

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO. SJC-12808

COMMONWEALTH OF MASSACHUSETTS

Appellee,

v.

TYKORIE EVELYN

Defendant-Appellant

ON INTERLOCUTORY APPEAL FROM AN
ORDER OF THE SUFFOLK SUPERIOR COURT

**BRIEF OF AMICI CURIAE THE CHARLES HAMILTON
HOUSTON INSTITUTE FOR RACE & JUSTICE AND THE
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
IN SUPPORT OF THE DEFENDANT-APPELLANT**

Katharine Naples-Mitchell
BBO #704239
CHARLES HAMILTON HOUSTON
INSTITUTE FOR RACE & JUSTICE
Harvard Law School
Areeda Hall, Room 522
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-5121
knaplesmitchell@law.harvard.edu

Jin Hee Lee*
Ashok Chandran*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
jlee@naacpldf.org
achandran@naacpldf.org

December 17, 2019

**Pro Hac Vice* application pending

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	3
INTEREST OF <i>AMICI CURIAE</i>	12
RULE 17(c)(5) DECLARATION.....	13
STATEMENT OF ISSUES	14
STATEMENT OF CASE AND FACTS	14
SUMMARY OF ARGUMENT	14
ARGUMENT	17
I. THE MOMENT OF SEIZURE MUST BE DETERMINED FROM THE PERSPECTIVE OF A REASONABLE BLACK YOUTH.....	17
A. A Court Must Consider Race and Age When Evaluating a Fourth Amendment Seizure.	18
B. Conducting a Seizure Analysis from the Perspective of a Reasonable Black Youth Is Consistent with <i>Commonwealth v.</i> <i>Matta</i>	23
II. DISCRIMINATORY POLICING OF YOUNG BLACK MALES SHAPES WHETHER A REASONABLE BLACK MALE TEENAGER WOULD FEEL COMPELLED TO STAY DURING A POLICE ENCOUNTER.....	25
A. The False, Yet Entrenched, Association Between Blackness and Criminality Has Long Dictated the Policing of Black Youth.....	26
B. Police Have Historically and Persistently Targeted Racially Segregated, Under-Resourced Black Communities For Law Enforcement Action.	31
CONCLUSION	40
MASS R. APP. P. 16(K) CERTIFICATION.....	42
CERTIFICATE OF SERVICE	42

TABLE OF AUTHORITIES

PAGE(S)

CASES

<i>Commonwealth v. Buckley</i> , 478 Mass. 861 (2018).....	19
<i>Commonwealth v. Gonsalves</i> , 429 Mass. 658 (1999).....	40
<i>Commonwealth v. Johnson</i> , 454 Mass. 159 (2009).....	36
<i>Commonwealth v. Matta</i> , 483 Mass. 357 (2019).....	17, 23
<i>Commonwealth v. Morales</i> , No. 19 P 399, 2019 WL 6487284 (Mass. Ct. App. Dec. 3, 2019).....	23
<i>Commonwealth v. Think Van Cao</i> , 419 Mass. 383 (1995).....	18
<i>Commonwealth v. Warren</i> , 475 Mass. 530 (2016).....	24, 33, 40
<i>Commonwealth v. Williams</i> , 481 Mass. 443 (2019).....	39
<i>Doe v. City of Naperville</i> , No. 17 CV 2956, 2019 WL 2371666 (N.D. Ill. June 5, 2019).....	20
<i>Doe v. Heck</i> , 327 F.3d 492 (7th Cir. 2003), <i>as amended on denial of reh'g</i> (May 15, 2003).....	20
<i>D.Y. v. State</i> , 28 N.E.3d 249 (Ind. Ct. App. 2015).....	18
<i>Floyd v. City of New York</i> , 959 F. Supp. 2d 540 (S.D.N.Y. 2013).....	27, 39
<i>Hunt ex rel. DeSombre v. State</i> , 69 A.3d 360 (Del. 2013).....	20
<i>Illinois v. Wardlow</i> , 528 U.S. 119, 132 (2000).....	22
<i>In re Elijah W.</i> , 74 N.E.3d 176 (Ill. Ct. App. 2017).....	20
<i>In re I.R.T.</i> , 647 S.E.2d 129 (N.C. Ct. App. 2007).....	20
<i>In re J.M.</i> , 619 A.2d 497 (D.C. Ct. App. 1992).....	20
<i>J.D.B. v. North Carolina</i> , 564 U.S. 261 (2011).....	19
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	19
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016).....	19

Moore v. Weekly, 159 F. Supp. 3d 784 (E.D. Mich. 2016).....20

United States v. Mendenhall, 446 U.S. 544 (1980).....17, 18

United States v. Smith, 794 F.3d 681 (7th Cir. 2015).....18

United States v. Washington, 490 F.3d 765 (9th Cir. 2007).....19

Utah v. Strieff, 136 S. Ct. 2056 (2016).....22

OTHER AUTHORITIES

ACLU of Mass., *Black, Brown, and Targeted: A Report on Boston Police Department Street Encounters from 2007–2010* (2014), <https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf>.....33, 39

ACLU of Mass., *Facts Over Fear: The Benefits of Declining to Prosecute Misdemeanor and Low-Level Felony Offenses* (2019), https://www.aclum.org/sites/default/files/20180319_dtp-final.pdf.....34

Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 *Criminology* 407 (2005).....27

Peter Annin, ‘*Superpredators*’ Arrive, *Newsweek*, Jan. 22, 1996.....30

Kate Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 *Rev. of Econ. & Stat.* 163 (2009).....36

Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, *N.Y. Times*, Feb. 9, 2001.....31

Jacob Bor et al., *Police killings and their spillover effects on the mental health of black Americans: a population-based, quasi-experimental study*, 392 *The Lancet* 302 (2018).....24

