

COMMONWEALTH OF MASSACHUSETTS

**SUPREME JUDICIAL COURT**

NO. SJC-12344

---

COMMONWEALTH OF MASSACHUSETTS,  
Appellee,

v.

ROGELIO BUCKLEY,  
Appellant.

---

ON APPEAL FROM JUDGMENTS OF  
THE BROCKTON SUPERIOR COURT

---

**BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND ECONOMIC JUSTICE, URBAN LEAGUE OF EASTERN MASSACHUSETTS, CHARLES HAMILTON INSTITUTE FOR RACE AND JUSTICE, MASSACHUSETTS LAW REFORM INSTITUTE, UNION OF MINORITY NEIGHBORHOODS, BOSTON POLICE CAMERA ACTION TEAM, GLBTQ LEGAL ADVOCATES & DEFENDERS, MASSEQUALITY, THE NETWORK/LA RED, INTERACT: ADVOCATES FOR INTERSEX YOUTH, THEATER OFFENSIVE, GREATER BOSTON PFLAG, CENTRO PRESENTE, BRAZILIAN WORKER CENTER, JUSTICE AT WORK, JUSTICE RESOURCE INSTITUTE, JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION, MASSACHUSETTS ASSOCIATION OF HISPANIC ATTORNEYS, AND MASSACHUSETTS BLACK LAWYERS ASSOCIATION**

---

Oren M. Sellstrom  
(BBO # 569045)  
Oren N. Nimni  
Iván Espinoza-Madrigal  
Lawyers' Committee for Civil  
Rights and Economic Justice  
61 Batterymarch Street  
5th Floor  
Boston, MA 02110  
osellstrom@lawyerscom.org  
617-988-0624

Date: September 18, 2017

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-12344

---

COMMONWEALTH OF MASSACHUSETTS,  
Appellee,

v.

ROGELIO BUCKLEY,  
Appellant.

---

ON APPEAL FROM JUDGMENTS OF  
THE BROCKTON SUPERIOR COURT

---

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND ECONOMIC JUSTICE, URBAN LEAGUE OF EASTERN MASSACHUSETTS, CHARLES HAMILTON INSTITUTE FOR RACE AND JUSTICE, MASSACHUSETTS LAW REFORM INSTITUTE, UNION OF MINORITY NEIGHBORHOODS, BOSTON POLICE CAMERA ACTION TEAM, GLBTQ LEGAL ADVOCATES & DEFENDERS, MASSEQUALITY, THE NETWORK/LA RED, INTERACT: ADVOCATES FOR INTERSEX YOUTH, THEATER OFFENSIVE, GREATER BOSTON PFLAG, CENTRO PRESENTE, BRAZILIAN WORKER CENTER, JUSTICE AT WORK, JUSTICE RESOURCE INSTITUTE, JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION, MASSACHUSETTS ASSOCIATION OF HISPANIC ATTORNEYS, AND MASSACHUSETTS BLACK LAWYERS ASSOCIATION

---

Oren M. Sellstrom  
(BBO # 569045)  
Oren N. Nimni  
Iván Espinoza-Madrigal  
Lawyers' Committee for Civil  
Rights and Economic Justice  
61 Batterymarch Street  
5th Floor  
Boston, MA 02110  
osellstrom@lawyerscom.org  
617-988-0624

Date: September 18, 2017

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21, *amici curiae* Lawyers' Committee For Civil Rights And Economic Justice; Urban League Of Eastern Massachusetts; Charles Hamilton Institute For Race And Justice; Massachusetts Law Reform Institute; Union Of Minority Neighborhoods; Boston Police Camera Action Team; GLBTQ Legal Advocates & Defenders; Masequality; The Network/La Red; Interact: Advocates For Intersex Youth; Theater Offensive; Greater Boston PFLAG; Centro Presente; Brazilian Worker Center; Justice At Work; Justice Resource Institute; Jewish Alliance For Law And Social Action; Massachusetts Association Of Hispanic Attorneys; and Massachusetts Black Lawyers Association make the following disclosures: They are non-profit corporations with no parent corporations, with no stock, and therefore with no publicly held company owning 10% or more of their stock.

**TABLE OF CONTENTS**

IDENTITY AND INTERESTS OF *AMICI CURIAE*..... 1

INTRODUCTION..... 10

ARGUMENT..... 11

    I.    BIAS IN POLICING AND TRAFFIC STOPS IS A  
          PERVASIVE PROBLEM THAT IMPOSES CONCRETE  
          HARMS ON MARGINALIZED COMMUNITIES..... 12

        A.    People of color are more likely to  
              be stopped and searched by police.... 13

        B.    Allowing unfettered pretextual  
              stops exacerbates the problems of  
              selective enforcement due to  
              implicit bias..... 15

        C.    Selective enforcement has a  
              deleterious effect on marginalized  
              communities in the Commonwealth..... 19

    II.   THE COURT SHOULD OVERRULE COMMONWEALTH  
          V. SANTANA AND ABANDON THE  
          AUTHORIZATION RULE..... 22

        A.    The authorization rule creates an  
              unacceptable risk of selective  
              enforcement..... 22

        B.    Under the existing authorization  
              rule, protections against  
              selective enforcement are almost  
              non-existent..... 26

