. Br. at 46 ("no prima facie pattern of discrimination existed"); id. at 49; id. at 50. See id. at 47 ("[T]he defendants failed to make a prima facie showing that a disproportionate number of challenges were being used to exclude African-American jurors."). This framing is incorrect because the defendant has no burden to establish a pattern and need not show a disproportionate number of challenges were used to exclude Black jurors. Instead, the trial court must evaluate discriminatory purpose based on "all relevant circumstances," not solely on "the composition of the seated jury." Sanchez, supra at 512.

On the record below, the totality of the facts gives rise to an inference of discrimination in each of a series of peremptory strikes by the Commonwealth. The defense repeatedly challenged the prosecutor's strikes of Black jurors, the

same race as the defendant and victim, where no obvious race-neutral reason for each strike is apparent from the record. Yet the trial judge primarily rested on jury composition to insulate the prosecutor from having to proffer a race-neutral reason for each strike.

In the challenge of Amber Holden, the judge agreed that the prosecutor had challenged three Black women prior to Ms. Holden and yet relied on the jury's composition in affirming the strike. Tr. 3:2:130. In the challenge of Cozia Nicholson, the defense noted "we lost four in a row" and argued composition could not shield repeated, back-to-back challenges of Black jurors. The judge overruled, invoking composition. Tr. 3:2:147-148. In the challenge of Arthur Jones, the defense preemptively questioned any race-neutral reason for the strike, saying the prospective juror was a college graduate who had answered all the questions and had no personal ties to gangs. The judge rejected the challenge based on the jury's composition. Tr. 3:2:176-177 ("The composition[,] Mr. Wilson. . . . Again, I have to look at the composition. Five[,] six out of twelve. So now we have fifty percent still of the Jury being people of color."). In the challenge of Sheryl Profford, the trial judge again stamped the strike with the court's imprimatur largely because of the jury's composition. Tr. 3:2:217-218 ("I look at patterns, I appreciate there can be a pattern of one. But I've looked at the pattern of challenges by the

Commonwealth. I look at the composition. . . . I can't find that you've made a sufficient showing.").

The trial judge repeatedly and primarily relied on jury composition to find defense counsel failed to meet his prima facie burden, despite easily satisfying the low step-one burden under an analysis of all the factors. The trial court failed to weigh whether those excluded "are members of the same constitutionally protected group as the defendant or the victim," which they were, and "the possibility of an objective group-neutral explanation for the strike or strikes," which "may play a role in the first-step analysis as well." Robertson, 480 Mass. at 392, quoting Jones, 477 Mass. at 322 & n.25.

Several challenged jurors were struck after the trial judge found them indifferent based on standard questions. E.g. Tr. 3:2:128 (Black woman struck who said childcare would not be an issue); Tr. 3:2:144-146 (Black woman struck who participated in previous jury resulting in acquittal for drug charges); Tr. 3:2:175-176 (Black man struck with no additional questioning); Tr. 3:2:213-214 (Black woman struck with no additional questioning). These strikes of Black jurors lacked apparent rationales beyond race, deviating from the Commonwealth's exercise of challenges where obvious race-neutral reasons appeared (e.g., upcoming trial or prior convictions, attorneys, student studying criminal justice, son involved in criminal legal system, student, juror with family members involved

in crime). In particular, Arthur Jones (Juror 187) and Sheryl Profford (Juror 227) were members of the same race as the victim and defendant, with no possible neutral justification appearing on the record—especially Jones, whom defense counsel described as the defendant's only true "peer." Tr. 3:2:177.

These facts are strikingly analogous to Sanchez, where five Black jurors were seated at the time of the peremptory challenges at issue. On habeas review, the First Circuit explained that the Appeals Court had "'wholly failed to consider all of the circumstances bearing on potential racial discrimination'" and "pointed primarily to the number of African-Americans who already had been seated," which this Court affirmed as improper. Sanchez, 485 Mass. at 496, quoting Sanchez v. Roden, 753 F.3d at 299.

Here, the Commonwealth argues "[t]he trial judge did not rely solely on the composition of the jury," Comm. Br. at 52, but the trial court need not have relied "solely" on composition to have erred. Recently, in Commonwealth v. Henderson, 486 Mass. 296 (2020), this Court upheld a trial judge who "did not rely 'exclusively' or 'primarily' on the number of Black jurors seated in the jury box. He considered the number of potential jurors determined to be indifferent and assessed whether the prosecutor had challenged a disproportionate number of

Black jurors." Id. at 313.[3] By contrast, here the trial judge did not consider the number of potential jurors deemed indifferent, see Comm. Br. at 52 ("the total number of African-American jurors who were found indifferent is not discernible from the record"), and her rulings showed improper primary reliance on composition, amounting to structural error.

