

[REDACTED]

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[REDACTED]

2

Attorney for Client

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF [REDACTED]

4

5

THE PEOPLE OF THE STATE OF CALIFORNIA,

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8

Plaintiff,

9

vs.

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XXXX

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Defendant.

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NOTICE OF MOTION AND MOTION IN LIMINE FOR QUESTIONNAIRE ON JUROR DEMOGRAPHIC INFORMATION

13

TO THE ABOVE-ENTITLED COURT AND TO [REDACTED], THE DISTRICT ATTORNEY OF [REDACTED] COUNTY, AND/OR THEIR REPRESENTATIVE:

14

15

PLEASE TAKE NOTICE THAT ON [REDACTED], at [REDACTED], in Department [REDACTED]

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of the above-entitled court, [Client] will, and hereby does, move this Court, by written questionnaire, to ask each member of the venire to provide their race and ethnicity [gender, national origin, etc.]. [Client] further moves that the same demographic information be included in the record as it pertains to the Court, counsel, alleged victims, and witnesses.

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The motion is necessary to ensure that citizens of color, especially those who are Black and Latinx, are not disproportionately excluded from jury service through the exercise of peremptory challenges in violation of Code of Civil Procedure section 231.7;

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1 article I, sections 7, 16, and 24 of the California Constitution; and the Sixth and Fourteenth
2 Amendments to the United States Constitution. The motion is likewise necessary to
3 protect [Client]'s rights to a jury selected free of bias consistent with the provisions of
4 section 231.7; article I, sections 7, 16, and 24 of the California Constitution; and the Sixth
5 and Fourteenth Amendments to the United States Constitution.
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7 The motion is based on this Notice; the attached Memorandum of Points and
8 Authorities; the Court's statutory authority to control the process of jury selection; such
9 other exhibits, memoranda, and briefing as the Court may permit; all documents and facts
10 of which the Court may take judicial notice; the files and records in this action; and such
11 additional evidence, argument, and authorities as may be presented at or before the
12 hearing on the Motion.
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14
15 Date: [REDACTED], 2024

16 Respectfully submitted,
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18 _____
19 Attorney for Client
20 [REDACTED]
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3 Attorney for Client

4 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
5 IN AND FOR THE COUNTY OF

6
7 THE PEOPLE OF THE STATE OF CALIFORNIA,

8 Plaintiff,

9 vs.

10
11 XXXX

12 Defendant.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION IN LIMINE FOR
QUESTIONNAIRE ON JUROR
DEMOGRAPHIC INFORMATION

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15 **I. INTRODUCTION**

16 In 2020, the California Legislature passed and the Governor signed Assembly Bill
17 No. 3070 (A.B. 3070), adding section 237.1 to the Code of Civil Procedure.¹ The statute,
18 which was implemented on January 1, 2022, replaces the *Batson-Wheeler* framework
19 with an entirely different inquiry for determining whether a peremptory challenge is
20 lawful. (Compare § 231.7 with *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and
21 *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).)
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25 ¹ See A.B. 3070 (2019-2020 Reg. Sess.) as enacted Sept. 30, 2020. All statutory
26 references are to the Code of Civil Procedure unless otherwise stated.

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2 The California Legislature’s findings acknowledge that “peremptory challenges
3 are frequently used in criminal cases to exclude potential jurors from serving based on
4 their race [or] ethnicity . . . , and that exclusion from jury service has disproportionately
5 harmed African Americans, Latinos, and other people of color.” (A.B. 3070 § 1, subd.
6 (b).) In particular, the Legislature found that “the existing procedure for determining
7 whether a peremptory challenge was exercised on the basis of a legally impermissible
8 reason has failed to eliminate that discrimination.” (*Ibid.*) The legislative preamble
9 echoes the views of California Supreme Court Justice Goodwin Liu, Court of Appeal
10 Justice Jim Humes, the Washington Supreme Court, other federal and state court jurists,
11 and extensive academic research. (See Semel et al., *Whitewashing the Jury Box: How*
12 *California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (2020)
13 at pp. 67-70).² Together, the findings acknowledge the profound failure of the *Batson-*
14 *Wheeler* regime to ensure that people of color, especially those who are Black and Latinx,
15 are present on the sworn jury and that their deliberations are reflected in verdicts rendered
16 throughout the state.
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21 Explaining the California Legislature’s intention to “put into place an effective

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23 ² at <[https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-](https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf)
24 [Jury-Box.pdf](https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf)> [as of [date]]; *id.* at pp. 82-84, endnote 2 [listing opinions, social science
25 research, and legal scholarship]; *see also* Conn. Superior Ct. Gen. Provisions § 5-12
26 (2024) [adopting a rule similar to Washington Supreme Court General Rule 37 and §
231.7]; N.J. Rules of Court R. 1:8-3A [adopting a version of Washington Supreme Court
General Rule 37 and § 231.7].

1 procedure” to guarantee the constitutional mandate, the Legislature’s findings highlight
2 three aspects of A.B. 3070. (A.B. 3070 § 1, subd. (a).)