The Boston Indicators Project, MassINC & the Mass. Criminal Justice Reform Coalition, *The Geography of Incarceration: The Cost and Consequences of High Incarceration Rates in Vulnerable City Neighborhoods* (2016), <https://massinc.org/wp-content/uploads/2016/11/The-Geography-of-Incarceration.pdf>.....32

Boston’s Legacy of Racist Policing & Media Coverage of Crime: 30 Years after Chuck Stuart, Medium (Oct. 30, 2019), <https://medium.com/houstonmarshall/bostons-legacy-of-racist-policing-media-coverage-of-crime-30-years-after-chuck-stuart-b64ebfd7928>.....38

Bos. Police Dep’t, *Boston Police Department Rules and Procedures, Rule 335 – Gang Assessment Database* (Mar. 23, 2017), <https://static1.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/593a8cb5e6f2e1d2faf8f4c3/1497009333424/rule335+%28gang+database%29.pdf>.....35

Berkeley Brown et al., Harvard Kennedy Sch., *Tech and Innovation in Government, DPI 663: Team Boston Police Department: User Insights* (2017), <https://static1.squarespace.com/static/56ae4eb5e707eb6849391d16/t/5a0ba5919140b7e76ccc8133/1510712733332/2017+Boston+Police+-+User+Insights>.....35

Rod K. Brunson, “*Police don’t like black people*”: *African-American young men’s accumulated police experiences*, 6 *Criminology & Pub. Pol’y* 71 (2007).....39

Rod K. Brunson & Jody Miller, *Gender, Race, and Urban Policing: The Experience of African American Youths*, 20 *Gender & Soc’y* 531 (2006).....38

Rod K. Brunson & Ronald Weitzer, *Negotiating unwelcome police encounters: The intergenerational transmission of conduct norms*, 40 *J. Contemp. Ethnography* 425 (2011).....39

Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 *Urb. Aff. Rev.* 858 (2009), <https://journals.sagepub.com/doi/10.1177/1078087408326973>.....26, 27, 38

Paul Butler, *The White Fourth Amendment*, 43 *Tex. Tech. L. Rev.* 245 (2010)....21

Devin W. Carbado, *From Stopping Black People to Killing Black People*, 105 *Calif. L. Rev.* 125 (2016).....21

Mia Carpiello, Note, *Striking A Sincere Balance: A Reasonable Black Person Standard for “Location Plus Evasion” Terry Stops*, 6 *Mich. J. Race & L.* 355 (2001).....22

Patrick J. Carr, Laura Napolitano & Jessica Keating, *We never call the cops and here is why: A qualitative examination of legal cynicism in three Philadelphia neighborhoods*, 45 *Criminology* 445 (2007).....39

Maria Cramer & Jan Ransom, *Despite drop in crime, some neighborhoods still feel besieged*, *Bos. Globe* (July 6, 2017, 10:15 AM), <https://www.bostonglobe.com/metro/2017/07/06/despite-drop-crime-some-boston-neighborhoods-still-feel-besieged/Ncoqh6Xb0ZL2TLq3Ne28RM/story.html>.....39

Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police violence and citizen crime reporting in the black community*, 81 *Am. Soc. Rev.* 857 (2016)....39

John J. DiIulio, Jr., *My Black Crime Problem, and Ours: Why are so many blacks in prison? Is the criminal justice system racist? The answer is disquieting*, *City Journal* (Spring 1996), <http://www.city-journal.org/printable.php?id=62>.....30

John J. DiIulio, Jr., *The Coming of the Super-Predators*, *The Weekly Standard*, Nov. 1995.....30

Shannon Dooling, *Here’s What We Know About Boston Police’s Gang Database*, *WBUR* (July 26, 2019), <https://www.wbur.org/news/2019/07/26/boston-police-gang-database-immigration>.....35

Nicole Eigbrett, *Mass Action in Boston Against Police Brutality: “It’s about all of us,”* *Weave News* (Apr. 7, 2018), <http://www.weavenews.org/stories/2018/4/7/mass-action-in-boston-against-police-brutality-its-about-all-of-us>.....36

John Eligon, *Police Killings Have Harmed Mental Health in Black Communities, Study Finds*, *N.Y. Times* (June 21, 2018), <https://www.nytimes.com/2018/06/21/us/police-shootings-black-mental-health.html>.....24

Themal I. Ellawala, *Pulling the Trigger: Dehumanization of African Americans and Police Violence*, 2 *Scholarly Undergraduate Res. J. at Clark* 1 (2016), <https://commons.clarku.edu/cgi/viewcontent.cgi?article=1039&context=surj>.....26

Jeffrey Fagan et al., *An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports* (June 15, 2015).....33

Jeffrey Fagan et al., <i>Stops and Stares: Street Stops, Surveillance, and Race in the New Policing</i> , 43 Fordham Urb. L.J. 539 (2016).....	32, 33
Amy Ferrell et al., Northeastern U. Inst. on Race & Just., Massachusetts Racial and Gender Profiling Study: Final Report (2004), https://repository.library.northeastern.edu/files/neu:344627/fulltext.pdf	34
Brittany N. Fox-Williams, <i>The Rules of (Dis) engagement: Black Youth and Their Strategies for Navigating Police Contact</i> , 34 Soc. F. 115 (2019).....	39
Andrew Guthrie Ferguson & Damien Bernache, <i>The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis</i> , 57 Am. U. L. Rev. 1587 (2008).....	32
Roland G. Fryer, Jr., <i>An Empirical Analysis of Racial Differences in Police Use of Force</i> , Working Paper 22399, Nat’l Bureau of Econ. Res. (Jan. 2018), https://www.nber.org/papers/w22399	28
Maggie Gallagher, <i>Juvenile Crime Wave is Just Beginning</i> , Long Beach Press-Telegraph, May 20, 1996.....	30
David Gergen, Editorial, <i>Taming Teenage Wolf Packs</i> , U.S. News & World Rep., Mar. 25, 1996.....	30
Phillip Atiba Goff et al., Ctr. for Policing Equity, <i>The Science of Justice: Race, Arrests, and Police Use of Force</i> 4 (2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf	28
Ben Grunwald & Jeffrey Fagan, <i>The End of Intuition-Based High-Crime Areas</i> , 107 Calif. L. Rev. 345 (2019).....	32
Rahsaan Hall, <i>Mistaken Identity</i> , ACLU of Mass. (Mar. 5, 2018), https://www.aclum.org/en/news/mistaken-identity	37
David A. Harris, <i>Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked</i> , 69 Ind. L.J. 659 (1994).....	32
Kristin Henning, <i>The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment</i> , 67 Am. U. L. Rev. 1513 (2018).....	21, 22

