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January 8, 2021

Via Electronic Mail and Electronic Filing

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Re: Letter of *Amici Curiae* in support of Defendant-Appellant's Request for Further Appellate Review in *Commonwealth v. Bailey-Sweeting* (FAR-28003) [1]

To whom it may concern:

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, the New England Innocence Project, and the Massachusetts Association of Criminal Defense Lawyers respectfully submit this letter to urge this Court to allow the pending Application for Further Appellate Review in *Commonwealth v. Bailey-Sweeting*, FAR-28003 (the "Application").[2] The undersigned anticipate that, if this Court were to grant the Application, we would submit a merits brief more fully exploring the points raised in this letter.

In a somber, sobering letter seven months ago, this Court implored the Commonwealth's legal community to "reexamine why, too often, our criminal justice system fails to treat African-Americans the same as white Americans, and recommit ourselves to the systemic change needed to make equality under the law an enduring reality for all."[3] This case presents a prime example of our courts emboldening and allowing the police to treat African-Americans differently than white people, and it must be reversed. The Court has the opportunity here to make a profound impact on the policing of people of color in the Commonwealth. Reversing here would be consistent with this Court's precedent, especially recent cases that aim to stamp out and redress the disparate policing of Black people. *See, e.g.*, *Commonwealth v. Evelyn*, 485 Mass. 691 (2020); *Commonwealth v. Long*, 485 Mass. 711 (2020).

This case raises substantial questions regarding how police may justify a patfrisk, which this Court has described as "a 'serious intrusion on the sanctity of the person [that] is not to be undertaken lightly.'" *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 36 (2020) (quoting

[1] The case caption below reflects erroneously reversed surnames, based on the indictment. *Amici* adopt the Defendant-Appellant's name as represented in his own papers.
[2] Statements of interest from the proposed *amici* are enclosed in an addendum.
[3] *Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar* (June 3, 2020) [hereinafter *Letter from the Seven Justices*], https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and.

Commonwealth v. Almeida, 373 Mass. 266, 270–71 (1977)) (alternation in original). The sharply divided 3-2 decision below reflects an expanded panel of the Appeals Court after the initial panel was ready to find the patfrisk in question unconstitutional.[4] Instead, a majority of the Appeals Court found that a police officer's hunch based on an associate's speech and behavior, police designations of gang affiliations, and knowledge of a past juvenile adjudication justified a search of the defendant's body at a traffic stop as he sat quietly in the backseat of a car, complying with police instructions. This Court should allow the Application because the Appeals Court plainly erred in applying *Torres-Pagan*, as the dissenting opinion below rightly explains. But the added constitutional dimension of effectively criminalizing speech and association and the racial justice implications of this case raise its import beyond this Court's error-correction role. This case allows this Court to continue its leadership in "confront[ing] squarely the fact that the phenomenon of racial profiling is a product of more than one-off cases of individual bias or animus – it is a systemic problem that has flourished under the rules that [our courts have] set." *Commonwealth v. Long*, 485 Mass. 711, 756 (2020) (Budd, J., concurring).

I. The Unconstitutional Patfrisk of Mr. Bailey-Sweeting's Body Was Not Supported By Reasonable Suspicion and Was Premised on Nothing More Than a Hunch.

Mr. Bailey-Sweeting was a passenger sitting quietly in the backseat of a car with three other people in it—a driver and two other passengers—pulled over for a traffic offense. The driver allegedly cut someone off while changing lanes. After the car pulled into a restaurant parking lot, pursued by police for the alleged civil traffic infraction, the front seat passenger, Raekwan Paris, exited the vehicle and started complaining about his experience of being repeatedly harassed by the police. Police officers testified at the suppression hearing that they had a "hunch" that Mr. Paris was unusually "combative" in this interaction to distract attention from something in the car. They said he was a gang member based on numerous past encounters, and that his behavior deviated from those prior encounters. Application at 4, 6–7. This testimony relied *not* on a series of specific, articulable facts that Mr. Bailey-Sweeting was armed and dangerous, but rather a series of stereotype-based assumptions and inferential leaps premised on Mr. Paris's conduct. Further, the officers' own testimony confirmed Mr. Paris's view that he was being repeatedly targeted for police stops, including many that did not result in his arrest, providing an available and even more likely explanation for his conduct. *Id.*