3 1. Proof of intentional bias will no longer be required. (A.B. 3070 § 1, subd. (b).)

4 2. Inasmuch as “many of the reasons routinely advanced to justify the exclusion of
5 jurors from protected groups are in fact associated with stereotypes about those groups or
6 otherwise based on unlawful discrimination,” “several justifications” are designated as
7 “presumptively invalid.” (A.B. 3070 § 1, subd. (b).)

8 3. The new procedure “provides a remedy for both conscious and unconscious bias in
9 the use of peremptory challenges.” (A.B. 3070 § 1, subd. (b); see also *id.* § 1, subd. (c).)

10 In 2020, the California Legislature also passed Assembly Bill No. 2542 (A.B. 2542),
11 the “California Racial Justice Act,” adding section 745 to the Penal Code.³ The statute
12 prohibits the prosecution from seeking a criminal conviction or sentence “on the basis of
13 race, ethnicity, or national origin” and provides procedural vehicles for a defendant to
14 establish a violation of the statutory prohibition. (Pen. Code, § 745, subd. (a).) In enacting
15 A.B. 2542, our legislature made findings consistent with those that supported the passage
16 of A.B. 3070. It declared that discrimination based on race, ethnicity, or national origin
17 is “intolerable” as well as injurious to defendants and to “our system of justice as a
18 whole.” (A.B. 2542 § 2, subds. (a), (c).) Racial discrimination persists, however,
19 “because courts generally only address racial bias in its most extreme and blatant forms.”
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25 ³ See A.B. 2542 (Reg. Sess. 2019-2020) as enacted Sept. 30, 2020.

1 (A.B. 2542 § 2, subd. (c).) Concluding that “no degree or amount of racial bias is
2 tolerable in a fair and just criminal justice system,” the California Legislature acted to
3 eradicate it, whether the form of bias is explicit or implicit, and to “provide remedies that
4 will eliminate racially discriminatory practices in the criminal justice system.” (A.B.
5 2542 § 2, subds. (h)-(j).)
6

7 For the reasons stated below, this Court can best protect [Client]’s rights under
8 section 231.7, Penal Code section 745, and the California and United States Constitutions
9 by (1) using a questionnaire that requires each prospective juror to provide their race and
10 ethnicity [gender, national origin, etc.]; (2) furnishing the questionnaire to counsel for use
11 during jury selection; and (3) making the questionnaires part of the record.⁴ The
12 questionnaire also should include an advisement that the purpose of asking jurors to
13 provide their provide their race and ethnicity [gender, national origin, etc.] is to ensure
14 that discrimination — explicit or implicit — does not play a role in jury selection and that
15 juries are representative and diverse. It is likewise necessary that the race and ethnicity
16 [gender, national origin, etc.] of the Court, counsel, alleged victims, and witnesses be
17 included in the record. As [Client] explains below, the collection of self-identified juror
18 demographic data is also necessary to determine whether A.B. 3070 is meeting its
19 objectives.
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24 ⁴ [Client] agrees that the Court should preserve the confidentiality of juror
25 questionnaires as long doing so is consistent with ensuring that counsel for the parties and
26 courts have access to the questionnaires throughout all judicial proceedings.

1 **I. CALIFORNIA AUTHORITIES AUTHORIZE AND SUPPORT THE**
2 **COLLECTION OF SELF-IDENTIFIED JUROR DEMOGRAPHIC**
3 **INFORMATION, INCLUDING RACE AND ETHNICITY.**

4 This Court has the statutory authority to ask members of the venire to complete
5 questionnaires. Code of Civil Procedure section 205, subdivision (c), provides: “The
6 court may require a prospective juror to complete such additional questionnaires as may
7 be deemed relevant and necessary for assisting in the voir dire process or to ascertain
8 whether a fair cross section of the population is represented as required by law. . . .” (§
9 205, subd. (c).) Section 205, subdivision (d) allows trial judges to collect juror
10 demographic data to assist the voir dire process upon counsel’s request. (§ 205, subd.
11 (d); see also § 223, subd. (e) [“The trial judge shall . . . consider reasonable written
12 questionnaires when requested by counsel.”].)

13 The California Supreme Court Jury Selection Work Group (Work Group)
14 endorsed the collection of juror demographic data by stating that doing so “would . . . be
15 instrumental in evaluating the efficacy of Assembly Bill 3070.” (*Jury Selection Work*
16 *Group: Final Report to the Supreme Court of California (2022) (Final Report)*, at p. 7.)⁵
17 The Work Group concluded, “[F]or evidence . . . of disproportionate use of peremptory
18 challenges by counsel and/or counsel’s office, it is important that all courts specify in the
19 JMS [Jury Management System] records the party responsible for each peremptory
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25 ⁵ at < <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2022-09/Jury%20Selection%20Work%20Group%20Final%20Report.pdf> > [as of [date] 2024].
26