Neil Hester & Kurt Gray, *For Black men, being tall increases threat stereotyping and police stops*, 115 Proc. Nat’l Acad. Sci. 2711 (2018),
<https://www.pnas.org/content/115/11/2711>.....26

Human Rights Watch, *II. Trying Children in Adult Courts, in No Minor Matter: Children in Maryland’s Jails* (1999),
<https://www.hrw.org/reports/1999/maryland/Maryland-02.htm>.....31

Yolander G. Hurst et al., *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, 23 Policing 37 (2000).....21

Meghan E. Irons, *Video of police stop of black man sparks outrage among civil rights activists*, Bos. Globe (Feb. 27, 2018),
<https://www3.bostonglobe.com/metro/2018/02/26/video-police-stop-black-man-sparks-outrage-among-civil-rights-group/sBh5bEnfiVWowZJkQVAsPN/story.html>.....37

Meghan E. Irons, *Women allege discrimination, retaliation on male-dominated Boston police force*, Bos. Globe (May 5, 2019, 6:31 PM),
<https://www.bostonglobe.com/metro/2019/05/05/lawsuits-women-allege-discrimination-retaliation-male-dominated-boston-police-force/65vGv4MCUG7Qyqc4ocenVM/story.html>.....36

Julia Jacobo, *Video of Boston officer questioning black pedestrian draws criticism from civil rights activists*, ABC News (Feb. 27, 2018),
<https://abcnews.go.com/US/video-boston-officer-questioning-black-pedestrian-draws-criticism/story?id=53396609>.....37

Erika L. Johnson, “*A Menace to Society: The Use of Criminal Profiles and Its Effects on Black Males*,” 38 Howard L. J. 629 (1995).....24

Lewis R. Katz, *Terry v. Ohio at Thirty Five: A Revisionist’s View*, 74 Miss. L.J. 423 (2004).....32

Kristin LaFratta, *Suffolk DA finds Boston officer justified in fatal shooting*, Mass Live News (Sept. 2, 2017),
https://www.masslive.com/news/boston/2017/09/suffolk_da_finds_boston_office.html.....37–38

Tracey Maclin, “*Black and Blue Encounters*” - *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val. U. L. Rev. 243 (1991).....22

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>.....35

Yawu Miller, *Mayor makes changes to police review board; Civil rights activists see little benefit to changes*, Bay State Banner (June 7, 2017), <https://www.baystatebanner.com/2017/06/07/mayor-makes-changes-to-police-review-board>.....38

Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 Md. L. Rev. 849 (2010).....28, 29

Cynthia J. Najdowski, Bette L. Bottoms & Phillip Atiba Goff, *Stereotype threat and racial differences in citizens’ experiences of police encounters*, 39 L. & Hum. Behav. 463 (2015).....39

Justin Nix et al., *A Bird’s Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias*, 16 Criminology & Pub. Pol’y 309 (2017).....28

Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679 (2002).....28

Office of the Surgeon Gen. (U.S.) et al., *Youth Violence: A Report of the Surgeon General* (2001), <https://www.ncbi.nlm.nih.gov/books/NBK44297/#A12312>.....31

Emma Pierson et al., Stanford Computational Policy Lab, *A large-scale analysis of racial disparities in police stops across the United States* (June 2017), http://www.antonioacasella.eu/nume/Pierson_2017.pdf.....27

Antonio Planas, *Arrested Diversity at BPD*, Bos. Herald (Apr. 4, 2018), <https://www.bostonherald.com/2018/04/04/arrested-diversity-at-bpd>.....36

Press Release, Ass’n for Psychological Sci., *Faces of Black Children as Young as Five Evoke Negative Biases* (Feb. 8, 2016), <https://www.psychologicalscience.org/news/releases/faces-of-black-children-as-young-as-five-evoke-negative-biases.html>.....27

Press Release, Harv. Sch. Pub. Health, Substantial racial stereotyping toward young children of color found among white adults who work with them (Sept. 12, 2018), <https://www.hsph.harvard.edu/news/press-releases/substantial-racial-stereotyping-toward-young-children-of-color-found-among-white-adults-who-work-with-them>.....26, 27

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>.....34

Tom Relihan, *State police more likely to search non-white drivers, less likely to discover contraband*, The Enterprise (Aug. 21, 2017), <https://www.enterpriseneews.com/news/20170820/state-police-more-likely-to-search-non-white-drivers-less-likely-to-discover-contraband>.....34

Alanna Durkin Richer, *Activists decry video of Boston police stop of black man*, Associated Press (Feb. 28, 2018), <https://www.boston.com/news/local-news/2018/02/28/activists-decry-video-of-boston-police-stop-of-black-man>.....37

Simón Rios, *Boston Cops, Man’s Mother Offer Differing Descriptions Of Fatal Shooting*, WBUR (Oct. 31, 2016), <https://www.wbur.org/all-things-considered/2016/10/31/south-end-fatal-shooting-disputed>.....37

Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 Denv. U. L. Rev. 1081 (2001).....28–29

Shira Schoenburg, *Racial justice advocates tell of ‘driving while black’*, Mass Live News (Oct. 23, 2019), <https://www.masslive.com/news/2019/10/racial-justice-advocates-tell-of-driving-while-black.html>.....38