As the Application details, there was no evidence the officers had any knowledge or belief that the car or anyone in it was engaged in or about to engage in criminal activity; no officer claimed to see any furtive movements; and no officer claimed anyone appeared nervous.[5] Application at 5. Nevertheless, against this Court's well-settled precedent, a majority of *all of the justices* on the Appeals Court determined that the officers met the threshold for reasonable suspicion that Mr. Bailey-Sweeting was dangerous and in possession of a weapon because they recognized Mr. Bailey-Sweeting to be a gang member in the company of another police-identified gang member, knew he had been adjudicated delinquent as a juvenile on a firearm offense several

[4] *See* Application at 3–4; *see also* Slip. Op. at 1 n.2 ("This case was initially heard by a panel comprised of Justices Rubin, Maldonado, and Shin. After circulation of a majority and a dissenting opinion to the other justices of the Appeals Court, the panel was expanded to include Chief Justice Green and Justice Vuono. *See Sciaba Constr. Corp. v. Boston*, 35 Mass. App. Ct. 181, 181 n.2 (1993).").

[5] *Amici* note that this Court's *Evelyn* decision would, in any event, greatly discount, if not eliminate, the probative value of "nervousness" in a stop of a group of young Black men. *Evelyn*, 485 Mass. at 708.

years earlier, and "a gang member might act to protect a fellow gang member from arrest and thus, given the circumstances known to the police, it was reasonable to suspect that the item from which Paris was trying to distract the police could be found not only in the car, but on the defendant's person." Slip Op. at 8.

The Appeals Court erred. The officer himself testified that his supposition was a mere "hunch." Application at 4, 6–7. This does not meet the standard for reasonable suspicion for a police officer to run his hands all over the Defendant's body—a "serious intrusion on the sanctity of the person," *Torres-Pagan*, 484 Mass. at 36 (citation omitted), which cannot be justified by an "essentially random and arbitrary" hunch, *Commonwealth* v. *Torres*, 424 Mass. 153, 161 (1997). Worse, the hunch that starts the chain of inferential leaps ignored *both* the calm, unobtrusive behavior of Mr. Bailey-Sweeting and that Mr. Paris's behavior, even if different from previous encounters, was accompanied by a reasonable explanation: he was fed up with being stopped by the police and was voicing his frustration at his experience of police harassment. His repeated police encounters were substantiated by police testimony, and their refusal to credit his frustration amounts to either retaliation for him voicing his frustration or a failure to recognize the impact of repeated, unwanted police contact on Black community members—one recognized by this Court and not unique to Mr. Paris.

Despite the reasonable explanation for Mr. Paris's vocal objections—a history of unwanted, and in his view unwarranted, police encounters—the officers in this case followed their gut down a rabbit-hole of escalating assumptions:

- Perhaps Mr. Paris was not actually upset, but was feigning anger because he was trying to *distract the police from something*;
- Perhaps he was yelling to cover for a fellow *gang member* in the car (rather than simply remaining quiet until the police went away);
- Perhaps he was trying to distract the police from some *physical object* another gang member had in the car;
- Perhaps the physical object in the car was a *weapon*;
- Perhaps that weapon was on *somebody else's person* in the car;
- Perhaps Mr. Bailey-Sweeting had *a gun*.