        C.    Overruling Santana would create a  
              workable standard that is in line  
              with Article 14 of the  
              Massachusetts Declaration of  
              Rights..... 27

CONCLUSION..... 28

TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<u>Com. v. Betances,</u> 451 Mass. 457 (2008) .....	26
<u>Com. v. Feyenord,</u> 445 Mass. 72 (2005) .....	19, 20, 23, 24
<u>Com. v. Gonsalves,</u> 429 Mass. 658 (1999) .....	22, 23, 27
<u>Com. v. Lora,</u> 451 Mass. 425 (2008) .....	11, 12, 24, 26, 27
<u>Com. v. Santana,</u> 420 Mass. 205 (1995) .....	1, 10, 22, 23, 27, 28, 29
<u>Com. v. Warren,</u> 475 Mass. 530 (2016) .....	12, 20, 24
<u>Commonwealth v. Amado</u> 474 Mass. 147, 151 (2016) .....	11, 24
<u>Commonwealth v. Blood,</u> 400 Mass. 61 (1987) .....	23
<u>State v. Ladson,</u> 138 Wash. 2d 343 (1999) .....	25
<u>State v. Ochoa,</u> 146 N.M. 32 (2009) .....	25
<u>United States v. Orozco,</u> 858 F.3d 1204 (9th Cir. 2017) .....	25
<u>Utah v. Strieff,</u> 136 S. Ct. 2056 (2016) .....	20
<u>Whitehead v. State,</u> 698 A.2d 1115 (Md. Ct. Spec. App. 1997) .....	16

**Other Authorities**

Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. Miami L. Rev. 425, 432 (1997) 15, 16, 20

Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945, 951 (2006) ..... 17

Crime Reporting, NPR (May 25, 2017), <http://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting> ..... 21

David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544 (1997) ..... 15, 23

David A. Harris, The Stories, The Statistic, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 273-274 (1999) ..... 13

David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 Sup. Ct. Rev. 271 (1997) ..... 15

HIV, May 2016, [http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap for change full report.pdf](http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap%20for%20change%20full%20report.pdf) ..... 17, 18

[https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy pdf/issue based/20160630 lgbtq-report.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy%20pdf/issue%20based/20160630%20lgbtq-report.pdf) ..... 19

ICE Criminal Alien Program, Warren Institute on Race, Ethnicity & Diversity, University of California, Berkeley Law School (Sept. 2009), [https://www.law.berkeley.edu/files/policybrief\\_irving\\_0909\\_v9.pdf](https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf) ..... 21

<u>Jackson Heights</u> , Oct. 2012, <a href="http://www.maketheroad.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf">http://www.maketheroad.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf</a> .....	12
Jan Ransom, <i>Blacks Remain Focus of Boston Police Investigations, Searches</i> , Boston Globe (Aug. 29, 2017) .....	14
Justice Statistics, <u><i>Police Behavior During Traffic Stops, 2011</i></u> .....	14, 18
L. Song Richardson, <u><i>Implicit Racial Bias and the Perpetrator Perspective: A Response to Reasonable but Unconstitutional</i></u> , 83 Geo. Wash. L. Rev. 1008, 1016 (2015) .....	18
<u>Massachusetts Racial and Gender Profiling Project: Preliminary Tabulations</u> , Jan. 20, 2004, <a href="http://archive.boston.com/globe/metro/packages/tickets/northeastern.pdf">http://archive.boston.com/globe/metro/packages/tickets/northeastern.pdf</a> .....	12, 14, 15
Matthew R. Segal & Carol Rose, <u><i>Race, Technology, and Policing</i></u> .....	13
Oct. 2014, <a href="https://aclum.org/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf">https://aclum.org/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf</a> . ....	13
<u>Report on Boston Police Department Street Encounters 2007-2010 at 2</u> .....	13
<i>Report Sexual Abuse. The Fear: Deportation</i> , New York Times (Apr. 30, 2017) .....	21
<i>Shooters' Paradise</i> , Boston Magazine (Feb. 2017), <a href="http://www.bostonmagazine.com/news/article/2017/02/12/boston-shootings/">http://www.bostonmagazine.com/news/article/2017/02/12/boston-shootings/</a> .....	21
Stanford Open Policing Project, <i>Findings: The Results of our Nationwide Analysis of Traffic Stops and Searches</i> (2017), <a href="https://openpolicing.stanford.edu/findings/">https://openpolicing.stanford.edu/findings/</a> .....	15

*Stop and Frisk: The Human Impact*  
(2012),  
<https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>; Final Report, An Analysis of  
Race and Ethnicity Patterns ..... 13



**IDENTITY AND INTERESTS OF AMICI CURIAE**

This brief is submitted by Lawyers' Committee For Civil Rights And Economic Justice; Urban League Of Eastern Massachusetts; Charles Hamilton Institute For Race And Justice; Massachusetts Law Reform Institute; Union Of Minority Neighborhoods; Boston Police Camera Action Team; GLBTQ Legal Advocates & Defenders; Masequality; The Network/La Red; Interact: Advocates For Intersex Youth; Theater Offensive; Greater Boston PFLAG; Centro Presente; Brazilian Worker Center; Justice At Work; Justice Resource Institute; Jewish Alliance For Law And Social Action; Massachusetts Association Of Hispanic Attorneys; and Massachusetts Black Lawyers Association as *amici curiae* urging the Court to discard the authorization rule established in Commonwealth v. Santana because it is contrary to Article 14 of the Massachusetts Declaration of Rights and imposes a discriminatory impact on people of color; immigrants; low-income individuals; lesbian, gay, bisexual, transgender, queer, intersex and asexual ("LGBTQIA") individuals; and other minorities.