David Seawell, *Wardlow’s Case: A Call To Broaden the Perspective of American Criminal Law*, 78 Denv. U. L. Rev. 1119 (2001).....32

Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 Soc. & Personality Psych. Compass 50 (2016), <https://gspp.berkeley.edu/assets/uploads/research/pdf/SpencerCharbonneauGlaser.Compass.2016.pdf>.....26

Randall S. Susskind, <i>Race, Reasonable Articulable Suspicion, and Seizure</i> , 31 Am. Crim. L. Rev. 327 (1994).....	22
Benjamin Swasey & Simón Rios, <i>Mother Whose Son Was Fatally Shot By A Boston Cop Files A Civil Rights Lawsuit</i> , WBUR (Apr. 4, 2018), https://www.wbur.org/news/2018/04/04/coleman-shooting-lawsuit	38
Lisa H. Thureau & Johanna Wald, <i>Police killings, brutality damaging mental health of black community</i> , USA Today (Sept. 15, 2018), https://www.usatoday.com/story/opinion/policing/spotlight/2018/09/14/police-brutality-damaging-black-communitys-mental-health/1218566002	24
Andrew R. Todd et al., <i>Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli</i> , 27 Psychol. Sci. 384 (2016).....	27
Walter L. Updegrave, <i>You're Safer Than You Think</i> , Money (June 1, 1994).....	29
<i>Video of Boston police stop of black pedestrian draws ire from activists</i> , CBS News (Feb. 28, 2018), https://www.cbsnews.com/news/video-of-boston-police-stop-of-black-pedestrian-draws-ire-from-activists	37
Rob Voigt et al., <i>Language from police body camera footage shows racial disparities in officer respect</i> , 114 Proc. Nat'l Acad. Sci. 6521 (2017).....	28
Ronald Weitzer & Rod K. Brunson, <i>Strategic responses to the police among inner-city youth</i> , 50 Soc. Q. 235 (2009).....	28, 39
Ronald Weitzer & Steven A. Tuch, <i>Perceptions of Racial Profiling: Race, Class, and Personal Experience</i> , 40 Criminology 435 (2002).....	21
Franklin E. Zimring, <i>The Youth Violence Epidemic: Myth or Reality?</i> , 33 Wake Forest L. Rev. 727 (1998).....	31
Richard Zoglin, <i>Now For the Bad News: A Teenage Time Bomb</i> , Time, Jan. 15, 1996.....	30

INTEREST OF *AMICI CURIAE*

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. CHHIRJ honors and continues the unfinished work of Charles Hamilton Houston, one of the twentieth 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 and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing, criminalization, and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed by these policies.

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is the nation's first and foremost civil rights law organization. Since its inception, LDF has sought to eliminate the arbitrary role of race on the administration of the criminal justice system by challenging laws, policies, and practices that discriminate against African Americans and other communities of color. For example, LDF has served as counsel of record or *amicus curiae* in such matters as *Buck v. Davis*, 137 S. Ct.

759 (2017) (invalidating death sentence due to explicit use of race in capital sentencing); *Miller v. Alabama*, 567 U.S. 460 (2012) (barring mandatory life without parole sentences for youth offenders); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (challenging the role of race in the imposition of capital punishment in Georgia); *Batson v. Kentucky*, 476 U.S. 79 (1986) (challenging the discriminatory exercise of peremptory challenges); *Brown v. City of Oneonta, N.Y.*, 235 F.3d 769 (2d Cir. 2000) (challenging the role of race in police stops); *People v. Hill*, 33 N.Y.3d 990 (N.Y. 2019) (finding unlawful police encounter with young, Black man in public housing building); *People v. Boone*, 30 N.Y.3d 521 (N.Y. 2017) (requiring jury instruction, on request, about likelihood of misidentification in cross-racial eyewitness testimony). In *Davis v. City of New York*, Civ. No. 10-0699 (S.D.N.Y.), LDF represents a class of Black and Latino/a public housing residents and guests, challenging the New York City Police Department’s unlawful stop and arrest practices in public housing residences throughout New York City.

RULE 17(c)(5) DECLARATION

CHHIRJ and LDF and their counsel declare that (a) no party or party’s counsel authored the brief in whole or in part; (b) no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; (c) no person or entity—other than *amici curiae* or their counsel—contributed money that was intended to fund preparing or submitting the brief; and (d) neither

amici curiae nor their counsel represent or have represented any of the parties to the present appeal in another proceeding involving similar issues, or were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF ISSUES

Amici curiae address the following issue raised by this Court: “Whether, in all the circumstances of this case involving a street encounter between police officers and the defendant (a seventeen-year-old African-American male), a seizure of the defendant occurred when a police officer exited his vehicle in pursuit of him after attempting to speak with him; whether the moment of seizure should be determined from the perspective of a reasonable African-American boy. *See Commonwealth v. Matta* (SJC-12693).”

STATEMENT OF CASE AND FACTS

Amici curiae adopt the Statement of the Case and Statement of the Facts set forth by Defendant-Appellant Tykorie Evelyn in his appeal brief.

SUMMARY OF ARGUMENT

This Court has raised the important question of whether the moment of seizure under the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights “should be determined from the perspective of a reasonable African-American boy.” Implicit in this question is the

widespread understanding that, throughout our Nation’s history and continuing to the present day, race shapes individuals’ experiences when encountering law enforcement. Race, along with age, must therefore be considered in applying the reasonable person standard, which is the touchstone for determining whether a seizure implicating federal and state constitutional rights has occurred.

