

8/13/25

No. 25-455

In The
Supreme Court of the United States

THANH C. TRAN,
Petitioner,

v.

**LIBERTY MUTUAL GROUP INC., LIBERTY
MUTUAL INSURANCE CO., LIBERTY
MUTUAL GROUP ASSET MANAGEMENT
INC., and TERRI Z. CAMPBELL,**
Respondents.

**On Petition for a Writ of Certiorari to the
Massachusetts Supreme Judicial Court
from a Decision of the
Massachusetts Appeals Court**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state appellate court violates the Fourteenth Amendment's Due Process Clause by deeming properly preserved trial errors waived without meaningful explanation, and, if so, whether closing the courthouse door in that manner also abridges the First Amendment right to petition the courts for redress.

PARTIES TO THE PROCEEDING

Petitioner Thanh C. Tran was the plaintiff-appellant in the Massachusetts state courts. Respondents are Liberty Mutual Group Inc., Liberty Mutual Insurance Co., Liberty Mutual Group Asset Management Inc., and Terri Z. Campbell, the defendants-appellees in the courts below. There are no additional parties requiring listing under U.S. Supreme Court Rule 14.1(b).

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INTRODUCTION

Massachusetts operates one of the nation's most unforgiving appellate systems: one that can refuse to review even properly preserved legal errors. At trial, Petitioner raised multiple evidentiary and instructional objections through motions *in limine*, oral argument, and written filings, and renewed them on appeal. The Massachusetts Appeals Court nevertheless declined to address those claims, invoking rigid, arbitrary waiver grounds without meaningful explanation, disregarding its own preservation rules, and in some cases ignoring explicit requests for review.

That refusal implicates core guarantees of the Fourteenth Amendment's Due Process Clause and the First Amendment's Petition Clause. Federal law and nearly every state system recognize that objections may be preserved by context, pretrial rulings, written proposals, or other record-based submissions, without requiring ritualistic phrasing. Massachusetts, by contrast, enforces its waiver doctrine with unusual severity, often rendering procedural safeguards illusory.

This entrenched approach places Massachusetts at the restrictive end of a well-developed split among federal circuits and state courts over the scope of appellate review for unpreserved or contextually preserved errors. Other jurisdictions apply more flexible and predictable standards, ensuring meaningful review where fairness so requires.

This petition seeks no ruling on the merits. It asks only for remand with instructions to review preserved claims under standards consistent with federal practice, national consensus, and constitutional guarantees of fair appellate process.

OPINIONS BELOW

The Massachusetts Appeals Court appellate opinion from final judgment, 105 Mass. App. Ct. 1105 (2024), 248 N.E.3d 676 (Table), 2024 WL 4948578 (No. 2023-P-1075) (App. 3a–11a), is unpublished. The order denying reconsideration (App. 12a) and the Supreme Judicial Court's order denying further appellate review (No. FAR-30140) (App. 12a) are unpublished. The Superior Court's final amended judgment (No. 1784CV01380E) (App. 13a) is unpublished. The Appeals Court's opinion in Petitioner's *interlocutory* appeal, 103 Mass. App. Ct. 1110 (2023), 220 N.E.3d 1267 (Table), 2023 WL 6811043 (redacted) (No. 2022-P-0667) (Sealed-App. 44s–48s, unredacted), is unpublished.

JURISDICTION

The Massachusetts Supreme Judicial Court denied further appellate review on May 15, 2025. This petition is timely under Sup. Ct. R. 13.1. Jurisdiction is invoked under 28 U.S.C. § 1257(a) to review a state-court judgment alleged to violate the Due Process Clause and the Petition Clause.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution, Petition Clause, provides in relevant part: “*the right of the people ... to petition the Government for a redress of grievances.*” U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution, Due Process Clause, provides in relevant part: “*nor shall any State deprive any person of life, liberty, or property, without due process of law.*” U.S. Const. amend. XIV, § 1.

The full texts of these provisions appear in the Appendix (App. 134a).

STATEMENT

This case arises from a civil action filed by Petitioner Thanh C. Tran against Liberty Mutual and a former supervisor, alleging unlawful racial discrimination, retaliation in violation of Massachusetts General Laws Chapter 151B, and failure to pay earned wages. Petitioner alleged that after he filed an internal discrimination complaint alleging disparate treatment on the basis of race, Liberty retaliated against him, culminating in his termination in 2016 for forwarding himself emails the company categorized as “internal,” but that he believed help document the disparate treatment.

Petitioner filed suit in Massachusetts Superior Court in 2017 after first raising his complaint with the state’s anti-discrimination agency. The case proceeded through five years of litigation, including extensive discovery. The trial court denied Respondents’ motions to dismiss, for summary judgment and directed verdict on Petitioner’s claims.

As trial approached and litigation costs mounted, Petitioner’s attorneys moved to withdraw due to a fee dispute. The court allowed the withdrawal over Petitioner’s objection. On *interlocutory* appeal, the Massachusetts Appeals Court upheld the withdrawal under an abuse-of-discretion standard but explicitly found that Petitioner had not rendered a mandatory withdrawal, financially burdened his attorneys, made representation unreasonably difficult, or acted in bad faith, nor was he found to have caused the breakdown in the relationship. Sealed-App. 44s-48s. Although the panel ultimately declined to vacate the

withdrawal order citing the broad deference afforded to motion judges in such matters, it noted that the judge could not properly have deemed the withdrawal “without material adverse effect,” given the timing and lack of continuity of representation. Sealed-App. 46s.

After a prolonged search, new counsel entered an appearance approximately two months before the rescheduled trial date. The trial judge refused to allow any further continuances, forcing replacement counsel to prepare for a complex three-week jury trial on an extremely compressed timeline. App. 104a-105a. On the day before the jury charge conference, Petitioner’s lead trial attorney collapsed in court due to a medical emergency brought on by exhaustion. App. 105a-107a.

Trial commenced in June 2023 and was marked by extensive evidentiary disputes. Petitioner filed pretrial motions seeking to exclude unrelated employment history as character evidence and to preclude lay witnesses from legal conclusions. App. 15a-21a, 32a-35a; Sealed-App. 2s-9s. The judge effectively denied these motions in part, permitting the contested evidence. App. 24a, 40a-41a.

During the charge conference, Petitioner objected to the judge’s explanation of “protected activity” in the retaliation instructions as ambiguous and proposed alternative language. App. 48a-53a. Petitioner also objected to the judge’s legal framing that self-help discovery in this case was not protected, arguing that her standard improperly required employees to be “perfect” by “parsing” each document fragment before applying the reasonableness test. App. 66a-73a.