II. UNDER STATE AND FEDERAL LAW, PEREMPTORY CHALLENGES CANNOT BE BASED ON SEXUAL ORIENTATION, A CHARACTERISTIC SUBJECT TO HEIGHTENED SCRUTINY.[4]

Article 12 of the Massachusetts Constitution guarantees a "tri[al] by an impartial jury of peers" which, as this Court explained in Soares, prohibits strikes based on membership in discrete groups. 377 Mass. at 489-490. Peremptory challenges based on sexual orientation raise urgent concerns under the Massachusetts Constitution and the U.S. Constitution's Fourteenth Amendment.

[3] Though decided soon after Sanchez, Henderson did not cite the updated Sanchez standard and concluded "there was no abuse of discretion in the judge's determination that the defendant had not established a pattern of racial discrimination." Henderson, 486 Mass. at 312 (emphasis added).

[4] Lesbian, gay, and bisexual people are hereinafter "LGB" people. Although not raised here, amici curiae believe that transgender persons likewise merit heightened scrutiny under both constitutional regimes. In this brief, "LGBT," "LGBTQ," and "LGBTQI+" refer to LGB, transgender, questioning, and intersex people.

As set forth below, LGB people are a discrete part of the community who should not be denied this civic responsibility to serve, and nor should litigants be deprived of this part of the community on their juries.

A. Under Art. 12, LGBT People Are A Discrete Group Who Should Not Be Struck From Juries Because Of Their Status.

The Massachusetts equality guarantees must be read to encompass LGB people as a discrete protected class in art. 106 for jury service and more generally. Article I has long guaranteed equality for all people, first as "the basis of the judicial abolition of slavery in 1781 . . . and subsequent decisions applying the guarantee of equal protection to African-Americans." Commonwealth v. Long, 485 Mass. 711, 716 (2020) (citing cases). Sex-based classifications were accorded strict scrutiny under art. I even before the ERA's ratification. Commonwealth v. MacKenzie, 368 Mass. 613, 615 (1975). Further, no provision of the Massachusetts Constitution prohibits recognizing other groups that, due to historical or social prejudices, may be subject to unequal treatment as a class. The broad sweep of equal protection "permeates the Massachusetts Constitution." Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655, 667-668 (2011) (referencing arts. 1, 6, 7, 10, and 106).

This Court was the first in the nation to name and remedy "invidious" discrimination and "prejudices against persons who are (or who are believed to be) homosexual" with respect to the "civil right" of marriage, acknowledging its "more

fully developed understanding" of exclusion from marriage as "trait" discrimination rather than any meaningful difference between same-sex and different-sex couples. Goodridge v. Department of Pub. Health, 440 Mass. 309, 325-326, 328, 341 (2003). Kitchen v. Herbert, 755 F.3d 1193, 1218 (10th Cir. 2014) ("[I]t is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian." [quotation omitted]).

Goodridge supports recognizing sexual orientation as a protected class under art. 106 by applying what we now recognize as heightened scrutiny to classifications based on sexual orientation. 440 Mass. at 330 (test requires logical belief that "the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class" [quotation omitted]). By highlighting the irrationality of imposing an unjustifiable "deep and scarring hardship" on "homosexuals," id at 341, this Court prefigured canonical "protected class" status for sexual orientation. See K. Eyer, The Canon of Rational Basis Review, 93 Notre Dame L. Rev. 1317, 1325-1326 (2018); id. at 1329 & n.59 (intensive rational basis scrutiny of sex and illegitimacy classifications was later characterized as "intermediate scrutiny").

Amici respectfully urge this Court to declare that, under art. 12, the exclusion of potential jurors because of their sexual orientation is both sex[5] and sexual orientation discrimination forbidden by art. 106.

B. Classifications Based On Sexual Orientation Satisfy Each Of The Four Factors For Applying Heightened Scrutiny.

The Fourteenth Amendment ensures that individuals' rights to equality and liberty are not left to state governments' political processes. Heightened scrutiny applies where the classified group has "experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (quotation omitted). The U.S. Supreme Court also sometimes considers whether the class is a politically vulnerable minority or has an "obvious, immutable, or distinguishing characteristic that define them as a discrete group." Lyng v. Castillo, 477 U.S. 635, 638 (1986). See Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (a particular classification "provides no sensible ground for differential treatment").

[5] This Court acknowledged "homosexuality is also sex-linked." Macauley v. Massachusetts Comm'n Against Discrimination, 379 Mass. 279, 281 (1979). In Bostock v. Clayton County, Ga., 140 S. Ct. 1731 (2020), the Supreme Court confirmed discrimination because of sexual orientation and gender identity is sex-based. See Def. Br. at 44-46.