Here, the relevant circumstances are not simply that an officer exited a police vehicle to question Tykorie Evelyn after he repeatedly tried to ignore the officer’s prior attempts to engage in conversation, which alone could be an act of coercion. The relevant circumstances also include the facts that the officer took this enforcement action against a Black, male teenager in an over-policed and racially segregated neighborhood, where similar encounters with law enforcement too often lead to wrongful arrests or bodily harm (*infra* 31–40). Thus, it is not only appropriate, but imperative, that courts consider both race and age in determining whether a person was seized in these circumstances. Indeed, to ignore the person’s race and age in assessing the reasonableness of their conduct with law enforcement would render “seizure” a mere abstract concept, rather than the serious invasion of individual rights that is addressed explicitly by both the United States Constitution and the Massachusetts Declaration of Rights (*infra* 17–25).

The striking differences in police encounters along racial lines do not occur in a vacuum. They are a product of longstanding, false stereotypes about Black

people being more criminal, more dangerous, and more violent. These stereotypes, which have been documented in numerous studies, have shaped society's perception of criminality and, likewise, have unduly influenced police behavior (*infra* 25–28). Young Black males in particular have been stereotyped as violent criminals, leading to a panoply of abusive law enforcement policies and practices targeting Black youth that continue to this day (*infra* 28–32).

One consequence of this stereotyping is that predominantly Black neighborhoods are subject to heavy and aggressive police presence in ways that do not correlate with crime conditions (*infra* 31–33). These circumstances, including a well-documented history of harassment by Boston police, shape how Black teenagers and young men interact with police officers. Black youth have been accustomed to—and therefore expect—to be treated with suspicion by police, regardless of whether they committed a crime. And Black youth are confronted regularly with the potentially deadly consequences of noncompliance, or even *perceived* noncompliance, with police (*infra* 33–40). The resultant fears from this reality must be a part of the totality of the circumstances that courts consider in assessing the moment of a seizure.

Scholars have long argued, and courts increasingly recognize, that a person's race and age affect their responses to police (*infra* 17–25). A Black teenager in the racially segregated neighborhood of Roxbury fully understands that an officer's

exit from a vehicle is a form of pursuit intended to compel him to stay, especially after he tries multiple times to end the police encounter. By failing to consider the specific lived experiences of Black youth, the court below effectively analyzed the constitutional seizure question through the lens of a reasonable white adult. This Court should remedy the lower court’s error.

ARGUMENT

In the context of an encounter between an individual and the police, a Fourth Amendment seizure occurs when, looking at the “totality of the circumstances,” a reasonable person “would believe that an officer would compel him or her to stay.” *Commonwealth v. Matta*, 483 Mass. 357, 362–63 (2019). Young Black men and boys in racially segregated and under-resourced communities saturated with police regularly face abuse and disrespect from police. These realities have shaped young Black men’s learned behavior to mitigate the dangers of police encounters, and cannot be separated from the reasonableness of Tykorie Evelyn’s belief that he would be compelled to stay once the police exited their vehicle to question him after he repeatedly declined to answer their questions.

I. THE MOMENT OF SEIZURE MUST BE DETERMINED FROM THE PERSPECTIVE OF A REASONABLE BLACK YOUTH.

The moment of a defendant’s seizure must be determined “in view of all the circumstances surrounding an incident.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). This Court has been clear that this question is “necessarily fact

specific” and requires “careful examination of the circumstances surrounding the police-citizen encounter.” *Commonwealth v. Thinh Van Cao*, 419 Mass. 383, 387 (1995). Mr. Evelyn’s status as a Black teenager in the predominantly Black community of Roxbury is undoubtedly an important part of such circumstances. Accordingly, this Court must view the actions of police affirmatively exiting their vehicle to continue questioning Mr. Evelyn—although he repeatedly refused to engage in conversation—from the perspective of a reasonable Black teenager.

A. A Court Must Consider Race and Age When Evaluating a Fourth Amendment Seizure.

The United States Supreme Court has recognized that a Black woman’s race and gender are relevant factors within the totality of circumstances in determining whether that person “may have felt unusually threatened by [police] officers.” *Mendenhall*, 446 U.S. at 558; *see also D.Y. v. State*, 28 N.E.3d 249, 256 (Ind. Ct. App. 2015) (noting *Mendenhall*’s prescription that “factors such as age, race, lack of education, and gender might be relevant” to seizure analysis). The Seventh Circuit has likewise acknowledged “the relevance of race in everyday police encounters with citizens . . . around the country . . . and empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system” when determining the moment of a Fourth Amendment seizure. *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015). And the Ninth Circuit has similarly considered “publicized shootings by

white Portland officers of African-Americans” in determining whether a seizure had occurred. *United States v. Washington*, 490 F.3d 765, 773 (9th Cir. 2007).

These courts have recognized the need to include race within the totality of circumstances, given how Black people face drastically different risks from police encounters than their white counterparts. Fully aware that their actions will be subjected to heightened scrutiny, Black individuals—and particularly, Black teenagers—will much sooner feel forced to submit to police officers’ authority, if only to avoid potential physical harm. Indeed, one member of this Court has noted that “the fear people of color have of being stopped by police is justified: African-Americans have been killed during routine traffic stops.” *Commonwealth v. Buckley*, 478 Mass. 861, 877 (2018) (Budd, J., concurring).