The **Lawyers' Committee for Civil Rights and Economic Justice** ("LCCR") fosters equal opportunity

and fights discrimination on behalf of people of color and immigrants. We engage in creative and courageous legal action, education, and advocacy, in collaboration with law firms and community partners. LCCR has a strong interest in eliminating discrimination in policing, and because pretextual stops lead to disparate impacts, LCCR has a specific interest in seeing them curtailed.

Founded in 1917 and affiliated in 1919, the **Urban League of Eastern Massachusetts (ULEM)** is a non-profit organization and one of the oldest affiliates within the National Urban League movement, originally established as a result of the Great Migration of African-Americans from the segregated South to the industries of the North for better opportunities. ULEM is a champion of civil rights, dedicated to helping people improve their lives. Its mission is to build stronger communities by providing local residents with education, job training and job placement at no cost. Racial profiling by police negatively impacts the communities that ULEM serves.

The **Charles Hamilton Houston Institute for Race and Justice (CHHIRJ)** at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse

Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, one of the 20th century's most important legal scholars and litigators. Houston engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities and privileges of membership in the United States. To further that goal, CHHIRJ seeks to eliminate practices such as racial profiling by police which contribute to the excessive criminal sentencing and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed by these policies.

**Massachusetts Law Reform Institute** is a statewide non-profit law and poverty center whose mission is to advance economic, social and racial justice for low-income persons and communities. For more than 45 years, MLRI has engaged in legislative, administrative and judicial advocacy on behalf of our clients and client groups. Particularly in light of the considerable body of evidence demonstrating the

problems of bias and selective enforcement in policing, MLRI has a strong interest in ensuring that the state's criminal laws do not have disparately negative effects on racial minorities and other marginalized groups.

The **Union of Minority Neighborhoods (UMN)** is a Boston-based community organization founded in 2002 to increase activism, empowerment, and opportunity in communities of color. UMN provides skills training to community activists and technical assistance to community based organizations in a number of areas, including housing, employment, Criminal Offender Record Information (CORI) reform, economic development, and voting rights. Racial profiling is of particular concern to UMN given past history of strained interaction between police and minority communities.

The **Boston Police Camera Action Team (BPCAT)** is a community group made up of Boston residents dedicated to addressing systemic issues with policing in communities of color in Boston by requiring police officers to wear body cameras. BPCAT believes that police body cameras can improve accountability and

safety. Identity-based profiling by police adversely impacts communities of color in Boston.

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders** (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that all citizens are treated with equal justice under law, particularly when engaging with public officials.

**MassEquality** is a statewide grassroots advocacy organization working to ensure that everyone across Massachusetts can thrive from cradle to grave without discrimination and oppression based on sexual orientation, gender identity, or gender expression. MassEquality partners across issues, identities and communities to build a broad, inclusive and politically powerful movement that changes hearts and minds and achieves policy and electoral

victories. As part of its mission to end discrimination, MassEquality is interested in preventing identity-based police profiling.

**The Network/La Red** is a survivor-led, social justice organization that works to end partner abuse in lesbian, gay, bisexual, transgender, polyamorous, and queer communities. The Network/La Red strengthens communities through organizing, education, and the provision of support services. Identity-based profiling undermines The Network/La Red's mission to end partner abuse.

**InterACT: Advocates for Intersex Youth** uses innovative legal and other strategies to advocate for the human rights of children born with intersex traits. The organization condemns all forms of identity-based bias and profiling.

The **Theater Offensive's** mission is to present the diversity of lesbian, gay, bisexual, and transgender lives in art so bold it breaks through personal isolation, challenges the status quo, and builds thriving communities.

**Greater Boston PFLAG** are a group of parents, families, friends, and lesbian, gay, bisexual, transgender, and queer people. We help change

attitudes and create an environment of understanding so that our LGBTQ family members and friends can live in a world that is safe and inclusive. We accomplish this through support, education, and advocacy. As part of its mission to achieve full equality, Greater Boston PFLAG stands firmly against all forms of identity-based bias and profiling.

Established in 1981, **Centro Presente** is a member-driven, state-wide organization dedicated to the self-determination and self-sufficiency of the Latin American immigrant community of Massachusetts. Through the integration of community organizing, leadership development and basic services, Centro Presente strives to give its members a voice and to build community power. Centro Presente is committed to ending profiling in its members' communities.

The **Brazilian Worker Center** is a grassroots, community-based, non-profit worker center that represents, supports, and organizes the Brazilian and wider immigrant community to defend and advocate for their rights. As part of its mission to further social justice for Brazilian and immigrant workers, and in solidarity with other affected communities, the Center opposes racial profiling.