In SmithKline Beecham Corp. v. Abbott Lab., 740 F.3d 471, 474 (9th Cir. 2014), the court held that heightened scrutiny was applicable to sexual orientation and disallowed peremptory challenges on that basis. J.E.B., 511 U.S. at 143 ("Parties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."). See Davis v. Minnesota, 511 U.S. 1115, 1117 (1994) (Thomas, J., dissenting from denial of cert.) (Batson applicable "to any strike based on a classification that is accorded heightened scrutiny").

Examination of the factors inescapably requires denominating LGB people as a protected class under state[6] and federal law.

1. History of discrimination.

Legal and social discrimination has and does pervade LGB people's lives. For much of the country's history, "gays and lesbians were prohibited from most

[6] As with the Fourteenth Amendment analysis, Massachusetts also uses the language of "tiers" and "scrutiny" and applies comparable tests for heightened review. E.g., Finch, 459 Mass. at 678 (classification based on alienage subject to strict scrutiny).

government employment,[7] barred from military service,[8] excluded under immigration laws,[9] targeted by police, and burdened in their rights to

[7] LGB people were barred from federal employment because it was believed that "efficiency" would be disrupted by the "revulsion of other employees"; fear of "homosexual advances, solicitations or assaults"; the "offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business"; and that the "the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010) (quotations omitted). Based on longstanding moral views, "[t]he presence of a sex pervert"—at that time a common term for gay people—was viewed as "a corrosive influence on his fellow employees," such that "[o]ne homosexual can pollute a Government office." Id. at 983-984, quoting Employment of Homosexuals and Other Sex Perverts in Government, S. Rep. No. 81-241, 81st Cong., 2d Sess., at 4 (1950). The federal government did not officially put a stop to sexual orientation discrimination in hiring until 1998. President William J. Clinton Executive Order No. 13087 (June 2, 1998).

[8] Until 2011, people could not serve openly as LGB, because the federal government had determined that homosexuality involved "a 'personality disorder' or 'mental illness.'" Able v. United States, 968 F. Supp. 850, 855-856 (E.D.N.Y. 1997), citing Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Sen. Comm. on Armed Servs., S. Hrg. No. 103-845, 103d Cong., 2d Sess. (1993). Even today, 59% of LGBT military service members are reluctant to come out, many citing the persistence of anti-LGBT sentiment in military culture and fear of "career ramifications." See K. McNamara et al., "You Don't Want to Be a Candidate for Punishment": a Qualitative Analysis of LGBT Service Member "Outness", Sexuality Research & Social Policy (2020), https://dworakpeck.usc.edu/sites/default/files/2020-10/McNamara%20Lucas%20Goldbach%20et%20al.pdf.

[9] The Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-5077 eliminated "sexual devia[nts]" from the list of excludable aliens, a ban that commenced in 1917. Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (requiring exclusion of "persons of constitutional psychopathic inferiority").

associate.[10]" Obergefell v. Hodges, 576 U.S. 644, 661 (2015). Moreover, "for centuries there have been powerful voices to condemn homosexual conduct as immoral" in law and culture. Lawrence v. Texas, 539 U.S. 558, 571 (2003). The Defense of Marriage Act ("DOMA") codified federal disrespect and authorized state nonrecognition years before same-sex couples could marry, casting "a disadvantage, a separate status, and so a stigma" on them, United States v. Windsor, 570 U.S. 744, 770 (2013), and causing "grave and continuing harm" to LGB people. Obergefell, 576 U.S. at 675. Nearly all of the state bans on same-sex marriage were enacted between 1998 and 2012, and many barred relationship recognition of any sort.[11]

Governmental discrimination and its legacies remain. Some states now preempt local governments from enacting nondiscrimination ordinances despite local preferences.[12] A 2016 Mississippi law immunizes both public and private

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[10] See G. Chauncey, The Forgotten History of Gay Entrapment, The Atlantic (June 25, 2019), https://www.theatlantic.com/ideas/archive/2019/06/before-stonewall-biggest-threat-was-entrapment/590536/.

[11] For example, State officials used legislatively or voter-enacted bans on marriage, civil unions, domestic partnerships, and "similar unions" to claim that lawmakers were barred from considering or enacting bills that would allow surviving "domestic partners" to bury a deceased partner's remains, e.g., Neb. Op. Att'y Gen. No. 03004 (2003), or public employers to extend domestic partnership benefits. Mich. Op. Att'y Gen. No. 7171 (2005).

[12] Movement Advancement Project, The Power of State Preemption: Preventing Progress and Threatening Equality, 4-5 (2018), https://www.lgbtmap.org/file/Preemption-Report-FINAL.pdf.

discriminatory conduct if it is consistent with the actor's beliefs about marriage, sexual activity, and sex. Miss. Code tit. 11, ch. 62 (applicable to settings including celebration or recognition of any marriage, housing, employment, adoption, foster care, fertility services, psychological services and counseling, and government employment).