The final instructions to the jury included the judge's typographical error (substituting "protect" for "protest"), which further distorted the definition of protected activity. App. 51a. When the jury sought clarification, the judge referred them back to the flawed charge. App. 53a-56a. The jury dismissed all claims, finding Petitioner failed to prove unlawful termination, which also foreclosed the derivative wage claim. App. 13a-14a. Petitioner raised these and other issues in a post-trial motion for a new trial, which was denied. App. 108a-109a.

On appeal, Petitioner filed a brief identifying multiple preserved errors, including those raised through evidentiary motions *in limine*, definitive pretrial rulings, and objections apparent from the record or specifically grounded under Massachusetts law. App. 21a-26a, 35a-40a. He challenged the flawed retaliation instruction, which also misapplied the multifactor test from *Verdrager v. Mintz*, 474 Mass. 382, 410-415, n.35 (2016), governing protected self-help discovery. App. 56a-63a, 73a-87a, 117a. He also filed a separate motion requesting that the Massachusetts Appeals Court review unpreserved (or minimally preserved) errors in the interest of justice, including repeated misconduct in closing argument. App. 118a-129a.

During oral argument in the Appeals Court, the justices acknowledged that Petitioner's claims, particularly the *Verdrager* ruling, had potential merit. App. 92a-101a. Nevertheless, the panel focused heavily on whether each objection had been preserved in the precise manner that they preferred. The justices appeared to require not only a timely objection but also proposed alternative jury language, even though the legal basis for Petitioner's

objection was apparent from context. App. 87a-92a.

Despite Petitioner's extensive efforts to preserve his claims, the Appeals Court declined to engage with nearly all of the asserted *legal* errors, citing only general grounds such as the absence of a specifically worded trial objection. App. 3a-11a. It did not apply any defined preservation standard or address the alternative methods Petitioner relied on, such as definitive pretrial evidentiary rulings, contextual clarity under state (and federal) rule of evidence 103(b), or proposed jury instruction revisions. The panel also denied Petitioner's motion without acknowledging the request for merits review. App. 130a.

The final opinion addressed only a few evidentiary points under the deferential abuse-of-discretion standard, and summarily concluded that "none of the preserved claims constitute reversible error." App. 3a. It did not conduct *de novo* review of any legal questions, including whether Petitioner's self-help evidence gathering was protected under *Verdrager*, and instead treated the arguments raised on appeal as waived.

Petitioner's motion for reconsideration in the Massachusetts Appeals Court challenged the panel's waiver rulings and asserted again that several alleged errors had in fact been preserved under Massachusetts law and must be reviewed on the merits. App. 28a-32a, 41a-46a, 64a-65a, 101a-104a. It was denied without further comment. App. 12a.

Petitioner then sought further appellate review in the Massachusetts Supreme Judicial Court ("SJC"), stressing that the Appeals Court had refused to review even clearly preserved legal claims. App. 130a-133a. He cited "constitutional issues", including

“U.S. Fourteenth Amendment, Due Process Clause.” He also noted that no appellate court had addressed whether the Appeals Court’s blanket waiver ruling was proper. The SJC denied that application without comment on May 15, 2025. App. 12a.

Under U.S. Supreme Court Rule 14(1)(g)(i), the federal Due Process Clause question presented was first raised in Petitioner’s Application for Further Appellate Review to the SJC.

REASONS FOR GRANTING THE PETITION

Petitioner now seeks a writ of certiorari to determine whether a state appellate court violates the Due Process Clause and Petition Clause when it refuses to review trial errors adequately preserved under its own rules, on an inadequately reasoned or mistaken finding of waiver. Such a refusal is especially problematic where the waiver doctrine is unusually strict and the extraordinary circumstances here, including involuntary counsel withdrawal, were raised but ignored.

I. MASSACHUSETTS’ REFUSAL TO PROVIDE MEANINGFUL REVIEW OF PRESERVED ERRORS VIOLATES THE DUE PROCESS CLAUSE

Once a state provides for appellate review, the Fourteenth Amendment’s Due Process Clause requires basic procedural fairness on how that review is conducted. State appellate courts cannot arbitrarily or unreasonably refuse to adjudicate preserved legal claims in an evenhanded manner or label them “waived” without meaningful explanation. See *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (due process requires fair appellate procedure);

Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 682 (1930) (state may not cut off a litigant's right to be heard arbitrarily); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (due process guarantees an opportunity to be heard on a claim).

The Constitution's structural promise of fair process extends to appellate proceedings. Once a state provides appellate courts, those courts are bound by law to apply consistent, neutral principles in exercising their discretion to avoid erosion of public confidence in the judicial system. *Evitts*, 469 U.S. at 404 (quoting *Griffin v. Illinois*, 351 U.S. 12, 17 (1956), that a state "violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved"); *Rogers v. Tennessee*, 532 U.S. 451, 477–78 (2001) (Scalia, J., dissenting) (emphasizing the Due Process Clause forbids appellate courts from abandoning established legal frameworks in ways that fundamentally alter judicial roles and undermine fair process). The Massachusetts Appeals Court committed the very structural failure Justice Scalia warned against, refusing without explanation to review multiple legal errors preserved in full compliance with the state's rules. This elevation of form over substance deprived Petitioner of meaningful appellate review, undermined the administration of justice, and insulated serious trial errors from correction.

A. Improper Lay Opinion on Ultimate Legal Issue

Petitioner properly preserved his challenge to the admission of lay witness opinion on the ultimate issue of racial discrimination. Before trial, Petitioner filed a motion *in limine* to exclude coworker

testimony opining that the supervisor “was not” racist, on the ground that such statements constitute improper legal conclusions. App. 15a-17a. At oral arguments, the judge ruled that witnesses could describe their observations, but not testify about whether they were “discriminated against.” App. 18a-19a. This initially adhered to the correct legal principle. Midway through the hearing, however, the judge expanded the ruling to permit lay testimony about a witness’s “understanding” of why they were treated a certain way. App. 20a. Petitioner promptly objected for lack of foundation, noting that the question would invite speculation about the witness’s understanding or motive, but he was overruled. *Id.* The subsequent written ruling denied Petitioner’s motion in part, despite formally stating it was “ALLOWED.” App. 24a.

Subsequently, Petitioner submitted succinct objections to the employer’s designated deposition excerpts in the narrow margins of the transcript, as required for pre-recorded testimony. App. 24a-26a. The court ruled on these objections before admitting the video to the jury. Four of the disputed excerpts included the opinion that *she wasn’t racist*, but the judge ruled them admissible. *Id.* No explanation was provided for this abrupt reversal from the judge’s prior pretrial rulings. Respondents then elicited similar lay-opinion testimony from other company employees, again opining on whether discrimination occurred, with no objection. App. 27a-28a. Petitioner renewed his argument on this issue post-trial, but it was denied. App. 108a-109a.