1 challenge, as well as the race . . . of the jurors.” (*Id.* at pp. 25-26.) The Work Group also
2 observed: “Other jurisdictions, including the federal courts, already collect demographic
3 data” (*Final Report, supra*, at p. 5; see 28 U.S.C. 1869, subd. (h) [providing that the
4 federal juror qualification form “shall elicit the . . . race . . . of a potential juror”].)
5 Currently, nineteen states collect prospective jurors’ self-reported race and ethnicity as
6 part of their jury composition process; most provide the information to the trial court and
7 counsel. (Semel et al., *Guess Who’s Coming to Jury Duty? How the Failure to Collect*
8 *Juror Demographic Data Contributes to Whitewashing the Jury Box* (2024) (Semel et al.,
9 *Guess Who’s Coming to Jury Duty?*) at pp. vii, 16-17.)⁶

12 California has taken steps toward the systematic collection of juror demographic
13 information. In 2022, the Legislature passed Assembly Bill No. 1981 (A.B. 1981), which
14 created a two-year pilot program to evaluate “whether increases in juror compensation
15 and mileage reimbursement rates increase juror diversity and participation.”⁷ (Code Civ.
16 Proc., § 241, subd. (a).) The new statute requires participating courts to collect
17 demographic data, as reported by jurors, to determine whether the pilot program is
18 meeting its primary objective of “promot[ing] jury diversity.” (*Id.* § 1; Code Civ. Proc. §
19 241, subd. (b).) The pilot program, which launches this year, will collect prospective
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23 ⁶ <[https://www.law.berkeley.edu/wp-content/uploads/2024/02/Guess-Whos-Coming-](https://www.law.berkeley.edu/wp-content/uploads/2024/02/Guess-Whos-Coming-to-Jury-Duty_2-14-24.pdf)
24 [to-Jury-Duty_2-14-24.pdf](https://www.law.berkeley.edu/wp-content/uploads/2024/02/Guess-Whos-Coming-to-Jury-Duty_2-14-24.pdf)> [as of [date] 2024].

25 ⁷ See A.B. 1981 (Reg. Sess. 2021-2022) as enacted Sept. 15, 2022 (Code Civ. Proc., §
26 241) § 3.

1 jurors' self-identified race and/or ethnicity and gender. (Semel, et al., *Guess Who's*
2 *Coming to Jury Duty?*, *supra*, at p. 19). Alameda, El Dorado, Fresno, Imperial,
3 Monterey, San Bernardino, and Shasta are the participating county superior courts.
4 (*Ibid.*) For these reasons, this Court need not and should not wait for statewide reform to
5 ensure that jury selection in [Client]'s trial complies with the letter and intent of section
6 231.7.
7

8 [Client] further requests that the Court follow the lead of other jurisdictions⁸ by
9 including an advisement about the demographic questions to reassure jurors that
10 furnishing their racial and ethnic [gender, national origin, etc.] identity (1) has no bearing
11 on their qualification for service, but rather, (2) will assist the judicial system in
12 preventing discrimination in the jury selection process and empaneling jurors who are
13 selected from a representative cross-section of the community. [Client] proposes the
14 following language with respect to the questions about racial and ethnic [gender, national
15 origin, etc.] identity:
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17

18 The following questions are required solely to avoid discrimination in juror
19 selection and have absolutely no bearing on qualifications for jury service.
20 By answering these questions, you help protect the constitutional and
21 statutory rights of the parties and assist the court in monitoring the juror
22 selection process so that discrimination does not occur. In this way, the
23 court can fulfill its legal obligation to provide jurors who are selected from

23 ⁸ See, e.g., Juror Qualification Questionnaire for the United States District Court for
24 the Central District of California, at
<www.insd.uscourts.gov/sites/insd/files/JQQ_Website%20Color.pdf> [as of [date]];
25 Connecticut Sample Jury Questionnaire and Instructions, at
<[https://ctd.uscourts.gov/sites/default/files/Sample%20Jury%20Questionnaire%20and%20](https://ctd.uscourts.gov/sites/default/files/Sample%20Jury%20Questionnaire%20and%20Instructions.pdf)
26 [Instructions.pdf](https://ctd.uscourts.gov/sites/default/files/Sample%20Jury%20Questionnaire%20and%20Instructions.pdf)> [as of [date]].

1 a fair cross-section of this community.

2 **II. SELF-IDENTIFIED JUROR DEMOGRAPHIC INFORMATION IS**
3 **NECESSARY TO EFFECTUATE THE INTENT AND OBJECTIVES**
4 **OF SECTION 231.7.**

5 **A. Reliance on “perceived membership” perpetuates the use of**
6 **stereotypes in contravention of section 231.7’s express intent.**

7 The enforcement of section 231.7 requires the Court to collect juror demographic
8 information and make the information available to the parties prior to jury selection. An
9 objection under section 231.7 is based on a showing that a party exercised a peremptory
10 challenge against a prospective juror who is a member of a statutorily cognizable group.
11 (§ 231.7, subd. (a).) [Client] cannot establish the basis for their objection in a way that is
12 consistent with the intent of section 231.7 unless there is a record of the juror’s self-
13 identified group membership.
14