Students face discrimination—often encompassing both verbal and physical acts—and the adults respond inadequately or not at all.[13] Recent research shows Massachusetts LGBT high school students experience higher mental health stresses than their non-LGBT peers because of bullying, fights, threats from weapons and other safety concerns.[14]

In the recent Bostock case, a county employee who worked with children was discharged for "conduct 'unbecoming' a county employee" simply because he had joined a gay softball league. 140 S. Ct. at 1737-1738. Closer to home, it is

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[13] See, e.g., Harrington v. City of Attleboro, 15-cv-12769-DJC, 2018 U.S. Dist. LEXIS 7828 (D. Mass. Jan. 17, 2018) (school district staff failed to respond to harassment from seventh through tenth grade, forcing lesbian student to drop out); Snelling v. Fall Mountain Regional Sch. Dist., 99-448-JD, 2001 U.S. Dist. LEXIS 3591 (D.N.H. Mar. 21, 2001) (students verbally and physically harassed others they perceived as gay, from ninth grade through graduation, with inadequate response from school personnel).

[14] Sexual Orientation and Gender Identity Among Massachusetts High School Students, Summary of LGBTQ Data in 2020 Annual Report (2020), https://www.mass.gov/doc/ma-commission-on-lgbtq-youth-2020-fact-sheet/download. Of all students, 14.3% are LGB, 2.9% are transgender. Of LGBT students, 86% are Black, Hispanic/Latinx, Asian, or Multiracial. Id.

clear that public employees likewise may face devastating discrimination on the job that their employer failed to address or to address adequately.[15]

Studies also show LGBT elders are at risk of being turned away from or charged higher rents at independent or assisted living centers.[16] In one case, Marsha Wetzel, a disabled woman whose partner had just died when she moved into an assisted living facility "faced a torrent of physical and verbal abuse from other residents because she is openly lesbian," but the facility sought to evict her. Wetzel v. Glen St. Andrew Living Community, LLC, 901 F.3d 856, 859-861 (7th Cir. 2018).

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[15] Ongoing research shows that LGBT Americans continue to experience public and private employment discrimination in hiring, on the job, and in pay, especially among Black and transgender employees. Equality Act of 2021: Hearing on H.R. 5 Before the S. Comm. on the Judiciary, 117th Cong. (2021) (statement of M.V.L. Badgett, Williams Institute on Sexual Orientation & Gender Identity Law & Public Policy), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-LGBT-Employment-Mar-2021.pdf. E.g., Franchina v. City of Providence, 881 F.3d 32 (1st Cir. 2018) (unaddressed peer harassment of lesbian firefighter); Digiacomo v. Kennebec Cty., 1:18-cv-163-GZS, 2019 U.S. Dist. LEXIS 44500 (D. Me. Mar. 19, 2019) (unaddressed peer harassment of lesbian correctional officer); Osher v. University of Maine System, 703 F. Supp. 2d 51 (D. Me. 2010) ("discriminatory animus" in denying tenure to lesbian professor).

[16] See A.P. Romero, S.K. Goldberg, L.A. Vasquez, LGBT People and Housing Affordability, Discrimination, and Homelessness, 21 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf.

LGBT people also face both overt and subtle discrimination as jurors, lawyers, litigants, and defendants.[17] In the context of jury selection, the Ninth Circuit cited empirical research showing that discriminatory attitudes towards lesbians and gay men continue to play a "significant role in courtroom dynamics." SmithKline, 740 F.3d at 486.

2. Ability to contribute to society.

Sexual orientation bears no relation to ability to perform or contribute to society. For many decades, the professional psychiatric and psychological organizations have recognized that "homosexuality" is not an illness and that a same-sex sexual orientation is "a normal expression of human sexuality and immutable." Obergefell, 576 U.S. at 661. Patriotic LGBT Americans bravely serve their country in the military. Pub. L. No. 111-321, 124 Stat. 3516 (2010) (eliminating service ban). "[M]any same-sex couples provide loving and nurturing homes to their children" and "the reasons marriage is fundamental under the constitution apply with equal force to same-sex couples." Obergefell, supra at 665, 668.

3. Immutable or distinguishing characteristic defining a discrete group.

[17] See T. Brower, Twelve Angry—And Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service, 59 Drake L. Rev. 669, 674 (2011) (examining empirical studies from California and New Jersey evaluating LGB court experiences).

The immutability inquiry speaks to identifying characteristics that individuals cannot and should not be required to change as a condition of equal treatment. Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977). Obergefell definitively stated that sexual orientation is precisely such a trait. 576 U.S. at 658, 661 (reference to "their immutable nature").