In a one-line dismissal, the Appeals Court asserted that Petitioner was raising “various new arguments against the admission of this testimony,

but none of those arguments were raised in the Superior Court.” App. 7a. However, Petitioner consistently objected starting from pretrial to lay-opinion conclusions of discrimination. After the court reversed its pretrial ruling mid-trial, similar lay-opinion testimony came in live with no further objection, underscoring the preservation confusion created by the court’s own contradictory rulings. App. 27a-28a. By refusing to acknowledge preservation and presumably faulting Petitioner for following inconsistent direction from the judge, the panel deprived him of review, violating due process.

B. Prejudicial Character Evidence of Collateral Employment History

Petitioner took all necessary steps to preserve his objection to Respondents’ use of collateral employment evidence as improper character impeachment. He filed two pretrial motions *in limine* to exclude any insinuation about job performance and other history at previous or subsequent employers, arguing that such evidence would serve only to suggest a propensity for poor performance or other misconduct. Sealed-App. 2s-9s; App. 31a-34a. Petitioner consistently framed his objection as one based on character evidence, both in his paper filings and during argument. The trial judge denied both motions, stating that Petitioner “may be cross-examined relative to his work history.” App. 40a. Yet this was adequate to preserve the issue for appeal when the disputed evidence was later admitted.

At trial, Petitioner objected at sidebar on relevance and prejudice grounds during his cross-examination when his collateral employment was offered to the jury. Sealed-App. 10s-36s. These objections encompassed the same character-based

grounds raised at pretrial. Although he did not repeat the word “character” during cross-examination, the judge’s response at sidebar: “If his other bosses had similar reviews, it’s fair game”, confirmed that the judge understood the objection as invoking the same grounds already ruled on. Sealed-App. 11s-12s. Respondents’ counterarguments confirm they also understood the objection’s basis. Id. Pressing further on terminology would have been futile. Petitioner was clearly attempting alternative legal phrasing rather than changing his position.

The Massachusetts Rules of Evidence, like its federal counterpart, treat character-based testimony as a subset of relevance-based exclusions under Article IV, *Relevance and Its Limits*. Accordingly, an objection on “relevance” grounds may encompass a character-based challenge, especially where the proffered evidence involved the party’s prior or subsequent conduct. This satisfies Mass.G.Evid. § 103(a)(1)(B), which parallels its federal analogue: an objection is preserved if “the specific ground was apparent from the context.” Both the judge and Respondents had full opportunity to respond.

Yet the Appeals Court left the character-evidence issue concerning his collateral employment history unaddressed and offered no analysis of the multiple procedural mechanisms by which the issue had been preserved, having subsumed them all within a blanket ‘waiver’ ruling. It did not discuss the pretrial motions, the sidebar objection, or the judge’s definitive rulings, all of which were flagged in the appellant brief. App. 35a-39a; Sealed-App. 38s-39s. Instead, the panel’s opinion relegated the matter to a footnote, referring to it as a mere “document,” labeling the objections “not preserved,” and ignoring

the voluminous disputed evidence. App. 8a, n.5.

Even assuming the panel's conclusion that Petitioner's character-based objections were waived, his repeated objections on "relevance" grounds independently required appellate review. Sealed-App. 11s, 13s. The written opinion mischaracterized those objections, suggesting none occurred until the hearsay objection that led to the disputed document's removal. App. 8a, n.5; Sealed-App. 21s. In reality, counsel had already objected to the same collateral line of questioning three times earlier in cross-examination, then firmly renewed: "we object to this line of questioning." Sealed-App. 19s. The court overruled once again, and Respondents continued questioning on unrelated employers. Even after the document's removal, Respondents' cross-examination using the disputed evidence nonetheless persisted. Sealed-App. 21s-36s.

The panel repeatedly cited to *Kennie v. Natural Resource Dept. of Dennis*, 451 Mass. 757, 759 n.12 (2008), noting "[o]ur review is limited to issues raised before the Superior Court judge." App. 7a. However, Petitioner here clearly raised objections pretrial, during trial and even post-trial, as detailed in his appellant brief. App. 36a-41a; Sealed-App 38s-39s. He provided additional preservation support in his motion for reconsideration. App. 41a-46a.

The judge's overruling of these objections encouraged a sustained and lengthy line of questioning about Petitioner's performance and other character-based propensity evidence at numerous collateral employers, using both documents and narrative to suggest a pattern of unfitness. Sealed-App. 10s-36s. Although Petitioner renewed his objections in many instances, he was not required to

object further after a definitive ruling, similar to his pretrial objections to improper lay opinion. *Tenczar v. Indian Pond Country Club*, 491 Mass. 89, 97–98 (2022) (“counsel ‘had given up’...after having received a number of adverse rulings”). Respondents then repeated the same disputed evidence at closing argument without further objection. Sealed-App. 37s.

By ignoring the sequence of rulings and objections, the Appeals Court not only distorted the record but denied Petitioner the very procedural safeguards that appellate review exists to protect.

C. Misstatement of Retaliation Instructions

Petitioner’s challenge to the jury instructions was preserved. He consistently argued that the retaliation instruction was legally erroneous because it conflated two distinct protected activities: (i) complaining about discrimination, and (ii) engaging in reasonable self-help discovery.

Before the charge conference, Petitioner submitted proposed instructions and a proposed verdict form to clarify this distinction. App. 46a-48a. At the conference, he objected to the judge’s draft instructions which omitted the distinction, warning that the jury might not clearly understand what qualified as “protected activity.” App. 48a-50a. Both the judge and Respondents acknowledged this concern. Petitioner submitted corrected instructions electronically. App. 50a-51a.

When finalizing the written charge, however, the judge made a typographical mistake that altered the scope of retaliation, substituting “protest” for “protect.” App. 51a. Petitioner was unaware of this error before deliberations began. When the jury later sent a note showing confusion about protected

activity, Petitioner renewed his objection and requested a clarifying instruction. This again preserved the issue as a legal error. App. 53-56a. The judge refused and directed the jurors back to the flawed charge, despite the totality of circumstances of Petitioner's prior proposals and objections. *Id.*

On appeal, the state's appellate court wrote that "the employee did not object to the jury instructions." App. 5a. That opinion clearly contradicts the trial transcript, as Petitioner argued in his reconsideration motion. App. 63a-65a. Invoking waiver, the panel limited its review to the judge's response to the jury question and ignored the underlying instructional error. In doing so, they improperly applied a deferential abuse-of-discretion review to that response, without ever addressing whether the instruction misstated the law. App. 5a-6a. But the instructional error was preserved and warranted *de novo* review. By misapplying the standard, the Appeals Court deprived Petitioner meaningful review of a preserved legal error.