**Justice At Work** is a non-profit legal services organization founded in 2011 to support organizing efforts among non-union low-wage immigrant workers. Justice At Work provides strategic employment and labor legal support in order to enable workers to directly impact conditions at work and in their communities and families. Justice At Work is interested in preventing profiling, including unfair police practices directed against immigrant workers.

The **Justice Resource Institute** (JRI) works in partnership with individuals, families, communities and government to pursue the social justice inherent in opening doors to opportunity and independence. JRI is a leader in social justice, with over 100 diverse programs - including extensive work in the juvenile and criminal justice system - to meet the needs of underserved individuals, families and communities.

The **Jewish Alliance for Law and Social Action** (JALSA) is member-based organization, inspired by Jewish teachings and values, dedicated to being a strong, progressive, inter-generational voice for social and economic justice, civil rights, and constitutional liberties. JALSA is interested in ending identity-based police profiling as part of its



broader work promoting criminal justice reform and civil rights protections.

The **Massachusetts Association of Hispanic Attorneys** (MAHA) promotes service and excellence in the Hispanic legal community and seeks to provide opportunities for professional growth to its members. MAHA strives to enhance the business and professional stature of its members in the legal community at large, increase the participation of Hispanic leaders in the civic arena, and elevate the standard of integrity, honor, and courtesy in the legal profession.

Since 1973, the **Massachusetts Black Lawyers Association** (MBLA) has been dedicated to providing a valuable network and visible presence for attorneys of color in the Massachusetts legal community. The MBLA actively seeks collaborations with other bar associations, professional organizations and social justice organizations, particularly those interested in providing services to the Black community and other legally underserved communities of color.

## INTRODUCTION

Since this Court established the authorization rule<sup>1</sup> in Commonwealth v. Santana in 1995, data and experience have demonstrated the problematic way in which the rule affects marginalized groups. Over the intervening decades, data has been collected on police stops, and it has become clear how the authorization rule plays out in practice. As this Court has increasingly recognized, the bright line authorization rule is ripe for abuse, and the burden falls squarely on the shoulders of marginalized members of our communities. Armed with this new data and knowledge about the unworkability and discriminatory impact of the authorization rule, the Court should take this opportunity to overrule Santana and craft a new, common-sense rule that more closely hews to fundamental Constitutional principles.

Protecting the rights of individuals to be free from discrimination is paramount under the Massachusetts Declaration of Rights. As such, this

---

<sup>1</sup> "Under this test, it is irrelevant whether a reasonable police officer would have made the stop but for the unlawful motive; the stop is valid so long as the police are doing no more than they are legally permitted and objectively authorized to do." Com. v. Santana, 420 Mass. 205, 209 (1995) (internal quotations omitted).

Court has acknowledged that there is no absolute bar to looking at the intent of an officer's actions. See Com. v. Lora, 451 Mass. 425 (2008). In Lora this Court crafted a rule that allows a particularized inquiry into officer actions, ostensibly as a means to protect drivers of color from discriminatory stops. In practice, however, pretextual stops proceed unfettered, and the protection against discriminatory traffic stops offered by Lora is virtually non-existent. This Court has recognized that a defendant's burden to show selective enforcement is "admittedly daunting." Lora 451 Mass. at 440. It is more than that: to amici's knowledge, there has been little, if any, evidence suppressed under the Lora standard to date (including for the defendant in Lora). Lora provides ineffective protection. There must be more.

#### ARGUMENT

Last year, in Commonwealth v. Amado this Court noted that pretextual traffic stops "implicate important policy concerns about racial profiling in encounters between the police and persons of color." 474 Mass. 147, 151 (2016). The Court left for another day "consideration of whether and how police authority should be limited when a stop is clearly pretextual."

Id. That day is today. The Court should overrule the outmoded decision of Commonwealth v. Santana and should abandon the authorization rule in favor of a standard that is informed by policing realities and one that better protects the rights of all residents of the Commonwealth.

**I. BIAS IN POLICING AND TRAFFIC STOPS IS A PERVERSIVE PROBLEM THAT IMPOSES CONCRETE HARMS ON MARGINALIZED COMMUNITIES**

Disparities and bias in policing pervade all areas of enforcement, from stop-and-frisk encounters<sup>2</sup> to traffic stops.<sup>3</sup> Arbitrary and discriminatory enforcement directly conflicts with the robust rights protected by the Massachusetts Declaration of Rights. Furthermore, it has profoundly negative effects on people of color, immigrants, low-income people, LGBTQIA individuals and other minorities, forcing them to alter their habits, appearance, and activities for

---

<sup>2</sup> See Com. v. Warren, 475 Mass. 530, 540 (2016).

<sup>3</sup> Northeastern University, Institute on Race and Justice, Massachusetts Racial and Gender Profiling Project: Preliminary Tabulations, Jan. 20, 2004, <http://archive.boston.com/globe/metro/packages/tickets/northeastern.pdf>; Make the Road New York, Transgressive Policing: Police Abuse of LGBTW Communities of Color in Jackson Heights, Oct. 2012, [http://www.maketheroad.org/pix\\_reports/MRNY\\_Transgressive\\_Policing\\_Full\\_Report\\_10.23.12B.pdf](http://www.maketheroad.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf).

fear of being repeatedly stopped by the police.<sup>4</sup> Arbitrary and discriminatory law enforcement also erodes faith in the police as unbiased public service agents.