15 [Client] acknowledges that the plain language of section 231.7 permits this Court
16 to rely not only on a juror’s membership in a protected group, but also on a prospective
17 juror’s “perceived membership” in a protected group to adjudicate an objection under the
18 statute. (§ 231.7, subd. (a).) In the absence of juror self-identification, however, the
19 Court and the parties are left to speculate about a prospective juror’s group membership
20 based on the juror’s physical characteristics and other aspects of the juror’s appearance
21 tied to stereotypes of race and ethnicity [gender, national origin, etc.].⁹ (See *People v.*
22
23
24

25 ⁹ [Client] uses race as a surrogate for all statutorily protected groups unless otherwise
26

1 *Davis* (2009) 46 Cal.4th 539, 584 [declining to identify as Latino three struck jurors with
2 Spanish surnames where the defense at trial failed to refute the prosecution’s description
3 of them as “Caucasian”].) “Racial categorizations based on characteristics such as
4 appearance, accent, and name are the tip of the implicit-bias iceberg. Encoding a
5 prospective juror as non-white also encodes a cascade of largely negative explicit and
6 implicit biases about the prospective juror, particularly if the juror is Black.” (Semel, et
7 al., *Guess Who’s Coming to Jury Duty?*, *supra*, at p. 11.)

9 In *United States v. Ochoa-Vasquez* (11th Cir. 2005) 428 F.3d 1015, 1040-1043,
10 for example, there was considerable debate during jury selection about the ethnic identity
11 of struck and seated jurors after the federal district court denied the defense request for
12 juror demographic information. The Eleventh Circuit found that the parties and the
13 district court had made incorrect judgments about several of the jurors’ ethnicities based
14 on the jurors’ appearance or accent. (*Id.* at p. 1043.) The court observed, “[T]he only
15 alternative to identifying the self-reported race or ethnicity of the venire members is to
16 establish it based on appearance, demeanor, accent, and other physical characteristics –
17 *thereby emphasizing racial distinctions in jury selection . . .*” (*Ibid.*, italics added; *id.* fn.
18 37 [stating the “better practice” would be to “give both parties the self-reported race or
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24 indicated. [Client] does not intend to reify the socially constructed notion of race but
25 uses the word “race” because of how entangled it is in every aspect of society. (See
26 generally Haney López, *The Social Construction of Race: Some Observations on Illusion,
Fabrication, and Choice* (1994) 29 Harv.C.R.-C.L. L. Rev. 1.)

1 ethnicity upon request in order to avoid any speculative stereotyping”).¹⁰

2 Empirical evidence supports the court’s conclusion in *Ochoa-Vasquez* that
3 observers rely on factors such as phenotype to racially classify others. Research shows
4 that skin color, hair, nose and lip shapes, and body types contribute to the racial
5 categorization process, with skin color playing the biggest role in this categorization.¹¹
6
7 Observers’ own characteristics, such as gender and race, also shape racial categorization.
8 (*Feliciano, Shades of Race: How Phenotype and Observer Characteristics Shape Racial*
9 *Classification* (2016) 60 Am. Behav. Scientist 390, 407-409.) Classifications based on
10 phenotype and shaped by observer characteristics do not always match how individuals
11 self-identify, however. (See Vargas & Stainback, *Documenting Contested Racial*
12

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15 ¹⁰ See also *Seals v. Vannoy* (5th Cir. 2021) 1 F.4th 362, 365-366 [where the defense
16 objected to the prosecutor’s strike of a juror the defense identified as “a person of color”
17 and the trial judge and prosecutor agreed that they could not tell the juror’s race based on
18 his appearance, with the prosecutor adding that “you can’t just tell by looking, the federal
19 appeals court removed the strike from the analysis — treating the juror as if he were
20 white — which further undermined the defendant’s prima facie showing].

21 ¹¹ Brown et al., *Perception of Race and Ethnicity* (1998) 13 J. Soc. Behav. &
22 Personality 295 [suggesting that skin color is the most important factor]; Alejandro-
23 Wright, *The Child’s Conception of Racial Classification: A Socio-cognitive*
24 *Developmental Model* in *Beginnings: The Art and Science of Planning Psychotherapy*
25 (Spencer et al. edit., 2013) pp. 185-200) [studying hair and nose and lip shapes]; Blair &
26 Judd, *Afrocentric Facial Features and Stereotyping* in *The Science of Social Vision*
(Adams et. al edit., 2011) pp. 306-320 [studying hair and nose and lip shapes]; Feliciano,
Shades of Race: How Phenotype and Observer Characteristics Shape Racial
Classification (2016) 60 Am. Behav. Scientist 390, 401-403 [studying hair, nose and lip
shapes, and body types]; Sims et al., *Doing Hair, Doing Race: The Influence of Hairstyle*
on Racial Perception Across the U.S. (2020) 43 Ethnic & Racial Stud. 2099-2119
[studying hair].