The “circumstances” relevant to the constitutional seizure inquiry must also include the defendant’s age. A child’s age is “far more than a chronological fact.” *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011). Minors are consistently treated differently from adults for constitutional purposes because they “are more vulnerable to negative influences and outside pressures” than adults. *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012)). As such, youth can affect “how a reasonable person in the suspect’s position would perceive his or her freedom to leave” an encounter with police. *J.D.B.*, 564 U.S. at 271–72 (internal quotation marks omitted). Applying these

principles, numerous courts have recognized that a young child is likely to feel unable to leave a police interaction, and thus be “seized” under the Fourth Amendment, far sooner than an adult. *See, e.g., Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003) (“[W]e conclude that John Jr. was ‘seized’ with the meaning of the Fourth Amendment because no reasonable child would have believed that he was free to leave the nursery.”), *as amended on denial of reh’g* (May 15, 2003); *In re Elijah W.*, 74 N.E.3d 176, 185 (Ill. Ct. App. 2017) (considering child’s age in determining moment of seizure); *Hunt ex rel. DeSombre v. State*, 69 A.3d 360, 366 (Del. 2013) (same); *In re I.R.T.*, 647 S.E.2d 129, 134 (N.C. Ct. App. 2007) (same); *In re J.M.*, 619 A.2d 497, 503–04 (D.C. Ct. App. 1992) (same); *Moore v. Weekly*, 159 F. Supp. 3d 784, 790 (E.D. Mich. 2016) (“When the subject of the alleged seizure is a minor, the question is whether a reasonable child of the plaintiff’s same age and maturity would have believed he was free to leave.”).

The intersection of race and age is, therefore, an integral part of the totality of circumstances to be considered in the context of Black youth’s interaction with police because whether a “reasonable person” might feel free to leave the police encounter may vary significantly by both race and age in any given circumstance. *See, e.g., Doe v. City of Naperville*, No. 17 CV 2956, 2019 WL 2371666, at *4 (N.D. Ill. June 5, 2019) (conducting Fourth Amendment seizure analysis from perspective of reasonable twelve-year-old African American child). In fact,

ignoring Mr. Evelyn’s race or age would hardly be a neutral position. As Professor Devon Carbado argues, ignoring race “creates a racial preference in the seizure doctrine for people who are not racially vulnerable to . . . interactions with police.”¹ That would cause the Fourth Amendment and Article 14 to become more protective of white people.² Moreover, as impressionable children and adolescents greatly influenced by their surroundings, “Black youths’ perceptions of law enforcement are shaped by the vicarious and collective experiences of their friends and family members, especially those who have been verbally or physically abused by the police.”³

Conducting the seizure analysis from the perspective of a reasonable Black youth recognizes what Black families have known for generations, as Black children have been taught from an early age that they are subject to heightened scrutiny by police. “For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep

¹ Devin W. Carbado, *From Stopping Black People to Killing Black People*, 105 Calif. L. Rev. 125, 142 (2016).

² See Paul Butler, *The White Fourth Amendment*, 43 Tex. Tech. L. Rev. 245 (2010).

³ Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 Am. U. L. Rev. 1513, 1530 (2018) (citing Yolander G. Hurst et al., *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, 23 Policing 37, 49 (2000); Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 Criminology 435, 450 (2002)).

your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.” *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting). This dynamic is hardly a secret: “the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.” *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J., concurring in part). Thus, the shared experience among young Black men and boys, as well as their family and friends, at the hands of police renders their understanding of police encounters fundamentally different from their white counterparts, and that difference must be considered in this Court’s analysis of Tykorie Evelyn’s seizure.⁴

⁴ Scholars have long argued for courts to adopt a reasonableness standard that takes race into account. *See, e.g.*, Mia Carpinello, Note, *Striking A Sincere Balance: A Reasonable Black Person Standard for “Location Plus Evasion” Terry Stops*, 6 Mich. J. Race & L. 355, 378 (2001); Randall S. Susskind, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 Am. Crim. L. Rev. 327, 327 (1994); Tracey Maclin, “*Black and Blue Encounters*” - *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val. U. L. Rev. 243, 250, 276 (1991). And at least one scholar argues for a reasonableness standard that specifically looks at police encounters from the perspective of a reasonable Black boy. *See Henning, supra* note 3 (arguing for reasonable Black boy standard).

B. Conducting a Seizure Analysis from the Perspective of a Reasonable Black Youth Is Consistent with *Commonwealth v. Matta*.

Recently, in *Commonwealth v. Matta*, this Court framed the Fourth Amendment seizure inquiry as “whether an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce [a] person to stay.” 483 Mass. at 362. This Court cautioned, however, that its reframing was not a significant change in the law: “the analysis takes the same circumstances into consideration.” *Id.* at 363.⁵ Critically, this Court explained that focusing on an officer’s conduct still required consideration of whether “a reasonable person would consider [that conduct] coercive; that is, behavior which could be expected to command compliance, beyond simply identifying him- or herself as police.” *Id.* at 362 (internal quotation marks and brackets omitted). Thus, *Matta* recognized that identical conduct by an officer could lead to different constitutional results, depending on the context. *See Id.* at 364 (noting that officer’s directive to “hold on a second” did not constitute seizure when it was first made, but could be a seizure if made after a suspect “chooses to ignore” the officer).

⁵ The only court to cite *Matta* in conducting a reasonableness analysis for a seizure has noted that the frameworks are largely similar and generally compel similar results. *See Commonwealth v. Morales*, No. 19 P 399, 2019 WL 6487284, at *2 (Mass. Ct. App. Dec. 3, 2019) (noting that same conduct “constituted a seizure under either the old ‘not free to leave’ standard or the new *Matta* standard”).

As such, *Matta* leaves in place this Court’s prior admonition that any seizure analysis “cannot be divorced from . . . a pattern of racial profiling of black males in the city of Boston.” *Commonwealth v. Warren*, 475 Mass. 530, 539 (2016). As *Matta* recognized, context matters. A police officer opening their door and moving towards a suspect carries a very different meaning for a white adult in a wealthy suburb than for a Black teenager in Roxbury like Tykorie Evelyn. As discussed *infra*, Section II(B), Black youth in Boston are vastly more likely to encounter police—and more likely to have those encounters escalate into arrests or violence—than their white peers. National tragedies, such as the killings of Tamir Rice, Michael Brown, and Laquan Macdonald, put the dangers of being seen as “noncompliant” into stark relief for Black youth.⁶ As a result, “black males, often targets of police harassment and brutality, will not feel free to leave a police officer without considering the possible repercussions—bodily injury or death.”⁷ That was very likely true in the case at hand, requiring this Court to pay special attention to

⁶ See, e.g., John Eligon, *Police Killings Have Harmed Mental Health in Black Communities, Study Finds*, N.Y. Times (June 21, 2018) (citing Jacob Bor et al., *Police killings and their spillover effects on the mental health of black Americans: a population-based, quasi-experimental study*, 392 *The Lancet* 302, 302–10 (2018)), <https://www.nytimes.com/2018/06/21/us/police-shootings-black-mental-health.html>; Lisa H. Thurau & Johanna Wald, *Police killings, brutality damaging mental health of black community*, USA Today (Sept. 15, 2018), <https://www.usatoday.com/story/opinion/policing/spotlight/2018/09/14/police-brutality-damaging-black-communitys-mental-health/1218566002/>.