**A. People of color are more likely to be stopped and searched by police.**

Numerous empirical studies have now established that people of color, especially Black people, are disproportionately stopped by the police.<sup>5</sup> This trend applies equally to traffic stops, which disproportionately impact drivers of color.<sup>6</sup> Drivers of

---

<sup>4</sup> David A. Harris, *The Stories, The Statistic, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 273-274 (1999); See also ACLU of Massachusetts, *Black, Brown, and Targeted: A Report on Boston Police Department Street Encounters 2007-2010* at 2, Oct. 2014, <https://aclum.org/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf>; Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (2012).

<sup>5</sup> Center for Constitutional Rights, *Stop and Frisk: The Human Impact* (2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>; Final Report, *An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports*, at 2 (June 15, 2015) ("[T]he targets of FIO reports were disproportionately male, young, and Black. For those 204,739 FIO reports, the subjects were 89.0 percent male, 54.7 percent ages 24 or younger, and 63.3 percent Black.").

<sup>6</sup> Matthew R. Segal & Carol Rose, *Race, Technology, and Policing*, Boston B.J., Summer 2015, at 27, 28.

color are stopped and searched with alarming frequency.<sup>7</sup>

The data on racial bias in traffic stops is staggering. A 2004 study conducted by Northeastern University revealed large disparities across Massachusetts. In Boston, for example, 32% of citations were given to Black drivers, while only 13.7% of the Boston driving population is Black. This means, that in Boston, you are more than twice as likely to get a traffic citation if you are Black.<sup>8</sup> In fact, in Boston in 2016, of the "nearly 15,000 individuals that police observed, interrogated, or searched...almost 70 percent were black."<sup>9</sup> Evidence of similar disparities ranged across most jurisdictions from large cities like Boston to small towns like Southborough where Black drivers are over five times

---

<sup>7</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Police Behavior During Traffic Stops, 2011*, NCJ 242937 (Revised Oct. 27, 2016).

<sup>8</sup> Northeastern University, Institute on Race and Justice, *Massachusetts Racial and Gender Profiling Project: Preliminary Tabulations*, Jan. 20, 2004, <http://archive.boston.com/globe/metro/packages/tickets/northeastern.pdf>.

<sup>9</sup> Jan Ransom, *Blacks Remain Focus of Boston Police Investigations, Searches*, Boston Globe (Aug. 29, 2017), <https://www.bostonglobe.com/metro/2017/08/28/blacks-remain-focus-boston-police-investigations-searches/PDbFr2QZexCEi3zJTO9mOJ/story.html>.

as likely to get a citation as other drivers.<sup>10</sup> Data demonstrates similar disproportionality in stops conducted by the state police,<sup>11</sup> and these findings are in line with data confirming similar statistical disparities nationally.<sup>12</sup>

**B. Allowing unfettered pretextual stops exacerbates the problems of selective enforcement due to implicit bias.**

The problems motorists of color face from selective enforcement are so ubiquitous that they simply cannot be ignored in crafting a rule on pretextual stops. See David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544 (1997); David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the

---

<sup>10</sup> Northeastern University, Institute on Race and Justice, Massachusetts Racial and Gender Profiling Project: Preliminary Tabulations, Jan. 20, 2004, <http://archive.boston.com/globe/metro/packages/tickets/northeastern.pdf>.

<sup>11</sup> The Stanford Open Policing Project, *Findings: The Results of our Nationwide Analysis of Traffic Stops and Searches* (2017), <https://openpolicing.stanford.edu/findings/>.

<sup>12</sup> For example, in Florida, videotaped traffic stops revealed that 70% of the 1,048 motorists stopped along Interstate 95 were Black or Latino, even though Blacks and Latinos made up only 5% of the drivers on that stretch of the highway. See Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. Miami L. Rev. 425, 432 (1997).

Fourth Amendment, 1997 Sup. Ct. Rev. 271 (1997);  
Angela J. Davis, Race, Cops, and Traffic Stops, 51 U.  
Miami L. Rev. 425, 432 (1997). This is especially true  
where the data bears out that pretextual stops are  
responsible for discriminatory impact because the  
arbitrary nature of their enforcement allows implicit  
bias to run rampant. See Charles R. Epp, Steven  
Maynard-Moody & Donald P. Haider-Markel, Pulled Over:  
How Police Stops Define Race and Citizenship (John M.  
Conley & Lynn Mather eds., 2014).

When officers are given *carte blanche* to conduct  
traffic stops and searches based on pretext or post-  
hoc rationalizations, the burden of this arbitrary  
enforcement scheme invariably lands on people of  
color. The vast majority of people commit routine  
traffic violations,<sup>13</sup> but people of color are  
disproportionately stopped and searched. Identity  
should never be a reason for the police to stop  
someone, but implicit biases often prompt officers to  
view drivers of color<sup>14</sup> as inherently more suspicious.

---

<sup>13</sup> See Whitehead v. State, 698 A.2d 1115, 1120 n.4 (Md.  
Ct. Spec. App. 1997) (detailing statistics showing  
high violation rates of driving laws).