D. Erroneous Self-Help Discovery Ruling

1. Objection Was Timely and Directed at Final Instruction

The trial court's jury instruction on self-help discovery misstated Massachusetts anti-retaliation law and was properly objected to. Petitioner's first trial counsel, relying on an overbroad "totality of the conduct" theory, failed to preserve the issue. App. 69a. But the next day, Petitioner's second counsel raised a timely and legally sound objection to the judge's final instruction. App. 69a-72a. On appeal, the panel conflated these distinct objections. App. 4a.

The transcript confirms the sequence. Even

before either of Petitioner's trial counsel spoke, Respondents argued that "[f]our out of the five board slides" in a self-help-discovered document was irrelevant. App. 66a-67a; Sealed-App. 40s-43s. The judge accepted that "portions"-based framing and incorporated that legal distinction into the final jury charge. App. 70a, 72a-73a. In response, Petitioner's second counsel objected that the instruction would improperly "require an employee to be perfect with what they do and what they send to themselves." App. 70a-71a. That objection was timely, legally grounded, and directly responsive to the judge's revised formulation from Respondent's argument.

Although the judge initially declined to give a *Verdrager*-based instruction as a matter of law, she ultimately adopted a narrower, fact-specific test that tracked the Respondents' parsing theory. Petitioner's objection to that final instruction preserved the correct document-by-document legal standard.

The "perfect[ion]" objection was contemporaneous with the final instruction and renewed before deliberations when Petitioner again challenged the "parsing" of protected conduct into document fragments. App. 72a. These objections satisfied preservation law, including Mass.R.Civ.P. 51(b) and Mass.G.Evid. §103(a)(1)(B), because they were timely and clearly directed at the judge's legal framework, including her "portions" formulation. App. 70a.

2. Objections Preserved Multiple Legal Errors

Together, the "perfect[ion]" and "parsing" objections preserved multiple distinct errors. **First**, they alerted the judge that dividing a document into "portions" contradicted *Verdrager*'s document-by-

document standard. **Second**, they argued that imposing a “perfect accuracy” requirement for legal relevance rather than considering the employee’s good-faith belief, violated the reasonableness standard governing self-help discovery. *Verdrager*, 474 Mass. at 410. **Third**, they implicitly challenged the court’s truncation of the *Verdrager* test to just two of seven required factors. App. 80a-83a.

The judge had a fair opportunity to correct the error. *Commonwealth v. Lenane*, 80 Mass.App.Ct. 14, 19 (2011) (“adequacy of an objection to preserve a claim of error must be assessed in the context of the trial as a whole”); *Selmark Assocs. v. Ehrlich*, 467 Mass. 525, 547 n.37 (2014) (“various ways” to put the judge “on notice of the issue” without formal repetition or phrasing); *Commonwealth v. Hollie*, 47 Mass.App.Ct. 538 n.3 (1999) (“counsel need not achieve perfection in identifying every impropriety or in offering an alternative so long as the objection alerts the judge to the grounds”).

Preservation does not require perfect articulation. Yet just as the trial judge imposed a ‘perfect’ legal standard on the employee’s conduct, the Appeals Court imposed a ‘perfect’ preservation standard on the litigant’s conduct, rejecting timely, specific objections not because they were late or vague, but for not precisely mirroring every sub-argument later raised on appeal. This misapplication of preservation doctrine violated the Due Process Clause.

3. Appeals Court Refused to Review a Preserved Instructional Error

The panel mischaracterized the record. It conflated Petitioner’s earlier “totality of the conduct” argument with his latter “perfection” objection,

ignored his “parsing” objection, evaluated the issue with his arguments waived, and concluded “no *preserved* error.” (emphasis added). App. 4a-5a. This allowed the court to sidestep the controlling legal question without meaningful review.

At oral argument, the panel compounded their preservation error by suggesting that counsel was required *both* to object *and* to propose an alternative instruction, contrary to Mass.R.Civ.P. 46, which states only one is sufficient. App. 88a-89a. The obligation to review is not contingent on perfect phrasing or sub-issue labeling.

Since the judge’s final instruction misstated a pure question of law, the panel was obligated to review it *de novo*. See *Commonwealth v. Va Meng Joe*, 425 Mass. 99, 102 (1997) (appellate courts may resolve preserved legal issues on any “grounds... supported by the record”); *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (when the correct legal rule is apparent, an appellate court should apply it rather than accept an erroneous premise framed by the parties). Here, a *de novo* approach required balancing all seven factors under the state’s self-help discovery framework, but the panel did not undertake that, undermining meaningful appellate review and violating the Due Process Clause. See *Verdrager*, 474 Mass. at 410-415.

E. Panel Ignored Preserved *Interlocutory* Objections Without Justification

Petitioner preserved several pretrial evidentiary objections by raising them in *in limine* motions, cited them in his appellate filings, and included the rulings in the addendum, under Mass.R.App.P. 16(a)(13)(B), and 18(a)(1)(A). App. 24a-26a, 40a. This

allowed for review of *interlocutory* motions after final judgment. Yet the panel ignored these requests, offered no explanation, and remained silent when the omission was raised again in Petitioner's motion for reconsideration. App. 12a, 32a, 45a.

That disregard, despite Petitioner's strict compliance with Massachusetts rules, exemplifies the broader structural problem of appellate courts ignoring preserved legal errors without explanation, which is an exercise of unbounded judicial discretion. No government actor's discretion is unlimited under our Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–374 (1886) (“Though the law itself be fair on its face...if it is applied and administered by public authority with...an unequal hand...the denial of equal justice is still within the prohibition of the Constitution.”).

II. MASSACHUSETTS' WAIVER DOCTRINE IS AN OUTLIER AMONG FEDERAL AND STATE COURTS

Massachusetts' rigid waiver regime stands virtually alone in denying review of preserved civil errors, even in serious or constitutional cases. Across the country, federal and other state appellate courts recognize safety valve doctrines (such as plain error, fundamental error, or miscarriage-of-justice exceptions) to reach unpreserved errors. Massachusetts provides no comparable safeguard, placing it at odds with prevailing norms of appellate fairness. The Due Process Clause requires that once a state provides an appeal, it must apply preservation rules in a consistent and reasoned manner, and not arbitrarily refuse to review preserved errors. *Evitts* 469 U.S. at 404–05 (1985).