1 *Identities Among Self-Identified Latina/os, Asians, Blacks, and Whites* (2016) 60 Am.
2 Behav. Scientist 442, 443.) One study found that “approximately 14% of self-identified
3 monoracial adults . . . have experienced racial contestation,” or have been perceived as a
4 member of a race with which they do not identify. (*Id.* at p. 457.)

5
6 Multiracial individuals experience higher rates of racial contestation than
7 monoracial individuals. (See Herman, *Do You See What I Am? How Observers’*
8 *Backgrounds Affect Their Perceptions of Multiracial Faces* (2010) 73 Soc. Psych. Q. 58,
9 72-73 [finding that observers classify almost half of self-identified multiracial people as
10 monoracial].) The population of individuals who identify as “two or more races” in the
11 United States increased by 275.7% from 2010 to 2020.¹² Racial and ethnic contestation
12 in the context of peremptory challenges will affect a growing number of prospective
13 jurors who identify as multiracial. This development further supports the need to have all
14 members of the venire identify their race and ethnicity.
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17 Relying on phenotype threatens to defeat section 231.7’s goal “of eliminating the
18 use of group stereotypes and discrimination, whether based on conscious or unconscious
19 bias, in the exercise of peremptory challenges.” (A.B. 3070, § 1, subd. (c).) Permitting
20 the parties and the court to act based on “perceived membership” is reminiscent of a
21 shameful, prolonged period in our nation’s history during which legislatures and courts
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23

24 ¹² Race and Ethnicity in the United States: 2010 Census and 2020 Census, at
25 <[https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-
united-state-2010-and-2020-census.html](https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-
26 united-state-2010-and-2020-census.html)> (as of [date]).

1 engaged in attempts to define race based on factors such as phenotype for the purpose of
2 excluding people of color from citizenship and civil society. (See, e.g., *Plessy v.*
3 *Ferguson* (1896) 163 U.S. 537, overruled by *Brown v. Bd. of Ed.* (1954) 347 U.S. 483;
4 *United States v. Thind* (1923) 261 U.S. 204.)

5
6 Protecting jurors from removal based on their “perceived membership” also risks
7 perpetuating the harms section 231.7 aims to remedy. (See A.B. 3070 § 1, subd. (b)
8 [finding that “exclusion from jury service has disproportionately harmed African
9 Americans, Latinos, and other people of color”].) If, for example, [Client] objected to the
10 prosecution’s strike of a juror because of [Client]’s perception that the juror is Black, the
11 prosecution might argue that the juror appears to be White. The prosecutor’s assertion
12 that the juror is White does not prevent an act of discrimination through implicit bias: the
13 prosecutor may unconsciously discriminate against the juror based on phenotypic
14 differences and assume the juror is a member of a group with which the juror does not
15 identify. Again, this is precisely the type of discrimination the statute aims to preclude.
16 (See § 231.7, subd. (a).) In this situation, the trial court could potentially rely on the
17 prosecution’s perception and deny the objection. (See § 231.7, subd. (a).) If, in fact, the
18 struck juror is Black, the ruling may preclude the defendant from succeeding on appeal,
19 as detailed in subsection D.
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23 A ruling based on “perceived membership” injures the defendant, the juror, and
24 their community. (See *Powers v. Ohio* (1991) 499 U.S. 400, 411 [“The discriminatory
25 use of peremptory challenges by the prosecution causes a criminal defendant cognizable
26

1 injury. . . .”]; *Batson, supra*, 476 U.S. at p. 87 [“The harm from discriminatory jury
2 selection extends beyond that inflicted on the defendant and the excluded juror to touch
3 the entire community.”)]; *J.E.B. v. Alabama ex. rel. T.B.* (1994) 511 U.S. 127, 140 [“The
4 community is harmed by the State’s participation in the perpetuation of invidious group
5 stereotypes and the inevitable loss of confidence in our judicial system that state-
6 sanctioned discrimination in the courtroom engenders.”].) As the Court stated in *Powers*,
7 “[F]or most citizens the honor and privilege of jury duty is their most significant
8 opportunity to participate in the democratic process.” (499 U.S. at p. 407). Thus, “[a]
9 venireperson excluded from jury service because of race suffers a profound personal
10 humiliation heightened by its public character.” (*Id.* at pp. 413-414.) The fact that the
11 prosecutor and the judge perceived the juror as White assuredly does not lessen the
12 humiliation for the struck Black juror.
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15 Counsel for [Client] is familiar with the practice of some judges who, when there
16 is a dispute about the prospective juror’s race or ethnicity, call the challenged juror to
17 sidebar or chambers and ask the juror to provide their racial or ethnic identification. This
18 practice is at best confusing to the juror who has been singled out. More than likely, it is
19 demeaning and suggests that, indeed, race or ethnicity is relevant to their qualification for
20 service. Distributing a questionnaire to all prospective jurors with a clear advisement of
21 the purpose of the demographic questions also eliminates the risk of embarrassment or
22 humiliation.
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1 **B. Although it allows for reliance on “perceived” group membership as a**
2 **factor, section 231.7 explicitly requires this Court to evaluate factors**
3 **that depend on the self-reported identification of the entire venire,**
4 **Court, counsel, alleged victim(s), and witnesses.**

5 After a party makes an objection under section 231.7, opposing counsel must state
6 their reasons for the peremptory challenge. (§ 231.7, subd. (c).) The court must then
7 evaluate the stated reasons in light of the totality of circumstances to determine whether
8 there is a substantial likelihood that an objectively reasonable person would view
9 membership in a cognizable group as “a factor” in the use of the peremptory challenge.
10 (§ 231.7, subd. (d)(1).)