<sup>14</sup> This is also true for transgender drivers. See  
Catherine Hanssens, Aisha C. Moodie-Mills, Andrea J.  
Ritchie, Dean Spade & Urvashi Vaid, A Roadmap for



Officers then target those same drivers, as opposed to white drivers, for searches even in circumstances involving comparable traffic offenses.

While intentional discrimination is an insidious problem it is not the only form of bias present in traffic stops. Drivers of color are disproportionately stopped because of the implicit biases of patrol officers. Implicit bias studies indicate that if a facially neutral rule is arbitrarily enforced, unconscious biases will result in increased enforcement against people of color in comparison to white people.<sup>15</sup> This is the precise situation at hand in the case of pretextual traffic stops:

Copious evidence demonstrates that police disproportionately stop Black and Latino drivers despite the fact that those populations do not commit traffic offenses at significantly higher rates than Whites. Often the assumption is that this results from conscious and intentional racial profiling, and it is certainly true that officers engage in this conduct. Individuals of color, however, will continue to bear the

---

Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV, May 2016, [http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap\\_for\\_change\\_full\\_report.pdf](http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf).  
<sup>15</sup> See Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945, 951 (2006).

brunt of pretextual policing even in the absence of conscious bias because of the effect of implicit racial biases on officer judgments of criminality and suspicion...This is precisely the situation that exists when officers are acting on hunches of criminality that do not rise to the level of reasonable suspicion or probable cause--in other words, when they are engaged in pretext stops.

L. Song Richardson, Implicit Racial Bias and the Perpetrator Perspective: A Response to Reasonable but Unconstitutional, 83 Geo. Wash. L. Rev. 1008, 1016 (2015) (further arguing that merely looking at intentionally discriminatory stops will not eliminate bias in policing).

Because of the realities of implicit bias, pretextual stops regularly become synonymous with discriminatory stops. Unfortunately, the same patterns are seen with other marginalized groups:<sup>16</sup> transgender people<sup>17</sup> and low-income people<sup>18</sup> are also

---

<sup>16</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Police Behavior During Traffic Stops, 2011, NCJ 242937 (Revised Oct. 27 2016).

<sup>17</sup> Catherine Hanssens, Aisha C. Moodie-Mills, Andrea J. Ritchie, Dean Spade & Urvashi Vaid, A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV, May 2016, [http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap\\_for\\_change\\_full\\_report.pdf](http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf);

disproportionately subject to law enforcement stops. In light of the breadth and depth of these problems, remedies that come only after problematic traffic stops have occurred, and that focus on ferreting out intentional discrimination, are insufficient and unworkable. This Court should look instead to a prophylactic rule that proactively limits pretextual stops in the first place.

**C. Selective enforcement has a deleterious effect on marginalized communities in the Commonwealth.**

For people of color, the indignities that come from selective "routine" traffic stops are anything but routine. As this Justice Greane has noted:

Getting a traffic ticket is never a happy experience. Getting a traffic ticket if you are a black or Hispanic person who has committed a minor traffic violation and then been questioned in public view by an armed police officer determined to find a basis, or extract consent, to bring a police dog, is humiliating, painful and unlawful.

---

see also NYC Civilian Complaint Review Board, Pride, Prejudice and Policing: An Evaluation of LGBTQ-Related Complaints from January 2010 through December 2015, 2016, [https://ww1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/issue\\_based/20160630\\_lgbtq-report.pdf](https://ww1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/20160630_lgbtq-report.pdf).

<sup>18</sup> See Com. v. Feyenord, 445 Mass. 72, 87 (2005) (Greane J. concurring) (noting that the burden of pretext stops often falls on people of "lower economic standing").

Feyenord, 445 Mass. at 88 (Greane J. concurring).

Even if a more extensive search is not conducted, this Court has recognized that years of discriminatory policing have made arbitrary police encounters a special form of harm in communities of color. In fact, this Court has found that that a Black civilian might well flee the police motivated by the desire "to avoid the recurring indignity of being racially profiled."

See Warren, 475 Mass. at 540; see also Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor J. dissenting) ("We also risk treating members of our communities as second-class citizens. Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more.").

Fear of discriminatory policing fundamentally changes the way people of color interact with the police and limits their ability to move freely about in the world. See Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. Miami L. Rev. 425, 432 (1997) (noting that people of color often change their behaviors including mannerism, clothing, automobile choice and driving route based on fear of policing). Arbitrary stops and selective enforcement also erode

trust between police and marginalized communities. See e.g. Charles R. Epp, Steven Maynard-Moody & Donald P. Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* at 143 (John M. Conley & Lynn Mather eds., 2014) (finding that arbitrary enforcement schemes such as the allowing of pretextual stops greatly undermine relationships between Black communities and police and foster ill-will and mistrust). Tension and distrust between police and marginalized communities weakens public safety by deterring victims and witnesses<sup>19</sup> from reporting crime.