This is not reasonable suspicion based on specific, articulable facts; it is speculation. As this Court held in *Torres-Pagan*, "surprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous," 484 Mass. at 40—let alone that *another* person in their presence is armed and dangerous. As the dissent below explained, "we [cannot] impute, from a gang member's uncharacteristic behavior during a motor vehicle stop, reasonable suspicion to believe that a fellow gang member, who did nothing more than sit calmly and quietly and cooperate with police, was armed and dangerous." Slip Op. at 1 (Maldonado, J., dissenting). The dissent rightly emphasizes that the majority derives "reasonable suspicion" that Mr. Bailey-Sweeting was armed and dangerous exclusively from Mr. Paris's behavior—not from Mr. Bailey-Sweeting's conduct during the traffic stop, when he was calm and compliant. This tortured reasonable suspicion invites substantial mischief. Black people are disproportionately policed. When they complain, that can be used against not only them but their law-abiding companions. To that end, *amici* note that the police also searched the car's female driver and found no contraband, and as the dissent explained, she "had no known gang affiliation or prior weapons involvement." *Id.* at 6 (Maldonado, J., dissenting).

Finally, the majority opinion's reasonable suspicion analysis begs the question: what could the defendant have done to *not* be frisked? Inevitably, had he not complied with police orders, or had he acted nervous or evasive, the police would have used that behavior to try to concoct reasonable suspicion. Thus, because he was riding in a car with someone who the police had labeled a gang member, he lost the right to be free from a warrantless search. In short, the police justification for searching a person who, by all accounts, did nothing wrong or suspicious, was woefully inadequate and requires this Court's intervention.

II. An Unreliable, Overbroad, and Racist Gang Designation Does Not Establish Reasonable Suspicion that Someone is Armed and Dangerous.

As this Court has repeatedly acknowledged, the policing experienced by Black people differs categorically from the policing experienced by white people.[6] This is part of a historical continuum. This past June, the seven justices led by the late Chief Justice Ralph Gants urged us all to "recognize and confront the inequity and injustice that is the legacy of slavery, of Jim Crow, and of the disproportionate incarceration of African-Americans, and challenge the untruths and unfair stereotypes about African-Americans that have been used to justify or rationalize their repression."[7] It is this last command—to challenge the untruths and unfair stereotypes—that is most directly triggered by this case.

[6] *See, e.g.*, *Commonwealth v. Long*, 485 Mass. 711, 717–18 (2020) ("This court has identified the discriminatory enforcement of traffic laws as particularly toxic. . . . The discriminatory enforcement of traffic laws is not a minor annoyance to those who are racially profiled. To the contrary, these discriminatory practices cause great harm."); *Commonwealth v. Evelyn*, 485 Mass. 691, 708 (2020) ("[T]his pattern of racial profiling has been confirmed by more recent FIO reports."); *Commonwealth v. Williams*, 481 Mass. 443, 451 n.6 (2019) (collecting studies showing "ample empirical evidence" to support a conclusion that "African-American males receive disparate treatment in the criminal justice system"); *Commonwealth v. Buckley*, 478 Mass. 861, 876–77 (2018) (Budd, J., concurring) ("Years of data bear out what many have long known from experience: police stop drivers of color disproportionately more often than Caucasian drivers for insignificant violations (or provide no reason at all)."); *Commonwealth v. Warren*, 475 Mass. 530, 539–40 (2016) ("[B]lack men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. Black men were also disproportionally targeted for repeat police encounters."); *Commonwealth v. Lora*, 451 Mass. 425 (2008); *Commonwealth v. Feyenord*, 445 Mass. 72, 88 (2005), *cert. denied*, 546 U.S. 1187 (2006) (Greaney, J., concurring) (discussing "humiliating, painful, and unlawful" nature of some police encounters targeting African-American and Hispanic individuals); *Commonwealth v. Gonsalves*, 429 Mass. 658, 670 (1999) (Ireland, J., concurring) (collecting studies on disparate policing of Black and Hispanic people in traffic stops); *Commonwealth v. Phillips*, 413 Mass. 50, 53 (1992) (describing informal Boston Police "search on sight" policy which enacted "martial law" for young Black people in Roxbury).