A. Discretionary Review Requires Evenhanded Application

States may certainly adopt rules surrounding preservation standards. But if appellate courts have discretion in applying such rules, that discretion must be exercised within principled bounds. A regime where appellate courts reject preserved claims without meaningful explanation is fundamentally inconsistent with basic protections of the Due Process Clause.

The waiver practice exemplified here lacks those necessary safeguards. As described, the Massachusetts Appeals Court repeatedly invoked “waiver” to bypass legal objections that were in fact preserved under the state’s own rules. It granted review only on certain issues subject to the forgiving abuse-of-discretion standard, while labeling legal issues as waived rather than applying *de novo* review. App. 3a-11a. This approach insulated the trial court’s most serious legal missteps from appellate scrutiny. Such unbounded discretion is a structural failing, not a mere exercise of parsimony.

When courts have broad discretion, the Constitution requires that it be exercised according to consistent and impartial principles, not arbitrarily or with unjustified inequality. See *Yick Wo v. Hopkins*, 118 U.S. 373, 373–74 (1886); *Caperton v. A.T. Massey Coal*, 556 U.S. 868, 883–84 (2009). This Court has said as much in contexts like selective prosecution and judicial recusal. A state appellate system that permits courts to skip over preserved questions of law is incompatible with such principles.

Such a system fosters perceptions of unequal justice and shields important claims from review, particularly when the issues are ones that courts

may find inconvenient to resolve. Discretion itself is not the enemy; it is the unreasoned, opaque exercise of discretion that the Due Process Clause forbids. This Court should reaffirm that appellate waiver doctrines must be applied in a reasoned, evenhanded way, and not wielded as a discretionary blank check to avoid addressing claims that demand review.

B. Massachusetts Deviates from the Recognized Practice on Civil Waiver

Even where an issue is not technically preserved, every federal circuit recognizes some form of plain-error review in civil cases under uniform federal rules. Federal Rule of Evidence 103(e) permits courts to notice “plain errors” related to evidentiary disputes while Federal Rule of Civil Procedure 51(d)(2) allows review of “plain error in the instructions”. Both are intended to protect substantial rights even if the issue was not properly preserved. And in *Hormel v. Helvering*, 312 U.S. 552, 557–60 (1941), this Court rejected a “rigid and undeviating” preservation rule where adherence would defeat the ends of justice, remanding for consideration of an unraised evidentiary issue.

Although circuits differ in the breadth of plain-error application, they share a basic willingness to correct non-preserved fundamental errors even in civil matters. For instance, the Ninth Circuit in *Hemmings v. Tidyman’s* (285 F.3d 1174, 1193–95 (9th Cir. 2002)) conducted full review of unobjected to misconduct in closing argument, even though it ultimately found prejudice was insufficient to warrant reversal. By contrast, Petitioner received no merits review on legal errors even though the panel cautiously framed its opinion that “none of the preserved claims constitute reversible error.” App.3a.

Most states likewise have appellate rules or doctrines enabling review of prejudicial errors not objected to below, including for civil cases. See e.g.,:

- **Florida** allows review of unpreserved errors beyond “fundamental error” when trial fairness is substantially compromised. See *Murphy v. Int'l Robotic Sys.*, 766 So. 2d 1010, 1020-21 (Fla. 2000) (reversing for improper closing argument despite no objection).
- **California** permits review of unpreserved issues when facts are undisputed or for pure questions of law. *Hale v. Morgan*, 22 Cal. 3d 388, 394, 404 (1978) (reversing excessive statutory penalty on due process grounds despite no objection).
- **Utah** permits review for plain error or manifest injustice in civil cases. Utah R.App.P. 24(a)(5)(B) allows appellants to file “statement of grounds for seeking review of an issue not preserved”.
- **Illinois** authorizes review of “plain error” and “defects affecting substantial rights” under Ill.Sup.Ct.R.615(a). *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 855-856, 858 (2010) (reviewed improper closing argument without objection despite insufficient prejudice to reverse).
- **Alaska** permits review of “plain errors affecting substantial rights although they were not brought to the attention of the court”, including for civil matters. Alaska Rule of Evidence 103(d).
- **Virginia** allows review of unpreserved legal errors “for good cause shown or to attain the ends of justice.” Va.Sup.Ct.R. 5A:18. *Herring v. Herring*, 33 Va. App. 281, 286–89 (2000) (applying “ends of justice” exception to review and remand child-support ruling).

- **New Mexico** permits review of unpreserved issues under NMRA Rule 12-321(B)(2) for “general public interest”, “plain error”, “fundamental error” or “fundamental rights of a party”, which are not excluded in civil cases.
- **Colorado** applies plain error review where trial fairness was seriously affected. *Blueflame Gas v. Van Hoose*, 679 P.2d 579, 586–90 (Colo. 1984) (reversing verdict where jury instruction misstated controlling law; applying plain error despite insufficiently preserved objection).

By contrast, Massachusetts, with their notably high appellate volume, provides no general safety valve for unpreserved errors for civil litigants. In criminal matters, Massachusetts courts will correct errors that create a “substantial risk of a miscarriage of justice” even absent objection, but they reject an analogous doctrine for civil appellants. See *Commonwealth v. Alphas*, 430 Mass. 8, 13 (1999) (reaffirming that unpreserved errors in criminal cases may be reviewed for miscarriage of justice); *Wahlstrom v. JPA IV Management Company*, 95 Mass.App.Ct. 445, 449 (2019) (“unpreserved claims of error that do not touch on jurisdiction are waived for purposes of appeal in almost all circumstances in a civil case”); Mass.G.Evid § 103(e) (miscarriage-of-justice review available only in “criminal and sexually dangerous person cases”).

Massachusetts nominally provides for “extraordinary circumstances” review. Yet in practice, this exception is illusory and largely theoretical. Petitioner invoked this exception in both his Appeals Court brief and a separate motion, pointing out that the errors were fundamental and the circumstances extraordinary. See App. 109a-

129a; see also *Filippone v. Mayor of Newton*, 16 Mass. App. Ct. 417, 421 (1983). The panel denied relief without even acknowledging Petitioner's request, though the errors at issue were potentially case-dispositive. App. 130a. Despite this Court's admonition in *Hormel* that rigid preservation rules must yield to the demands of justice, Massachusetts not only enforces inflexible waiver doctrines but also declines to engage with requests for extraordinary review (see Argument IV, *infra*).