⁷ Erika L. Johnson, “*A Menace to Society: The Use of Criminal Profiles and Its Effects on Black Males*,” 38 *Howard L. J.* 629, 663 (1995).

the circumstances of an officer exiting a vehicle in a heavily-policed, Black neighborhood to question Tykorie Evelyn, a Black teenager who had attempted multiple times not to engage with the officer's inquiries. In such circumstances, it is clear that the police were objectively communicating that they were using their police power to coerce Mr. Evelyn.

II. DISCRIMINATORY POLICING OF YOUNG BLACK MALES SHAPES WHETHER A REASONABLE BLACK MALE TEENAGER WOULD FEEL COMPELLED TO STAY DURING A POLICE ENCOUNTER.

The historical conflation of Blackness with criminality in Boston and across this nation has, unfortunately, all too often resulted in law enforcement actions predicated on an individual's race rather than credible and articulable facts surrounding the police encounter. It is, therefore, no coincidence that predominantly Black communities in Boston, like the rest of the country, are targeted by law enforcement. As a result, Black communities—especially their youth—regularly confront abusive police practices that can, at times, risk their own safety and security. This lived reality of Black youth necessarily influenced Tykorie Evelyn's reasonable belief that, by exiting their vehicle after he repeatedly refused to respond to their questions, police were coercing him to stay.

A. The False, Yet Entrenched, Association Between Blackness and Criminality Has Long Dictated the Policing of Black Youth.

Stereotypes that falsely link young Black men and children with dangerousness pervade American society. Studies have shown that Black men are deemed more threatening for being tall;⁸ are more likely than white men to be mistaken for being armed;⁹ and are more likely than white men to be considered suspicious for identical conduct.¹⁰ Black children are not free from this stereotyping: they are routinely seen as older, and thus more threatening, than they actually are.¹¹ Studies have shown that white adults are more than twice as likely to view Black children as “violence-prone” compared to white children.¹² Black

⁸ Neil Hester & Kurt Gray, *For Black men, being tall increases threat stereotyping and police stops*, 115 Proc. Nat’l Acad. Sci. 2711 (2018), <https://www.pnas.org/content/115/11/2711>.

⁹ Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 Soc. & Personality Psych. Compass 50, 55 (2016), <https://gspp.berkeley.edu/assets/uploads/research/pdf/SpencerCharbonneauGlaser.Compass.2016.pdf>.

¹⁰ Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 Urb. Aff. Rev. 858 (2009), <https://journals.sagepub.com/doi/10.1177/1078087408326973>.

¹¹ Themal I. Ellawala, *Pulling the Trigger: Dehumanization of African Americans and Police Violence*, 2 Scholarly Undergraduate Res. J. at Clark 1 (2016), <https://commons.clarku.edu/cgi/viewcontent.cgi?article=1039&context=surj>.

¹² Press Release, Harv. Sch. Pub. Health, Substantial racial stereotyping toward young children of color found among white adults who work with them (Sept. 12, 2018), <https://www.hsph.harvard.edu/news/press-releases/substantial-racial-stereotyping-toward-young-children-of-color-found-among-white-adults-who-work-with-them>.

children as young as five years old can prompt such reactions in white adults,¹³ with Black teenagers like Tykorie Evelyn evoking the strongest negative stereotypes.¹⁴

Police officers “share the latent biases that pervade our society.” *Floyd v. City of New York*, 959 F. Supp. 2d 540, 580 (S.D.N.Y. 2013). Studies have repeatedly found that police tend to view Black people more suspiciously than they view white people, even controlling for a suspect’s behavior.¹⁵ After being stopped, false perceptions of Black criminality make Black people more likely to be searched, questioned, and arrested than their white counterparts, regardless of their conduct and responses.¹⁶ Police biases also lead them to treat Black people

¹³ Press Release, Ass’n for Psychological Sci., Faces of Black Children as Young as Five Evoke Negative Biases (Feb. 8, 2016) (citing Andrew R. Todd et al., *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli*, 27 *Psychol. Sci.* 384 (2016)), <https://www.psychologicalscience.org/news/releases/faces-of-black-children-as-young-as-five-evoke-negative-biases.html>.

¹⁴ Press Release, *supra* note 12.

¹⁵ See, e.g., Brunson & Weitzer, *supra* note 10, at 858–59; Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 *Criminology* 407, 417–19 (2005).

¹⁶ Emma Pierson et al., Stanford Computational Policy Lab, *A large-scale analysis of racial disparities in police stops across the United States* 5–7, 15–16 (June 2017), http://www.antonioacasella.eu/nume/Pierson_2017.pdf.

with greater disrespect during interactions with police,¹⁷ and to be more likely to use force—of all levels—on Black individuals they encounter.¹⁸

Nowhere is this stereotyping of Black children, and the impact of that stereotyping on law enforcement policies and practices, more apparent than in the pernicious history of the “super-predator” myth. Beginning in the late 1980s, young Black children became the subject of intense panic across the country, as broad swaths of society began to fear a “new breed” of adolescents who they believed to be capable of committing crimes and violent acts for no reason.¹⁹ This super-predator myth relies heavily on “racist imagery and stereotypes” and harkens back to “historic representations of African Americans [and other people of color] as violence-prone, criminal and savage.”²⁰ One prominent example is a high-

¹⁷ Rob Voigt et al., *Language from police body camera footage shows racial disparities in officer respect*, 114 Proc. Nat’l Acad. Sci. 6521 (2017); Ronald Weitzer & Rod K. Brunson, *Strategic responses to the police among inner-city youth*, 50 Soc. Q. 235, 244 (2009).