---

<sup>19</sup> In Boston, "[m]ore than 96 percent of gunmen involved in non-fatal shootings are never arrested" due, in large part, to mistrust between police and communities of color. David S. Bernstein, *Boston is a Shooters' Paradise*, *Boston Magazine* (Feb. 2017), <http://www.bostonmagazine.com/news/article/2017/02/12/boston-shootings/>. Similarly, immigrant victims and witnesses are reluctant to call 911 due to local and state police entanglement in federal immigration enforcement. Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, *New York Times* (Apr. 30, 2017) ("Law enforcement officials in several large cities, including Los Angeles, Houston and Denver, say the most dangerous fallout of changes in policy and of harsh statements on immigration is that fewer immigrants are willing to go to the police."); John Burnett, *New Immigration Crackdowns Creating Chilling Effect on Crime Reporting*, *NPR* (May 25, 2017), <http://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting> (discussing fear in immigrant communities); see also Trevor Gardner II & Aarti Kohli, *Racial Profiling in the ICE Criminal Alien Program*, *Warren Institute on Race, Ethnicity &*

Racial bias in policing is a reality, and pretextual stops are at the heart of this reality. Because discriminatory enforcement of laws is contrary to fundamental principles of justice and exacts harm on marginalized communities, the Court should take steps to guard against these effects and abandon the authorization rule.

**II. THE COURT SHOULD OVERRULE COMMONWEALTH V. SANTANA AND ABANDON THE AUTHORIZATION RULE.**

**A. The authorization rule creates an unacceptable risk of selective enforcement.**

Since the decision in Santana, this Court has expressed reservations about the scope of police power, particularly in relation to the policing of marginalized communities. Not long after the Santana decision, this Court noted in Commonwealth v. Gonsalves that "routine traffic stops may also pose unique hardships on minority communities who, it has been argued, are often the subject of stops **on pretext.**" Com. v. Gonsalves, 429 Mass. 658, 663 (1999) (emphasis added). In his concurrence in Gonsalves, Justice Ireland took great pains to elucidate the

---

Diversity, University of California, Berkeley Law School (Sept. 2009), [https://www.law.berkeley.edu/files/policybrief\\_irving\\_0909\\_v9.pdf](https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf) (local police target Latino drivers to turn them over to federal immigration officials).

dangers of racial discrimination raised by unfettered police power. His concurrence stated "[t]he grant of such power is certainly, as the majority notes, a clear invitation to discriminatory enforcement of the rule. This is precisely the type of power that art. 14 was adopted to guard against." Gonsalves, 429 Mass. at 669 (citing Commonwealth v. Blood, 400 Mass. 61, 71 (1987)). Justice Ireland noted that discriminatory enforcement is not just a possibility, but an active reality, citing studies similar to those set forth above from a number of states demonstrating discriminatory enforcement and detailing the problems attendant to "Driving While Black"<sup>20</sup> - similar concerns have been raised about "Walking While Trans."<sup>21</sup>

Acknowledgement of the selective enforcement risks of unfettered police power and the discriminatory impact of such policies can be found throughout the Court's jurisprudence since Santana. In Commonwealth v. Feyenord, Justice Greaney's concurrence noted the need to "balance the rights of

---

<sup>20</sup> See David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544 (1997).

<sup>21</sup> Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, Queer (In)Justice: The Criminalization of LGBT People in the United States (2012).

the police with the protections afforded less powerful citizens who often feel the brunt of *Terry* type stops." 445 Mass. 72, 87 (2005) (Greaney J. concurring) (internal citations omitted). According to the concurrence, "the majority of officers proceed in good faith when making traffic stops. Some officers, however, do not and on more stereotypical thinking and **hunches, using dubious investigative techniques that result in the harassment of racial and ethnic minorities.**" Feyenord, 445 Mass. at 88 (Greaney J. concurring) (emphasis added); see also Lora, 451 Mass. 425 (discussing the history of concern with racial profiling in traffic stops); Amado, 474 Mass. 147 (noting that pretextual traffic stops implicate important policy concerns about racial profiling in encounters between the police and persons of color); See also Com. v. Warren, 475 Mass. 530 (2016) (noting that Black men are disproportionately stopped in police encounters and recognizing the ill effect that prolonged selective enforcement of street stops has on the interactions between Black men and the police).

Other courts across the country have similarly highlighted the problem of selective enforcement that comes with unfettered police discretion, and have



taken issue with the abuses that are inherent in allowing pretextual traffic stops. See United States v. Orozco, 858 F.3d 1204, 1213 (9th Cir. 2017) (requiring an objective test to determine whether a stop made for an ostensibly legal reason is a pretext for what is, in reality, an impermissible reason; State v. Ladson, 138 Wash. 2d 343 (1999) (holding that in evaluating whether a stop is legitimate or pretextual "[the] Court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior"); State v. Ochoa, 146 N.M. 32, 40 (2009) (holding pretextual stops invalid under New Mexico law and noting the selective enforcement problems such stops present)).

In sum, allowing unfettered pretextual stops by police officers makes enforcement arbitrary and impermissibly increases the risk of discriminatory enforcement. For this reason, the Court should abandon the authorization rule.