Nor is this merely a one-off issue. Massachusetts appellate courts handle one of the nation's heaviest caseloads, creating a strong incentive to dispose of cases quickly by invoking waiver without thorough analysis. Administrative convenience, however, cannot justify ignoring meritorious issues. Critical claims risk being swept aside without meaningful consideration under the current regime.

C. Massachusetts Applies Its Waiver Doctrine Inconsistently

Even within Massachusetts, appellate panels apply inconsistent preservation standards, further undermining predictability and fairness. The state recently aligned more closely with longstanding federal standards after *Commonwealth v. Grady*, 474 Mass. 715, 719 (2016), clarifying that objections at pretrial adequately preserve issues in criminal matters. Yet they have hesitated to extend this clarity to civil litigation, perpetuating confusion over preservation requirements. In *Slesar v. Goldman*, 101 Mass.App.Ct. 1110, n.5, 190 N.E.3d 1119 (2022) (Table), 2022 WL 2184560 (unpublished), the Appeals Court noted that a motion *in limine* preserves an issue for appeal in criminal cases, but

its application in civil cases has not been expressly resolved. Despite the absence of a trial objection, the panel treated the motion *in limine* as sufficient to preserve the issue and decided it on the merits, ultimately affirming the trial court's ruling. By contrast, in Petitioner's case, where the preserved error was more consequential, the panel invoked waiver. App. 7a-8a. This included Petitioner's pretrial motions on lay-opinion testimony and collateral employment evidence, both of which should have preserved the issues for the duration of trial, even when there was no or inadequate objection at trial. See *supra* I(A) and I(B). Such inconsistent treatment underscores the arbitrary application of the waiver doctrine in Massachusetts civil appeals.

Massachusetts' uneven implementation of its Rule § 103(b) to civil appeals not only conflicts with the federal counterpart, but its inconsistent enforcement and ambiguous rationale also undermines the procedural safeguards guaranteed by the Due Process Clause. By contrast, Federal Rule 103(b) reflects the principle that demanding a redundant objection after a definitive *in limine* ruling for both civil and criminal matters alike is an empty formality, serving no purpose except to create a waiver trap. See *Proctor v. Fluor Enters.*, 494 F.3d 1337, 1350 (11th Cir. 2007) (definitive pretrial ruling on a motion *in limine* preserved the issue for appeal without further objection).

Massachusetts's waiver rules are unpredictably applied, leaving parties unsure whether a pretrial objection preserves the issue. This uncertainty disproportionately harms less-sophisticated litigants, who may not anticipate that an objection explicitly overruled before trial might nonetheless be deemed

waived for not being re-uttered at trial, despite evidentiary rules stating otherwise. *Pro se* and under-resourced parties further face practical challenges navigating complex appellate rules.

Moreover, litigants and attorneys with disabilities or language barriers face special disadvantages when required to recognize and restate objections on the spot each time the same evidence is introduced. Unlike the federal courts (and nearly all states) that allow issues to be preserved via motions *in limine*, Massachusetts litigants in civil cases face a trap: even when an evidentiary issue is argued and decided before trial, the Appeals Court may refuse review on arbitrary and inconsistent grounds.

This Court need not manage state dockets or second-guess routine rulings; it need only ensure that once a state provides appellate review, it applies its own rules uniformly and in good faith. The Due Process Clause does not permit a state to effectively close the appellate courthouse door on a litigant who complied with those rules and raised serious legal errors, particularly when those errors implicate statutory or constitutional rights. *Evitts v. Lucey*, 469 U.S. 387, 405; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678–79. Under the prevailing practice in nearly all other jurisdictions identified in *supra* II(B), Petitioner's preserved claims would have received meaningful merits review. Massachusetts' refusal to do so violates the baseline fairness the Constitution requires.

III. THE WAIVER DOCTRINE BURDENS ACCESS TO THE COURTS IN VIOLATION OF THE PETITION CLAUSE.

From the founding of our Republic, the right to seek redress of grievances embodied in the Petition Clause has been understood to include access to courts. The First Amendment guarantees “the right of the people... to petition the Government for a redress of grievances,” which includes a meaningful right of access to the courts. *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510-511 (1972). This Court has long held that states may not erect procedural barriers that arbitrarily block litigants from obtaining adjudication of their claims. See *Bounds v. Smith*, 430 U.S. 817, 825 (1977) (“a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts”); see also *Christopher v. Harbury*, 536 U.S. 403, 414 (2002) (recognizing access-to-courts claims where official conduct prevents adjudication of meritorious legal claims).

Although Petitioner did not expressly frame this claim under the Petition Clause below, this Court may review closely related constitutional theories arising from the same facts, particularly where the underlying determination is intertwined with the merits. See *Perittu v. Richards*, 605 U.S. ___, slip op. at 10–12 (2025) (recognizing that when a threshold determination is intertwined with the merits, the usual practice is to decide it on the merits stage across a variety of contexts). The Petition Clause claim here rests on the same record as the preserved Due Process Clause issue: the Appeals Court’s refusal to review preserved errors. As in *Harbury*, 536 U.S. at 415–16, where this Court recognized that procedural barriers can deprive a litigant of any forum to vindicate federal rights, that refusal here makes the Petition Clause injury coextensive with the due process injury.

This is not a hypothetical or trivial concern. It strikes at the heart of accountability in the justice system. The Massachusetts practice in civil cases, if tolerated, turns the right to petition the judiciary into a conditional privilege, to be granted or withheld at the whim of a court's unexplained decision. That approach cannot be squared with the First Amendment. Procedural arbitrariness that deprives a litigant of any forum for vindicating fundamental rights is itself a constitutional injury. Here, Petitioner's claims received no real hearing on appeal because of the state court's capricious use of waiver. That outcome devalues the Petition Clause's protection of courthouse access.

Granting certiorari would reaffirm that state procedures, whether at trial or on appeal, cannot nullify federal rights by barring access to a forum. While states retain discretion to manage dockets and enforce rules, they may not use it to unreasonably deny litigants a reasonable avenue to present preserved claims for review on the merits. The Petition Clause guarantees access to the courts; not a theoretical right, but a practical one. When appellate courts invoke unjustified procedural barriers to avoid adjudicating substantial claims, they render the right to petition illusory. This Court's intervention is needed to ensure access to justice remains a constitutional reality, not a discretionary favor.

IV. EXTRAORDINARY CIRCUMSTANCES WARRANT INTERVENTION

This case's exceptional posture shows why waiver rules should have been relaxed, or at a minimum not held to standards of perfection, as Petitioner faced trial under circumstances that compromised fairness

but were disregarded by the appellate courts. These unusual circumstances help explain why some issues were not raised, or not re-raised, with precision at trial under the rigid yet inconsistent Massachusetts preservation expectations. Enforcing waiver in the perfunctory manner adopted by the state's Appeals Court for this situation, is therefore unfair.