11 The statute includes a list of non-exclusive circumstances for courts to consider in
12 ruling on the objection. (§ 231.7, subd. (d)(3)(A)-(G).)¹³ Many of these factors depend
13 upon the racial and ethnic [gender, national origin, etc.] identity of the challenged juror
14 because they are statistical and/or comparative. (See *ibid.*) Section 231.7, subdivision
15 (d)(3) permits the court to consider, for example:

16 (A)(i) Whether the objecting party is a member of the same cognizable
17 group as the challenged juror;

18 (A)(ii) Whether the alleged victim is not a member of that cognizable
19 group;

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24 ¹³ [Client] acknowledges that most of these subdivisions include the word “perceived.”
25 (See, e.g., § 231.7, subd. (d)(3)(A)(i)-(iii). However, subdivision (d)(3)(D) does not. (*Id.*,
26 subd. (d)(3)(D).)

- 1 (A)(iii) Whether the witnesses or the parties are not members of that
2 cognizable group;
- 3 (B) Whether membership in a cognizable group bears on the factors of
4 the case to be tried;
- 5 (C)(i) Whether the party exercising the peremptory challenge failed to
6 question the prospective juror about the concerns later stated by the
7 party as the reason for the peremptory challenge;
- 8 (C)(ii) Whether the party exercising the peremptory challenge engaged in
9 cursory questioning of the challenged potential juror;
- 10 (C)(iii) Whether the party exercising the peremptory challenge asked
11 different questions of the potential juror against whom the
12 peremptory challenge was used in contrast to questions asked of
13 other jurors from different cognizable groups about the same topic or
14 the party phrased the questions differently;
- 15 (D) Whether other prospective jurors, who are not members of the same
16 cognizable group as the challenged prospective juror, provided
17 similar, but not necessarily identical, answers but were not the
18 subject of a peremptory challenge by that party;
- 19 (G) Whether the counsel or counsel's office exercising the challenge has
20 used peremptory challenges disproportionately against a given group
21 in the present case or in past cases.
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1 The objecting party cannot establish the circumstances delineated in section 231.7,
2 subdivisions (d)(3)(C), (D), and (G) without information on the race and ethnicity
3 [gender, national origin, etc.] of all jurors in the venire. Nor can counsel establish the
4 circumstances delineated section 231.7, subdivisions (d)(3)(A) and (B) without
5 information on the race and ethnicity [gender, national origin, etc.] of the judge, counsel,
6 the defendant, the alleged victim(s), and the witnesses. If the record does not reflect
7 these facts, it could be fatal to a fair and accurate ruling by the Court.
8

9 To date, none of the published appellate opinions applying section 231.7 address
10 the subject matter of the instant motion.¹⁴ However, the California Supreme Court has
11 criticized trial judges and counsel for failing to make a record that is adequate to review a
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14 ¹⁴ See *People v. Jimenez* (2024) 2024 WL 397716, *4-7 [where law enforcement
15 officers were the only prosecution witnesses and the prosecutor struck a Latina juror
16 based in part on her acknowledged difficulty in being fair to them because of her belief
17 that they are racially biased, holding that the prosecutor overcame the presumption of
18 invalidity under section 231.7, subd. (e)(1)–(2) and upholding the trial judge’s denial of
19 the objection under section 231.7, subd. (d)(1)]; *People v. Ortiz* (2023) 96 Cal.App.5th
20 768, 314, Cal.Rptr.3d 732, 757-758 [holding that where the prosecutor adopts reasons for
21 its strike that were initiated offered by the trial court, those reasons qualify under
22 subdivision (c)(1) as reasons “actually given” by the prosecutor]; *id.* at 760-761 [holding
23 that “any explanation regarding ‘why the asserted demeanor, behavior, or manner . . .
24 matters to the case to be tried’ fulfills the explanation requirement of section 231.7,
25 subdivision (g)(2)”]; *People v. Aranda* (2023) 95 Cal.App.5th 311, 314 [“On its face,
26 section 231.7 applies only to peremptory challenges, not challenges for cause.”]; *People*
v. Jaime (2023) 91 Cal.App.5th 941, 946-947 [finding no forfeiture based on the
27 defendant’s failure to object under section 231.7 — rather than *Batson/Wheeler* — where
28 the prosecution informed the trial court that the new statute applied and offered a
presumptively invalid reason for its strike and where the court “still analyzed the
objection under the *Batson/Wheeler* framework” such that an objection under “section
231.7 would have been futile”].