4. LGBT people remain politically vulnerable minorities.

LGB people remain politically underrepresented minorities. Neither immutability nor relative political powerlessness is required to apply heightened security for a group classification. See Cleburne, 473 U.S. at 440. Frontiero v. Richardson, 411 U.S. 677, 687 (1973) (plurality) (noting Congress had already approved express federal employment and equal pay protections and the Equal Rights Amendment); id. at 686 n.16 (noting women are not a "small and powerless minority"). LGB people have made gains in rectifying legally imposed disadvantages, with judicial victories largely responsible for advancing the status of LGB people from "[o]utlaw to outcast." Obergefell, 576 U.S. at 667.

Emblematic of the relative lack of power of LGBT people to protect themselves from discrimination is Congress's failure to pass a federal nondiscrimination law ever since a bill was first introduced in 1974. Equality Act of 1974, H.R. 14752, 93rd Cong. To this day, nearly half of all LGBT people still lack explicit state statutory nondiscrimination protections in employment,

education, housing, public accommodations, and credit.[18] Lacking sufficient political strength to protect themselves at the ballot box, LGBT people have seen their rights put to a popular vote more often than any other group.[19]

In sum, the "fundamental" principle of "[a]bsolute equality before the law" under the Massachusetts Constitution, Opinion of the Justices to the Senate, 211 Mass. 618, 619 (1912), is reason enough to apply art. 12 to LGB people. In addition, the four factors, together with the evolution in understanding about LGB people since Goodridge, likewise compel this Court to declare that sexual orientation is as protected a trait as any enumerated in art. 106 as other courts have held under their state constitutions. E.g., Griego v. Oliver, 2014-NMSC-003, ¶ 4 (2013) (application of factor test; intermediate scrutiny standard required); id. at ¶¶ 47-53; Varnum v. Brien, 763 N.W.2d 862, 889-895 (Iowa 2009); Kerrigan v. Commissioner of Pub. Health, 289 Conn. 135, 175-213 (2008); In re Marriage Cases, 43 Cal. 4th 757, 841-843 (2008).

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[18] K. Conron & S. Goldberg, LGBT People in the U.S. Not Protected By State Non-Discrimination Statutes (Apr. 2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf.

[19] B.S. Gamble, Putting Civil Rights to a Popular Vote, 41 Am. J. Pol. Sci. 245 (1997) (calculating the high rate of success of anti-gay ballot initiatives). D.P. Haider-Markel, A. Querze, K. Lindaman, Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights, 60 Pol. Res. Q. 304, 312-313 (2007) (same).

Classifications based on sexual orientation likewise warrant heightened scrutiny under the Fourteenth Amendment. See Windsor, 570 U.S. at 770 ("careful consideration" required for laws disadvantaging LGB people); Obergefell, 576 U.S. at 675 (acknowledging applicability of each factor to LGB people). See also Baskin v. Bogan, 766 F.3d 648, 659-660 (7th Cir. 2014) (forecasting this development); SmithKline, 740 F.3d at 481 (same); Windsor v. United States, 699 F.3d 169, 181-185 (2d Cir. 2012), aff'd, 570 U.S. 744 (2013) (same).

III. THE TRIAL COURT COMMITTED STRUCTURAL ERROR REQUIRING REVERSAL WHEN IT REFUSED TO EXPLORE QUESTIONS OF PEREMPTORY STRIKES BASED ON SEXUAL ORIENTATION.

On the record in this case, the trial court committed structural error requiring reversal for two independent reasons: (1) failing to apply Batson-Soares to challenges based on sexual orientation; and (2) failing to allow a proper step one Batson-Soares analysis when an objection was raised by defense counsel.

A. The Record Clearly Sets Forth Defense Counsel's Objection And The Trial Court's Actions.

As the court was questioning Louise Aulier (Juror 202), defense counsel noted that a couple of questions on the juror questionnaire had not been answered. The following exchange took place:

> THE COURT: "[…] also a couple things missing your questionnaire, could you tell us how old you are?"

THE JUROR: “64.”

THE COURT: “Okay. And your household status, single, married, domestic partner, separated, divorced or widowed?”

THE JUROR: “Domestic partner.”

THE COURT: “Okay. Thank you. I find her indifferent.”

THE PROSECUTOR: “The Commonwealth challenges.”

MR. WILSON: “For the record, the two challenges the Commonwealth has done they are both, […]”

THE PROSECUTOR: “Can we release the juror?”

THE COURT: “Okay, thank you.”

DEFENSE COUNSEL: “Let her be held outside for a minute.”

THE COURT: “Ma’am, could you just step outside for a second?”

THE JUROR: “All right.”