These circumstances are not unique to Petitioner. Other litigants, especially those with limited resources or late changes in counsel forced on them, face similar structural disadvantages that prevent timely preservation and foreclose meaningful appellate review. Petitioner's attorneys, who were familiar with the case from summary judgment, discovery and pre-trial conference proceedings, were allowed to withdraw on the eve of trial. Sealed-App. 44s. This despite Petitioner's objection and the Appeals Court's own suggestion that Petitioner was not at fault for any breakdown in the attorney-client relationship. Sealed-App. 45s-47s. The withdrawal left Petitioner scrambling to find new representation. His new counsel entered only about two months before trial, which, for a complex multi-week trial, is a dangerously short lead time. The trial court ruled out any further continuance for trial preparation. App. 104a-105a. The predictable result was that Petitioner went to trial with an attorney who barely had time to familiarize himself with the voluminous record and legal issues. Indeed, on the eve of the charge conference, that overburdened attorney collapsed in court from exhaustion. App. 105a-107a.

These circumstances created a structural disadvantage for Petitioner akin to having no counsel at all in a criminal trial. *Cf. Powell v. Alabama*, 287 U.S. 45, 57-58 (1932) (recognizing that denying

counsel sufficient time to prepare can be as devastating as denying counsel entirely). While the Constitution does not guarantee counsel in civil cases, it does guarantee every litigant an opportunity to be heard “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, Petitioner was effectively deprived of that meaningful opportunity. Through *no fault of his own*, he went to trial without the team that developed his case, relying instead on a replacement forced to litigate on the fly. When a *pro se* litigant, or one functionally deprived of effective representation through no fault of their own, is denied appellate correction of serious errors of law, it raises core concerns about equal access to justice. That breakdown undermines the adversarial system’s structural safeguards.

The consequences manifested throughout the trial. Numerous errors and irregularities occurred that might well have been handled differently had Petitioner’s original counsel (fully versed in the facts and law) been present. Some objections were not made contemporaneously, or not made with the ideal, comprehensive specificity preferred by the panel, because substitute counsel lacked the procedural background and preparation time. App. 109a-114a. Opposing counsel capitalized on the situation, engaging in tactics (like the improper closing argument) that drew no objection. App. 111a-112a, 123a-129a. Important nuances, such as the subtleties of the *Verdrager* factors in the jury instruction, may not have been fully appreciated by hastily prepared counsel. App. 110a-111a

In short, the procedural unfairness at trial was a

direct product of Petitioner's extraordinary circumstances. The same circumstances then led the Appeals Court to conclude that issues were "waived." Petitioner's trial was unfair due to the lack of continuity in representation, yet on appeal he was penalized for counsel's imperfect issue preservation. This litany of unobjected or, in the panel's view, insufficiently objected errors is not cited to relitigate them, but to show how the absence of continuous, prepared representation caused the lapses that the Appeals Court deemed "waivers."

Petitioner explicitly alerted the appellate courts to this *no-win* scenario. In his motion for discretionary review, he argued that rigid, flawless-preservation expectations would unfairly punish him for the disruption caused by counsel's withdrawal and urged consideration of the totality of circumstances. Both appellate courts declined to address the issue. The Appeals Court offered no acknowledgment, and the SJC denied review without comment. App. 12a, 130a.

The cumulative effect collapsed the usual functioning of the adversarial and appellate process. This is exactly the kind of scenario that raises a federal Due Process Clause concern. *Brinkerhoff-Faris*, 281 U.S. at 682 (states may not deprive a person of all existing remedies for the enforcement of a right unless given some real opportunity to protect it); *Lee v. Kemna*, 534 U.S. 362, 375-376 (2002) ("firmly established and regularly followed" state procedural rules may be inadequate to bar review in extraordinary cases). The combination of an unfair trial and an unreasoning refusal to consider that unfairness on appeal presents a *structural* problem appropriate for this Court's intervention.

The Due Process Clause and the Petition Clause both converge on one basic promise that courts must be open and fair to those who seek justice. When a litigant like Petitioner finds himself in an impossible position through events outside his control, the courts have a duty to *respond* with a meaningful opportunity for redress, not to hide behind procedural bars. The Constitution does not permit a litigant to be set up for failure at trial and then told that failure is final because of procedural default. Fundamental fairness required more from Massachusetts courts and warrants this Court's voice to correct such injustice in the face of extraordinary disadvantage.

V. MASSACHUSETTS IGNORED MERITORIOUS AND PREJUDICIAL ERRORS

While this petition does not ask this Court for a merits review, the gravity of the errors that went uncorrected reinforces the need for this Court's intervention. Each of the errors unreviewed by the Appeals Court was independently significant and prejudicial. This underscores that the appellate court's waiver ruling did not merely overlook harmless matters. It insulated impactful mistakes that affected the trial's outcome, and deprived Petitioner of a fair proceeding. They distorted the evidentiary landscape, misled the jury on the governing legal standard, and undermined confidence in the verdict's reliability.

The Appeals Court acknowledged the legitimacy of the underlying issues which they designated as waived through their conclusory comments that "none of the *preserved* claims constitute reversible

error" (emphasis added), and Petitioner's "appeal is far from frivolous." App. 3a, 11a, n.9. The following errors, left unremedied, inflicted serious prejudice:

A. Improper Lay Opinion on Ultimate Legal Issue

The trial court abdicated its gatekeeping role by allowing Petitioner's coworkers to offer conclusory testimony that his supervisor "wasn't racist" and therefore no discrimination occurred. App. 25a-28a. These statements allowed lay witnesses to essentially "vote" on a finding of discrimination, improperly usurping the jury's constitutional function. By permitting coworkers to vouch for the employer's intent, the court distorted the trial's truth-seeking process. The jury was invited to substitute these unsupported personal opinions for its own legal judgment. That breakdown in evidentiary control undermined the structural integrity of the adjudicatory process. See *Torres v. County of Oakland*, 758 F.2d 147, 150–52 (6th Cir. 1985) (lay testimony asserting employer's racial motivation was inadmissible).