1 *Batson/Wheeler* claim. (See *People v. Baker* (2021) 10 Cal.5th 1044, 1079-1080 (*Baker*)
2 [citing *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1172 (*Gutierrez*)].) The Court in
3 *Gutierrez* held, “[T]he obligation to avoid discrimination in jury selection is a pivotal
4 one. It is the duty of courts and counsel to ensure the record is both accurate and
5 adequately developed.” (*Gutierrez, supra*, 2 Cal.5th at p. 1172.) Recently, citing *Baker*
6 and *Gutierrez*, the Court of Appeal observed, “Our ability to undertake this third stage
7 review is made more difficult because the parties and the trial court did not make a robust
8 record when the *Batson* issues were raised.” (*People v. Salinas* (2022) 77 Cal.App.5th
9 20, 34.) As [Client] showed above, section 231.7 increases the need for a complete
10 record.
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13 Particularly in the last decade, the United States Supreme Court has considered
14 many of the factors listed above “under the totality of the circumstances” at *Batson*’s
15 third step. (§ 231.7, subd. (d); see *Batson, supra*, 476 U.S. at p. 95 [requiring that courts
16 “undertake ‘a sensitive inquiry into such circumstantial and direct evidence of intent as
17 may be available’”]; see, e.g., *Foster v. Chatman* (2016) 578 U.S. 488, 501 (*Foster*)
18 [holding that “‘all of the circumstances that bear upon the issue of racial animosity must
19 be consulted’” at step three (quoting *Snyder v. Louisiana* (2008) 552 U.S. 472, 478)
20 (*Snyder*)].) Although *Batson* imposes a more onerous burden of proof than section 231.7,
21 subdivision (d)(1), the Supreme Court cases are instructive as they address the evidence
22 necessary to prevail on statistical and/or comparative arguments. For example, in *Miller-*
23 *El v. Dretke* (2005) 545 U.S. 231, 240-41 (*Miller-El*), the United States Supreme Court
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1 observed:

2 The numbers describing the prosecution’s use of peremptories are
3 remarkable. Out of 20 black members of the 108-person venire panel for
4 Miller-El’s trial, only 1 served. Although 9 were excused for cause or by
5 agreement, 10 were peremptorily struck by the prosecution. [Citation.]
6 “The prosecutors used their peremptory strikes to exclude 91% of the
7 eligible African-American venire members Happenstance is unlikely
8 to produce this disparity.” [Citation.]

9 The Supreme Court’s reliance on this pattern of strikes was feasible only because
10 the record reflected the total number of Black veniremembers, the number of Black
11 prospective jurors excused for cause, and the number of Black prospective jurors against
12 whom the prosecution exercised peremptory challenges. (See *ibid.*) The Supreme Court
13 also found that the “side-by-side comparisons of some black venire panelists who were
14 struck and white panelists allowed to serve” were “more powerful” than the statistical
15 showing. (*Id.* at p. 241.) In *Gutierrez, supra*, 2 Cal.5th at p. 1174, the Court — relying
16 on *Miller-El, Snyder, Foster*, and *People v. Lenix* (2008) 48 Cal.4th 602 —criticized the
17 Court of Appeal for failing to undertake a comparison of the struck Latinx juror with
18 seated White jurors. Absent an accurate and complete record of self-reported
19 demographics, it will be exceedingly difficult, if not impossible, for [Client] to offer a
20 comparative juror analysis that this Court or a reviewing court can reliably assess.

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2 **C. A ruling based on the juror’s “perceived” [racial or ethnic] identity**
3 **risks undermining the California Constitution’s representative cross-**
4 **section guarantee.**

5 In *Wheeler, supra*, 22 Cal.3d at p. 272, the state supreme court explained that the
6 representative cross-section protection is “guaranteed equally and independently” by the
7 California and United States Constitutions, obligating our courts to ensure that it “not be
8 reduced to a hollow form of words, but remain a vital and effective safeguard of the
9 liberties of California citizens.” (See Cal. Const., art. I, § 16.) *Wheeler* highlighted the
10 imperative of empaneling jurors who have diverse perspectives “derived from their life
11 experiences” as members of distinct groups. (*Id.* at p. 266.) The Court concluded that
12 “the only practical way to achieve an overall impartiality is to encourage the
13 representation of a variety of such groups on the jury so that the respective biases of their
14 members, to the extent they are antagonistic, will tend to cancel each other out.” (*Id.* at
15 pp. 266-267.) Thus, removing jurors based on their “perceived membership” in a
16 cognizable group, i.e., more often than not identifying jurors’ race or ethnicity based on
17 racial or ethnic stereotypes, frustrates the representative cross-section guarantee by
18 reducing the number of diverse viewpoints offered by people of different racial and
19 ethnic backgrounds.
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23 The Work Group observed that diverse juries “who represent a cross section of the
24 community” play a central role in “our justice system” and “are more thorough and
25 accurate than all-white juries.” (Jury Selection Work Group: Final Report to the Supreme
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1 Court of California (2022) (Final Report), p. 4.) Social science research shows that
2 racially diverse juries are more inclined to confront contrasting interpretations of the
3 evidence. For example, one study found that racially heterogeneous juries, as compared
4 to all-White juries, deliberated longer, discussed more of the trial evidence, considered a
5 wider range of information, made fewer factually inaccurate statements while discussing
6 the evidence, and were more likely to correct inaccurate statements. (Sommers, *On*
7 *Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial*
8 *Composition on Jury Deliberations* (2006) 90 J. Personality & Soc. Psych. 597, 606,
9 608.) Another found that racial diversity motivated White jurors to contribute more fact-
10 based, unbiased observations during jury deliberations, thereby reducing racial disparity
11 in trial outcomes. (Peter-Hagene, *Jurors' Cognitive Depletion and Performance During*
12 *Jury Deliberation as a Function of Jury Diversity and Defendant Race* (2019) 43 L. &
13 Hum. Behav. 232, 245.)