THE COURT: “Mr. Wilson, what did you want to say?”

DEFENSE COUNSEL: “The Commonwealth has made two challenges, […]”

THE COURT: “Three actually.”

DEFENSE COUNSEL: “But two of the three are I believe people that may be considered gay. That is a protected group and I raise that issue. Number 176 and now number 202.”

THE COURT: “Well, from what do you glean that they are gay?”

DEFENSE COUNSEL: “Well, I’m just speculating. I don’t know but I mean, […]”

THE COURT: “Domestic partner can mean something homosexual it could be something heterosexual.”

DEFENSE COUNSEL: “It could mean, I don’t know the answer. All I’m saying is that I don’t know the answer but I, […]”

THE PROSECUTOR: “Can I go on the record?”

THE COURT: "We don't need to go any farther down this road because to this point as far as I know the SJC has not extended the [Soares] holding past gender and race, sexual orientation is not one of those suspect classifications.

Even assuming, Mr. Wilson, that you could show me definitively, […]"

DEFENSE COUNSEL: "Well, I can't do that definitively unless you start letting me question them, I mean it's a call, you know. But I believe that anybody that might be any different the District Attorney is going to challenge them and I think those two people, the record will reflect what it is, I know I can't go anywhere, but hey, […]"

THE PROSECUTOR: "Your honor, if I might just put one thing on the record which is I did not ask household status. I was prepared to strike the juror and Mr. Wilson is the one who asked household status which he sees as some sort of evidence, just for the record."

DEFENSE COUNSEL: "Just for the record, that's what he says. I don't know what he was going to do or not do and last time we checked we can't get inside his brain and after the fact he's saying, thank you."

THE COURT: "Thank you, gentlemen."

Tr. 3:1:184-186.

B. The Trial Court's Failure To Apply Batson-Soares Requires Reversal.

As the Commonwealth concedes, and as the principles of equality underpinning art. 12 demand, sexual orientation is a protected classification under Soares. See Section II, supra. In declining to initiate the Soares analysis in response to the defendant's objection—saying there was no "need to go farther down this road" because Soares applies only to race and gender, Tr. 3:1:185—the trial judge made a fundamental error of law, incorrectly ruling that she "ha[d] no power to" consider the objection. Commonwealth v. Knight, 392 Mass. 192, 193-

194 (1984). This squarely requires reversal. See id. In particular, this error of law "prematurely terminat[ed] [the] Batson-Soares inquiry," meaning the trial judge's "error is structural" and "the only proper remedy . . . is a new trial." Sanchez, 485 Mass. at 503 n.7 (2020).

C. The Trial Court's Failure To Conduct A Proper Step One Batson-Soares Analysis Requires Reversal.

The trial court did not allow defense counsel to develop his position that the prosecution had made a peremptory challenge based on sexual orientation. Moreover, the trial court implied that defense counsel would have to "show me definitively" that the juror was LGB. Tr. 3:1:185. The trial court's actions constitute reversible error.

On the question of whether Juror 202 was a member of the discrete LGB group, both the trial judge and the Commonwealth seem to believe that "factual uncertainty" about group membership, which "was not clear," are enough to affirm the peremptory challenge in this case. Comm. Br. at 37-40. However, that is not the law.

This Court has held that a prima facie showing under Soares was established because a juror was wearing a headscarf "of a type traditionally worn by Muslim women," even though her religion was not conclusively on the record. Commonwealth v. Obi, 475 Mass. 541, 551 (2016). Similarly, this Court has endorsed the presumption of membership in an ethnic group by surnames,

pondering "how the issue of ethnicity could ever be raised in the context of juror selection" if it were "improper to draw such an inference from a surname (an inference commonly drawn by most people outside the courtroom)." Commonwealth v. Carleton, 418 Mass. 773, 775 (1994).

Most recently, in Robertson, the prosecutor believed a juror was Hispanic while the defense counsel viewed the juror as Black, "highlight[ing] the challenges of justly administering the mandates of Batson and Soares." 480 Mass. at 394. "The usual tools we rely on to measure one's ethnicity, primarily name and appearance, are often deceptive." Id., quoting Commonwealth v. Calderon, 431 Mass. 21, 25 n.2 (2000).

Noting that trial judges must decide on membership in a protected class immediately and without much information, and citing Obi and Carleton, this Court held, "[c]onsistent with our cautious jurisprudence when analyzing Batson and Soares challenges, where a juror's membership in a protected class is reasonably in dispute, trial judges, in performing the first step of the Batson-Soares analysis, ought to presume that the juror is a member of the protected class at issue." Robertson, 480 Mass. at 395.[20]

[20] In this regard, see United States v. Guerrero, 595 F.3d 1059, 1064 n.3 (9th Cir. 2009) ("Batson is predicated not on the potential juror's actual race/ethnicity, but on the prosecutor's perception of that race/ethnicity as the reason for striking an otherwise qualified venire person"); Franceschi v. Hyatt Corp., 782 F. Supp.