In a workplace bias trial, labels like "racist" convey legal but "inadmissible...empty conclusions" about intent. *Bulwer v. Mount Auburn Hosp.*, 86 Mass.App.Ct. 316, 354 (Sikora, J., concurring and dissenting in part)(2014) (quoting *Caban Hernandez v. Philip Morris*, 486 F.3d 1, 8 (1st Cir. 2007)). Jurors may evaluate whether a witness saw or heard racially insensitive conduct, but may not be told how to interpret the observation. To say 'I never heard her use a slur' is proper; to say 'She wasn't racist' crosses the line. That shift from sensory observation to legal conclusion is precisely what the *Bulwer* court condemned. It allowed jurors to conflate lay opinion

with legal instruction, obscuring their duty to independently apply the law. Mass.G.Evid. § 701(a) (lay opinion must be “rationally based on the witness’s perception” and not a legal conclusion)

This constitutional injury was compounded by the trial court’s exclusion of Petitioner’s expert, a tenured social psychology professor specializing in discriminatory bias. App. 23a. The jury was thus left with unqualified lay opinion rather than expert testimony on the core legal issue. That evidentiary asymmetry deprived jurors of the tools needed to evaluate motive and encouraged unchecked speculation. Allowing conclusory lay opinions while suppressing qualified expert input undermines the adversarial process.

B. Prejudicial Character Evidence of Collateral Employment History

The trial court permitted selective evidence about Petitioner’s unrelated job history, inviting the jury to infer he was generally problematic or untrustworthy. App. 40a; Sealed-App. 10s-37s. This framing distorted the factfinding process. It encouraged the jury to discredit Petitioner’s claims not based on the legally admissible evidence in this case, but because he was portrayed as someone who had issues elsewhere. The resulting prejudice went to the heart of the jury’s impartiality. See *Old Chief v. United States*, 519 U.S. 172, 180–82 (1997) (recognizing that propensity-related evidence, even when proffered for a non-propensity purpose, can unduly sway a jury and must be carefully controlled to ensure fairness).

This is not merely a matter of evidentiary misjudgment. Courts routinely exclude collateral employment history under Rules 403 and 404 to

preserve the integrity of the adjudication. See, e.g., *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1510–12 (D.C. Cir. 1995) (excluding prior job-performance records in a discrimination case as improper propensity evidence, holding plaintiff's employment challenges inadmissible under Rule 404(a) to show she "acted in conformity therewith" at her new job; evidence was also irrelevant for impeachment). These safeguards reflect more than a rule of evidence. They serve as structural protections to prevent juries from deciding cases based on personal disapproval rather than law.

Those protections failed here. The trial court's refusal to exclude this character evidence, or even issue a limiting instruction, allowed the jury to assess Petitioner's legal claims through an improper lens. That skewed the factfinding process in a way that the Due Process Clause cannot tolerate. The jury was not weighing relevant facts, but was invited to disbelieve Petitioner based on the perception that he was problematic. That kind of error undermines the constitutional function of the jury and deprives the litigant of a reliable adjudication on the merits.

C. Misstatement of Retaliation Instructions

The retaliation instruction misrepresented Massachusetts law and obscured the two distinct legal theories Petitioner advanced for protected activity: (1) internal complaints of discrimination, and (2) oppositional conduct through reasonable self-help discovery. Massachusetts precedent permits either to independently support liability under M.G.L. c. 151B, § 4(4). But the instruction collapsed these separate theories into a single standard, implying that Petitioner had to prove both to prevail.

This conflation struck at the heart of the jury's deliberation, as supported by their question to the court. App. 53a-56a. A central issue was whether Petitioner's self-help discovery met the legal standard for protected activity, an element the employer conceded was the reason for termination. But the judge's instruction misled the jury by collapsing that inquiry with the internal complaint component, which required a separate finding about retaliatory motive. That legal error substantially raised the bar for liability and tilted the factfinding process in the employer's favor, particularly disadvantaging the self-help discovery theory governed by *Verdrager*'s distinct framework.

Errors like this do more than misstate the law; they collapse critical legal distinctions that guide a jury's decision-making. Courts have long emphasized that retaliation claims require instructions that clearly distinguishes the multiple forms of protected activity at issue. See *Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. 107, 121–22 (2000). When that safeguard is removed, as here, the jury's constitutional function is undermined and the verdict becomes unreliable.

D. Erroneous Self-Help Discovery Ruling

The trial court undermined core legal protections afforded to employees who oppose discrimination. Rather than applying the settled principle that protected activity turns on the employee's good-faith belief, the court applied an unduly narrow definition of protected oppositional activity. The inquiry shifted to a post hoc parsing of an individual document, fragmenting Petitioner's self-help conduct into isolated parts and imposing a de facto "perfect[ion]" standard. This framework required employees to be

flawless in their legal assessments or lose protection entirely, contrary to the Due Process Clause's guarantee of fair (not perfect) adjudication. App. 80a.

Instead of Petitioner's good-faith intent, the instructions improperly allowed jurors to adopt the employer's retrospective view of document relevance. App. 81a-82a, 91a, 98a-99a. That misdirection turned the legal question of protected activity into a factual referendum on whether Petitioner's opposition was sufficiently polished, loyal, or technically precise. App. 87a. See *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1011-1014 (9th Cir. 1983) (holding that employees' "good faith opposition" to discrimination remains protected even if expressed in a form the employer deems "disloyal"); *Niswander v. Cincinnati Ins.*, 529 F.3d 714, 721-22 (6th Cir. 2008) (employee's reasonable belief governs protection of self-help discovery). The court compounded the error by deferring to the employer's assertions of confidentiality rather than applying Massachusetts' objective test. App. 85a-86a. See *Jet Spray Cooler v. Crampton*, 361 Mass. 835, 840 (1972) (confidentiality turns on duplicability and security risk, not employer say-so).

Petitioner laid out the proper legal test. The *Verdrager* framework requires courts to assess protected activity through a multi-factor lens: motive, necessity, scope, manner of acquisition, dissemination, policy clarity, and enforcement consistency. *Verdrager*, 474 Mass. at 413-414. Petitioner's appellate brief addressed all seven factors. App. 73a-80a. The judge addressed only two. App. 83a. That silence, mirrored by the Appeals Court, allowed the jury to deem Petitioner's conduct unprotected without applying the governing legal

framework. This was not a mere instructional glitch, but a denial of the structured legal analysis necessary for a fair trial, where jurors were permitted to substitute legal standards with subjective impressions. This sacrifices the structural guarantees of the Due Process Clause.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to grant the writ, vacate the judgment below, and remand with instructions that the Massachusetts appellate courts review the preserved errors on the merits, particularly the improper lay-opinion and character evidence, erroneous retaliation instruction, and misapplication of the self-help discovery test, under correct legal standards. This GVR relief is necessary to restore Petitioner's right to appellate review and ensure fair process below. Petitioner does not seek a merits ruling from this Court, but only *structural correction*.

Respectfully submitted,

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Dated: August 13, 2025