**B. Under the existing authorization rule, protections against selective enforcement are almost non-existent.**

Existing protections against selective enforcement of pretextual stops do not meaningfully exist. The authorization rule itself provides no protection against discriminatory behavior. Defendants must instead rely on the equal protection framework under Lora. While Lora does make it clear that it violates equal protection for an officer to stop a driver solely based on the driver's race, the claim that this provides adequate protection from selective enforcement rings hollow. In order to challenge a discriminatory stop, defendants must overcome a virtually insurmountable burden.<sup>22</sup> That burden is made even steeper by the inability to obtain data relevant to a selective enforcement claim through automatic discovery protocols under rule 14. See Com. v. Betances, 451 Mass. 457 (2008).

---

<sup>22</sup> "Because the ability of defendants to establish a prima facie case is fraught with such great difficulty, my concern is the degree to which the right to challenge seized evidence could seemingly be elusive in practice." Lora, 451 Mass. at 449 (Ireland J. concurring) (noting that much of the statistical data needed to sustain a claim is unavailable to defendants or non-existent).

Given all of the obstacles to raising the issue, it is unsurprising that little, if any, evidence has ever been suppressed under the Lora standard. A mountain of data demonstrates that people of color are disproportionately stopped by the police - yet successful claims of selective enforcement are virtually non-existent. Lora was intended as an equal protection bulwark in the traffic stop context, but it has not manifested that protection in reality.

**C. Overruling Santana would create a workable standard that is in line with Article 14 of the Massachusetts Declaration of Rights**

"The distinguishing feature of our criminal justice system is its insistence on principled, accountable decision making in individual cases. Bright line rules tend to eliminate this feature." Gonsalves, 429 Mass. at 665 (internal quotations omitted). A rule allowing a subjective intent inquiry and a requirement of objective reasonableness is more in line with Article 14 and the Fourth Amendment. Inquiries into reasonableness are an essential feature of the protection against unreasonable search and seizure. See 3 Wayne R. LaFare, Search and Seizure (5th ed. 2012) ("Bright line rules also undermine the Fourth Amendment's underlying touchstone of

reasonableness"). Inquiries into intent are necessary to suss out discriminatory enforcement. By preventing an inquiry into whether a stop was pretextual, and whether a reasonable officer would have made a particular stop, Santana removed an important protection against arbitrary enforcement of criminal laws. That protection should be restored, and this Court should adopt a rule that allows an inquiry into the subjective intent of an officer and the reasonableness of an officer's behavior in making an alleged pretextual stop.

#### **CONCLUSION**

This case presents a situation where the stop of the vehicle was admitted to be pretext, and the result was the arrest of the Black passenger in the car. There is nothing under the current authorization rule that prevents an officer from pursuing a hunch - the type of subjective impression that provides fertile ground for implicit bias - and then following that hunch until the person invariably commits a minor traffic infraction. The question must be - but for that hunch - would the officer pull the car over? Without this inquiry, officers can stop people arbitrarily and then manufacture post-hoc

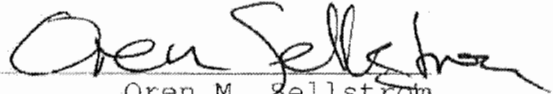
rationalizations based on regularly occurring traffic violations.

This kind of arbitrary enforcement scheme has a deeply harmful impact on people of color, immigrants, low-income people, LGBTQIA individuals and other minorities. Under such schemes drivers of color, transgender drivers, and low-income drivers are disproportionately stopped and searched, and subjected to the indignities that come with those interactions. Because of the unavoidable reality of the negative impact that the current rule has on marginalized people, this Court should overrule Santana and create a pretext rule that provides robust protections against selective and arbitrary enforcement.

September 18, 2017

Respectfully submitted on  
behalf of *amici curiae*,

By their attorneys,



Oren M. Sellstrom  
(BBO # 569045)

Oren N. Nimni

Iván Espinoza-Madrugal  
Lawyers' Committee for Civil  
Rights and Economic Justice  
61 Batterymarch Street  
5th Floor  
Boston, MA 02110  
osellstrom@lawyerscom.org  
617-988-0624

**RULE 16(k) CERTIFICATE OF  
COMPLIANCE WITH RULES OF APPELLATE PROCEDURE**

I, Oren N. Nimni, attorney for *amici*, certify that the foregoing brief of *amici curiae* complies with the Massachusetts Rules of Appellate Procedure regarding the form and submission of appellate briefs. I have caused 17 copies and one original of the brief to be filed with the court.

A handwritten signature in black ink, appearing to read "Oren N. Nimni", is written over a horizontal line. The signature is stylized and cursive.

Oren N. Nimni

**CERTIFICATE OF SERVICE**

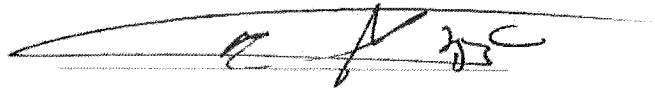
I, Oren N. Nimni, certify that I have this day served, by first class mail, two copies of this brief of *amici curiae* on:

Counsel for Commonwealth:

Mary E. Lee  
Office of the District Attorney/Bristol  
888 Purchase St.  
New Bedford, MA 02740

Counsel for Defendant ROGELIO R. BUCKLEY

Matthew Malm  
Wood & Nathanson, LLP  
50 Congress Street  
Suite 600  
Boston, MA 02109

A handwritten signature in black ink, appearing to read "Oren N. Nimni", is written over a horizontal line.

Oren N. Nimni