[7] *Letter from the Seven Justices*, *supra* note 3.

Gang policing is built on a foundation of untruths and unfair stereotypes.[8] More than seventy-five percent of the names in Boston's gang database belong to Black men or teens.[9] The police monitor what young Black and Latinx people wear, where they go, and who they know. Based on this surveillance, they assign people points according to criteria of police invention, which become the basis for entry into the gang database.[10] If you're a young Black person wearing a red hat, talking to your cousin while standing in your neighborhood, police may designate you an associate of the Bloods gang. That would never happen to a young white person in a different neighborhood, where the school colors are red.

The majority opinion assumes that any police officer's determination of "gang membership" is reliable, when in fact, being labeled gang-involved is an unreliable, overbroad,[11] and often racist designation that reflects patterns of policing more than criminal associations or activities. Although this case arose elsewhere, the available data about Boston's gang database is instructive. According to coding in the Boston Police Department's own published records, every year roughly 40% of the Boston Police Department's Field Interrogations and Observations (FIOs)—which provide the basis for information in the gang database—are supported by *neither* reasonable suspicion nor probable cause.[12] Additionally, as this Court well knows, *see Evelyn*, 485 Mass. at 708; *Warren*, 475 Mass. at 539–40, over the last decade, each year of available data has shown that 60-70% of FIOs in Boston target Black people, reflecting gross disproportionality

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[8] *See, e.g.*, K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 Univ. Denver Crim. L. Rev. 1, 4 (2015) ("The gang narrative will be used, and has already been used, to justify an even more aggressive regime of stops, summonses, arrests, and surveillance than the pre-*Floyd* regime. The central concepts, however, like those underpinning the stop-and-frisk narrative, are defined so broadly that they can capture any neighborhood or individual the police deem suspicious. No criminal conduct whatsoever is required to be identified as a gang member. The gang allegation provides a facially race-neutral means for policing the usual suspects in the usual way. However, because gang databases and intelligence are secret, this policing avoids both public and judicial scrutiny."); *see also Long*, 485 Mass. at 750 (Budd, J., concurring) ("[T]he officer's recognition of the vehicle or an occupant from a prior interaction or observation, conversations with other officers, or information in a gang database . . . are the same factors currently used by police to racially profile people of color.").

[9] Yawu Miller, *Are there really 160 gangs in Boston?*, Bay State Banner (July 30, 2019), https://www.baystatebanner.com/2019/07/30/are-there-really-160-gangs-in-boston.

[10] *See, e.g.*, Shannon Dooling, *Here's What We Know About Boston Police's Gang Database*, WBUR (June 26, 2019), https://www.wbur.org/news/2019/07/26/boston-police-gang-database-immigration ("Boston police provided redacted documents showing how gang members and associates are tracked. An individual's name and photo, aliases and nicknames, and gang affiliations are listed. In one example, a man is documented as an 'INACTIVE' gang associate who was born in 1996. . . . The report states that the man was wearing a brand of hat that's known to be worn by gang members (four points). The type of hat was redacted by Boston Police. He was also seen in East Boston 'alongside 3 other males, all of which are now verified [redacted] gang members' (two points).").

[11] A "gang" is defined for the Boston Regional Intelligence Center Gang Database as, "a group of three or more people with a common name or identifying signs (like colors or symbols) who frequent a specific area. They also must have members who individually or together engage in criminal activity, which may include targeting rival gang members or being targeted by other gangs." Dooling, *supra* note 10.