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17 Diverse juries also diminish the influence of racial bias in capital sentencing. (See
18 Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of*
19 *Jurors' Race and Jury Racial Composition* (2001) 3 U. Pa. J. Const. L. 171, 189, 193.)

20 Racial diversity in the jury increases the likelihood that a fulsome discussion of
21 mitigating circumstances will take place:
22

23 Conspicuous in these white male dominated juries is the lack of serious
24 discussion of mitigation In contrast, when there are African Americans,
25 or at least one African-American male, on the jury, conflict is evident and
26 mitigation is voiced and considered. In addition, there is a tendency for the
jurors themselves to acknowledge how race colors their perspectives and

1 how the race of other jurors may do likewise.

2 (Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in*
3 *Capital Sentencing When the Defendant Is Black and the Victim Is White* (2004) 53
4 DePaul L. Rev. 1497, 1532.)

5 Taken together, this research demonstrates that when juries are representative,
6 jurors often present different perspectives on the evidence that would otherwise go
7 unacknowledged among a racially or ethnically homogeneous White jury, much less be
8 integral to the deliberations. These conflicting perspectives provoke a more thorough
9 review of the evidence. “Thus, increasing representation in juries may also improve the
10 quality of juror decisionmaking by ensuring that deliberations involve differing
11 viewpoints that encourage more open and robust dialogue.” (Final Report, *supra*, at p.
12 4.)

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14 **D. Juror demographic information is crucial to meaningful review in**
15 **California appellate courts and in federal habeas proceedings.**

16 The cases above also highlight how crucial juror demographic information is to
17 federal review. [Client] acknowledges that under section 231.7, an objection brought
18 under the statute is deemed to be an objection under the California and United States
19 Constitutions. (§ 237.1, subd. (d)(1).) The statutory provision may, however, be
20 insufficient to fully preserve and litigate a *Batson* violation in in state or federal court
21 proceedings if the record is inadequate. First, federal courts still employ the *Batson*
22 framework to evaluate the lawfulness of peremptory challenges. Second, defendants who
23 pursue relief through federal habeas proceedings face a doubly deferential standard of
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1 review under the Antiterrorism and Effective Death Penalty Act.¹⁵ They must have a
2 complete state court record upon which they can rely to allege the discriminatory use of
3 peremptory challenges. (See *Cullen v. Pinholster* (2011) 563 U.S. 170, 180-81 [holding
4 that federal habeas review is “limited to the record that was before the state court that
5 adjudicated the claim on the merits”].)
6

7 Without self-reported juror demographic information, the record is incomplete and
8 deprives defendants of due process. Even if the case never reaches the federal system, a
9 thorough record is essential for state appellate review.¹⁶ Therefore, due process requires
10 the collection of demographic information. (See *People v. Alvarez* (1996) 14 Cal.4th
11 155, 196, fn. 8; U.S. Const., 14th Amend.; Cal. Const., art. I. § 7.)
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21 ¹⁵ Pub.L. No. 104-132 (Apr. 24, 1996) 110 Stat. 1214. See *Harrington v. Richter*
22 (2011) 562 U.S. 86 (explaining the application of 28 U.S.C. §§ 2254(d)(1), (d)(2), and/or
(e)(1)).

23 ¹⁶ See also N.C. Task Force for Racial Equity in Crim. Just., 2020 Report (2021), at pp.
24 101, at https://ncdoj.gov/wp-content/uploads/2021/02/TRECReportFinal_02262021.pdf
25 [recommending the state supreme court adopt a rule “requiring consistent self-
26 identification of race and gender and complete recordation of jury selection” as necessary
to “[e]nable a more effective appellate review of *Batson* challenges”].

1
2 **III. CONCLUSION**

3 For the foregoing reasons, [Client] moves that this Court, by written questionnaire,
4 ask each member of the venire to provide their race and ethnicity [gender, national origin,
5 etc.] and that the same demographic information be made part of the record as it pertains
6 to the Court, counsel, alleged victims, and witnesses.
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9 Date: [redacted], 2025

Respectfully submitted,
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