Here, the sexual orientation of the prospective juror was, at the very least, reasonably in dispute because: (1) she perhaps avoided answering a question about her relationship or household status, and (2) then, when questioned, she identified herself as a "domestic partner." This information suggested that the juror was LGB, prompting an immediate challenge by the prosecutor. Tr. 3:1:184.

The hesitancy to reveal relationship details tends toward LGB status. To this day, many LGB people experience discrimination and sometimes are unwilling to identify themselves at all, especially in unfamiliar settings. In fact, only about one third of LGBT adults disclose their sexual orientation or gender identity to most of their coworkers,[21] and many parents are afraid to disclose their LGBT status at their children's schools.[22] The first openly gay cabinet officer, Pete Buttigieg, recently spoke publicly about his fear of disclosing his sexual orientation: "I had to wonder whether just acknowledging who I was, was going to be the ultimate career-ending professional setback."[23] It should come as no surprise that many

712, 721 n.14 (D.P.R. 1992) ("It is the perception, by the discriminator, of the discriminatees' race that is important for purposes of § 1981.").

[21] National Academies of Science, Eng'g, and Med., Understanding the Well-Being of LGBTQI+ Populations, 10:12 (The National Academies Press 2020).

[22] Id. at 9:9.

[23] Transcript of Third Democratic Presidential Debate, Texas Southern University (ABC News television broadcast Sept. 12, 2019),

LGB people would hesitate to disclose their sexual orientation in any way on a juror questionnaire.

Second, while "domestic partner" may apply to same-sex or different-sex couples, the term originated to refer to same-sex couples who were unable to marry.[24] Domestic partnerships emerged in Massachusetts in the early 1990s, first with private businesses[25] then later public employers,[26] as a means to recognize that employees (and residents) had family lives worthy of respect but little to no access to family-based protections. Around that time, Boston and Cambridge introduced domestic partnership registries to provide limited familial protections to

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https://abcnews.go.com/US/read-full-transcript-abc-news-3rd-democratic-debate/story?id=65587810.

[24] In 2015, the Human Rights Campaign reported that 38% of businesses with domestic partner programs extend those options exclusively to same-sex couples. Human Rights Campaign, Domestic Partner Benefits (2015), https://assets2.hrc.org/files/documents/MarriageEquality-DomesticPartnerBenefits.pdf?_ga=2.258790730.1512836100.1616996895-945144181.1616605071.

[25] In 1991, Lotus Development Company initiated the Commonwealth's first domestic partnership program to extend health care benefits to an employee's same-sex partner. T.A. Stewart, Lotus Offers Benefits for Homosexual Pairs, N.Y. Times, Sept. 7, 1991, § 1, at 12.

[26] Governor William F. Weld Executive Order No. 340 (1992) (extending bereavement and other leave-related employee benefits to non-marital familial intimate partner relationships).

same-sex couples.[27] Domestic partnerships responded in part to the AIDS epidemic and the toll it took on same-sex couples who had no legal protections.[28]

The world's first domestic partnership registration laws only applied to same sex couples.[29] As more employers in the United States began extending benefits to the domestic partners of their employees, those benefits were often only available to employees in same-sex relationships,[30] although it eventually became common to extend domestic partnership benefits to different-sex couples. Because legal protections extend only to legally recognized families, the innovation of "domestic

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[27] Boston Public Health and Welfare Ordinance 12-9A.1(a)(6) (1993); City of Cambridge Municipal Code ch. 2, § 119 (1992) (including hospital and correctional facility visitation rights, child information rights). See J. Shih, Changing Families, Benefits: Cambridge Considers Domestic Partnership Ordinance, The Harvard Crimson, July 24, 1992, https://www.thecrimson.com/article/1992/7/24/changing-families-benefits-pcambridge-resident-margaret/ (featuring only gay advocates in story).

[28] D.L. Chambers, Tale of Two Cities: AIDS and the Legal Recognition of Domestic Partnerships in San Francisco and New York, 2 Law & Sexuality 181, 186 (1992), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1091&context=articles.

[29] See Recognising Same-Sex Relationships, Law Comm'n of Wellington, N.Z. (Dec. 1999), http://www.nzlii.org/nz/other/nzlc/sp/SP4/SP4.pdf. For example, the Danish Registered Partnership Act of 1989 begins: "Two persons of the same sex may have their partnership registered."