[12] The Boston Police Department designates every FIO as supported by probable cause, reasonable suspicion, intel, or encounter. In 2019, a cumulative 41.6% of FIOs were designated as "intel" or "encounter." In 2018, a cumulative 39% of FIOs were designated as "intel" or "encounter." In 2017, a cumulative 37.1% of FIOs were designated as "intel" or "encounter." *See Boston Police Department Releases Latest Field Interrogation Observation Data*, Boston Police Dep't (May 8, 2020), https://bpdnews.com/news/2020/5/8/boston-police-department-releases-latest-field-interrogation-observation-data; *Boston Police Department Releases Latest Field Interrogation Observation Data*, Boston Police Dep't (Mar. 13, 2020), https://bpdnews.com/news/2020/3/13/boston-police-department-releases-latest-field-interrogation-observation-data?rq=fio.

compared to population representation.[13] Further, just *two percent* of the more than 5,300 unique names in the Boston Regional Intelligence Center Gang Database represent white people.[14] A staggering 97.7% of names in the gang database belong to non-white people.

The fact that gang databases are almost uniformly comprised of the names of young Black and Latinx men, in every place that has one,[15] demonstrates that police departments focus their resources and investigations in a discriminatory fashion.[16] If a police designation of gang membership, without any indication of reliability or equal application, is used to justify intrusive actions against community members, then it will only incentivize police departments to expand their gang databases, which already enjoy secrecy.

The majority opinion relies heavily on *Commonwealth v. Elysee* to find that officers had reasonable suspicion to believe Mr. Bailey-Sweeting might be armed and dangerous based on his gang affiliation. *See* Slip Op. at 8 (citing *Commonwealth v. Elysee*, 77 Mass. App. Ct. 833, 841 (2010) ("While gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, the police are not required to blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members, which are all part of the totality of the circumstances they confront and must assess.")). In doing so, the Appeals Court sets a precedent that anything done by anyone the police have deemed to be a gang member can constitute reasonable suspicion that anyone in their presence who police have also labeled a gang member might be armed and dangerous. There is undeniable injury in Massachusetts police applying gang labels almost exclusively to Black and brown people and maintaining an unreliable, overbroad, and racist database of purported gang members and associates—something other cities have abandoned because of precisely these concerns.[17] Our courts add insult to this injury when they endorse these policing judgments and give them sufficient force of law to undermine constitutional rights. *Amici* join the dissent in finding that the majority opinion below effectively "exclude[d] gang members with any prior firearm involvement from the

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[13] *See, e.g.*, Gal Tziperman Lotan, *Data show Boston police stop Black people most often*, Bos. Globe (June 15, 2020), https://www.bostonglobe.com/2020/06/15/metro/data-show-boston-police-stop-black-people-most-often; Jan Ransom, *Blacks remain focus of Boston police investigations, searches*, Bos. Globe (Aug. 28, 2017), https://www.bostonglobe.com/metro/2017/08/28/blacks-remain-focus-boston-police-investigations-searches/PDbFr2QZexCEi3zJTO9mOJ/story.html; Evan Allen & Travis Andersen, *Evans defends Boston police after ACLU report on racial bias*, Bos. Globe (Oct. 9, 2014), https://www.bostonglobe.com/metro/2014/10/08/aclu-charges-boston-police-engaged-racially-biased-tactics-police-call-report-inaccurate/Zev3p7jvRVQ2loKSWncu2H/story.html.

[14] Dooling, *supra* note 10 (noting that 2.3% of the gang database names with known races are white people).

[15] *See, e.g.*, City of Chi., Office of Inspector General, Review of the Chicago Police Department's "Gang Database," at 4 (2019), https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf ("OIG's analysis of Gang Arrest Card data found that Black, African American, and Latinx persons comprise 95% of the 134,242 individuals designated as gang members during arrest, and are designated at both younger and older ages as well as issued more Gang Arrest Cards per person than White gang designees."); Hum. Rights Watch, Groups Urge NYPD Inspector General to Audit the NYPD "Gang Database," (Sept. 22, 2020), https://www.hrw.org/news/2020/09/22/groups-urge-nypd-inspector-general-audit-nypd-gang-database ("[A]ccording to the latest figures provided by the department, the database is 98.5% nonwhite, and a majority of those individuals are Black (66%) and Latino (31.7%).").