[30] See, e.g., University of California, University Committee on Faculty Welfare Annual Report, 2000-2001 ("Board of Regents approved University health benefits only for same-sex domestic partners"), https://senate.universityofcalifornia.edu/_files/committees/ucfw/ar/ucfw00-01ar.pdf.

partnership" policies, programs, and ordinances provided at least a limited means of recognizing the adult relationships of same-sex couples as "familial" even if they were not "marital." See Connors v. City of Boston, 430 Mass. 31, 42-43 (1999).

Given this context and in light of the direction this Court provided in Robertson "to presume that the juror is a member of the protected class at issue," 480 Mass. at 395, it was error for the trial court not to proceed with the Soares analysis. In addition, as this Court has reiterated "on numerous recent occasions," because failure to find a reasonable inference of discrimination where one exists is structural error, trial judges are "strongly encouraged to ask for an explanation as questions are raised regarding the appropriateness of the challenges." Commonwealth v. Jackson, 486 Mass. 763, 776 (2021) (quotation omitted). See Commonwealth v. Issa, 466 Mass. 1, 11 n.14 (2013). Here, the trial court did not ask for an explanation even though the strike came immediately after Juror 202 revealed her domestic partnership status, Tr. 3:1:184, and there was no group-neutral reason for the peremptory challenge evident on the record.[31]

[31] Interestingly, the Commonwealth touts the neutral reason for another juror that the defense believed to be gay, i.e., the fact that he identified himself as an attorney, while saying nothing about Juror 202. Comm. Br. at 40-41.

For these additional reasons, the trial court's errors require reversal.[32]

[32] Although the court need go no further to decide this case, this Court may wish to consider and/or address as guidance to the trial courts other considerations when the question of sexual orientation challenges arise in the future.

First, a person may communicate their sexual orientation in various ways, e.g., mentioning a partner or a spouse of the same sex or the use of same-sex pronouns to describe a partner/spouse. Describing certain activities, like attendance at Gay Pride marches or perhaps the neighborhood in which one lives, may provide other possible evidence of sexual orientation. Like domestic partnership status, each of these should be enough to satisfy step one of the Batson-Soares test.

Second, at the same time, amici agree with those courts which have indicated that no juror should be asked to reveal their sexual orientation. "No one should be 'outed' in order to take part in the civic enterprise which is jury duty." People v. Garcia, 77 Cal. App. 4th 1269, 1280 (2000).

Third, the courts are not caught, as the Commonwealth would suggest, between Scylla and Charybdis—unable to ask sexual orientation and yet unable to apply Batson-Soares without certainty about sexual orientation. This case puts a lie to that argument.

Additionally, sexual orientation enters the jury selection process in subtler ways. Undoubtedly, many (if not most) people believe they can "read" someone's sexual orientation—based on speech, voice, mannerisms, body motions, etc. And, in fact, there is support for this "ability" in the expert literature. See, e.g., N. Ambady et al., Accuracy of Judgments of Sexual Orientation from Thin Slices of Behavior, 77(3) J. Personality & Soc. Pyschol. 538 (1999); N.O. Rule, Perceptions of Sexual Orientation from Minimal Cues, 46 Archive of Sexual Behav. 129 (2016); S. Kachel et al., Investigating the Common Set of Acoustic Parameters in Sexual Orientation Groups: A Voice Averaging Approach, Public Libr. Sci. 13 (Dec. 10, 2018).

Indeed, in the present case, defense counsel "read" Juror 176 as a gay man. Tr. 3:1:184-185. And there is reason to believe that he was correct. Amici were easily able to discover from the Suffolk County Registry of Deeds that Juror 176 was granted a deed to a residential unit in a condominium in Boston with a co-grantee of the same sex on November 5, 2010.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the Defendant's brief, the amici respectfully submit that the Defendant's conviction must be reversed and vacated.

Respectfully submitted.

BLACK AND PINK MASSACHUSETTS

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The trial courts would benefit from guidance from this Court on how to proceed and deal with these "cues" of sexual orientation arising in the context of jury selection without, in the end, simply trading on stereotypes.

Finally, amici suggest that it might be appropriate for the Court to consider the creation of a working group to address the questions raised here, including, among other things, potential adaptations of the Juror Questionnaire, including an option to decline to answer certain questions, such as "household status."

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(9) of the Massachusetts Rules of Appellate Procedure, I hereby certify that this brief complies with Rules 17 and 20 of the Massachusetts Rules of Appellate Procedure. This brief has been produced in 14-point Times New Roman font and contains 7,474 non-excluded words. The brief was created using Microsoft® Word for Mac, Version 16.46.

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CERTIFICATE OF SERVICE

Pursuant to Rule 13(e) of the Massachusetts Rules of Appellate Procedure, I hereby certify that on April 20, 2021, this document was served upon all counsel of record via the Massachusetts Tyler Host electronic filing system.

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