[16] *See Long*, 485 Mass. at 734 ("[T]he Commonwealth argued that Black drivers were overrepresented in the statistical data because Black individuals commit more crimes. '[W]e are unaware of any reliable study establishing that motor vehicle violations are more frequently committed by any particular race of driver.'" (citations omitted)).

[17] Chicago and Portland, Oregon both eliminated their gang databases due to concerns about racism, inaccuracy, and overbreadth. *See* Yasmeen Khan, *Damning Report On NYPD Gang Database Increases Calls To End 'A Tool Of Mass Criminalization'*, Gothamist (Dec. 13, 2019), https://gothamist.com/news/damning-report-nypd-gang-database-increases-calls-end-tool-mass-criminalization.

reasonable suspicion requirement established by *Terry v. Ohio*, 392 Mass. 1, 30 (1968), and its progeny." A patfrisk of Mr. Bailey-Sweeting simply cannot be justified by alleged gang affiliation and a years-old juvenile adjudication, the sole factors the Appeals Court invoked that were about him—and not Mr. Paris. The Appeals Court decision deviates from this Court's precedent and requires reversal.

III. Conclusion

Cases that reach this Court in this posture uniformly involve criminal allegations. This Court rarely hears from the many people of color who are stopped and searched every day in the Commonwealth where criminal charges never arise[18]—who have invited police suspicion based on hunches implicitly or explicitly tied to the color of their skin and little or nothing more. The Appeals Court's published decision below bulldozes *Torres-Pagan* and greatly expands the ability of police to stop and frisk people on the basis of racialized intuition. Allowing the Appeals Court's holding to stand would disparately expose Black people in the Commonwealth to ever more invasive policing, exacerbating the substantial racial disparities that already pervade the Commonwealth's criminal legal system. This Court has the opportunity to curb police overreach in interactions with Black and brown people. Reversing here would be consistent with this Court's vast body of cases acknowledging how systemic racism infects our criminal legal system. The failure of the majority below to appreciate its substantial deviation from this Court's robust constitutional protections requires intervention. We urge this Court to allow the Application and to protect Black people from disproportionately intrusive police encounters.

Sincerely,

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[18] Yawu Miller, *FIOed: some in Boston face weekly police stops*, Bay State Banner (July 29, 2020), https://www.baystatebanner.com/2020/07/29/fioed-some-in-boston-face-weekly-police-stops ("'I've seen cops deal with white people,' Weathers said. 'I know it's different. The police speak in a respectful way. They act reasonable. That never happens with my people.' In 2017, Weathers says, his car was surrounded by more than 10 police cruisers at Warren and Dale streets. 'They came out of nowhere,' he said. 'They searched us and pulled us out of the car. They had no reason to. There was no probable cause.' Violations of the Fourth Amendment occur on a daily basis, youth advocates say, when officers stop, question and search young Black men and women in Boston's neighborhoods. 'Nearly everyone I work with has been stopped,' says Toni Golston, a 15-year-old youth organizer who works with The Center for Teen Empowerment and has herself been stopped and questioned. 'It's very belittling. The police assume we're criminals.'").

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ADDENDUM

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 work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most harmed.

The **New England Innocence Project** (NEIP) is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for legal and policy reforms that will reduce the risk of wrongful convictions. This includes advocating for the increased use of reliable scientific evidence and the exclusion of "common sense" misconceptions and assumptions to guide judicial decision-making. NEIP is committed to raising public awareness of the prevalence, causes, and costs of wrongful convictions, including bringing to light the racial disparities that exist within the criminal legal system and that have led to a disproportionate number of people of color who have been wrongfully convicted.

The **Massachusetts Association of Criminal Defense Lawyers** (MACDL) is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

CERTIFICATE OF SERVICE

On January 8, 2021, I served a copy of this letter on all parties through the e-file system and by electronic mail.

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