¹⁸ Phillip Atiba Goff et al., Ctr. for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force* 4 (2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf; Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, Working Paper 22399, Nat’l Bureau of Econ. Res. (Jan. 2018), <https://www.nber.org/papers/w22399>; Justin Nix et al., *A Bird’s Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias*, 16 Criminology & Pub. Pol’y 309 (2017).

¹⁹ Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 Md. L. Rev. 849, 850–51 (2010).

²⁰ Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 712 (2002); Mary Romero,

profile case in which five Black and Latino teenagers were charged with the brutal rape and assault of a white woman in New York City's Central Park—charges for which they wrongfully spent decades in prison before being exonerated.²¹

Media coverage of “super-predators” was quick to draw racial lines; Black youth appeared in crime stories significantly more than white youth to an extent not supported by actual crime rates in each population.²² This coverage, coupled with increasing residential segregation over the same period, led white adults to have outsized fears of Black children.²³ In 1994, nearly twice as many white adults reported fears of being victimized by a Black person, as opposed to a white person, even though the reverse was true: in actuality, white people were more than three times more likely to be victimized by another white person than by a Black person.²⁴ Thus, white people, increasingly living in racially homogenous communities, began to support harsher and more punitive punishments for Black youth accused of criminal activity based on unfounded fears predicated on their own biases.²⁵

State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member, 78 Denv. U. L. Rev. 1081, 1083–84 (2001).

²¹ Moriearty, *supra* note 19, at 862–64.

²² *Id.* 868, 870–71.

²³ *Id.*

²⁴ Walter L. Updegrave, *You're Safer Than You Think*, Money 114 (June 1, 1994).

²⁵ Moriearty, *supra* note 19, at 873.

The media's false connection between race, crime, and youth was corroborated and propelled by pseudo-scientific research on the purported impending rise of hyper-violent, morally depraved, and criminally-involved children who would terrorize society.²⁶ Academics, led by Professor John J. DiIulio, predicted a probable surge in the "number of young black criminals," which caused him to further predict that the "black crime rate, both black-on-black and black-on-white" would increase substantially.²⁷ Professor DiIulio focused his predictions on "black inner-city neighborhoods," which he said would witness "an army of young male predatory street criminals who will make even the leaders of the Bloods and Crips . . . look tame by comparison."²⁸

Despite the fervor around the super-predator myth, it has now been uniformly discredited. As early as 1998, the very academics who had made the

²⁶ See, e.g., Peter Annin, 'Superpredators' Arrive, *Newsweek*, Jan. 22, 1996, at 57; David Gergen, Editorial, *Taming Teenage Wolf Packs*, *U.S. News & World Rep.*, Mar. 25, 1996, at 68; Richard Zoglin, *Now For the Bad News: A Teenage Time Bomb*, *Time*, Jan. 15, 1996, at 52, <http://content.time.com/time/magazine/article/0,9171,983959,00.html>; Maggie Gallagher, *Juvenile Crime Wave is Just Beginning*, *Long Beach Press-Telegraph*, May 20, 1996, at B7.

²⁷ John J. DiIulio, Jr., *My Black Crime Problem, and Ours: Why are so many blacks in prison? Is the criminal justice system racist? The answer is disquieting*, *City Journal* (Spring 1996), <http://www.city-journal.org/printable.php?id=62>.

²⁸ John J. DiIulio, Jr., *The Coming of the Super-Predators*, *The Weekly Standard*, Nov. 1995, at 1, 3.

doomsday predictions were forced to concede that “it clearly hasn’t happened.”²⁹ Indeed, the juvenile crime rate eventually “dropped by more than half,” causing Professor DiIulio to concede that “he wished he had never become the 1990’s intellectual pillar for putting violent juveniles in prison and condemning them as ‘superpredators.’”³⁰ Yet, although the false association between race/youth and violent criminal behavior has been widely and repeatedly debunked, this entrenched racial stereotyping stubbornly persists, especially in law enforcement’s treatment of Black youth in racially segregated, urban neighborhoods.

B. Police Have Historically and Persistently Targeted Racially Segregated, Under-Resourced Black Communities For Law Enforcement Action.

The deeply entrenched stereotype linking Blackness with criminality affects

²⁹ Human Rights Watch, *II. Trying Children in Adult Courts, in No Minor Matter: Children in Maryland’s Jails* (1999), <https://www.hrw.org/reports/1999/maryland/Maryland-02.htm>.

³⁰ Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19, <https://timesmachine.nytimes.com/timesmachine/2001/02/09/836966.html?pagenumber=19>; see also Office of the Surgeon Gen. (U.S.) et al., *Youth Violence: A Report of the Surgeon General* (2001), <https://www.ncbi.nlm.nih.gov/books/NBK44297/#A12312> (“There is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years.”); Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 Wake Forest L. Rev. 727, 728 (1998) (finding that “there never was a general pattern of increasing adolescent violence in the 1980s and 1990s[,]” and that “there is no basis for making *any* projections fifteen years forward based on [then] current trends”).

how police departments define whole neighborhoods and decide where to patrol; indeed, in Boston and elsewhere, neighborhoods labeled “high crime” track more closely with concentrations of Black residents than with crime rates.³¹ While this phenomenon is prevalent throughout the United States,³² the Boston Police Department, in particular, disproportionately targets the substantially Black neighborhoods of Roxbury, Mattapan, Dorchester, and parts of Jamaica Plain, causing Black residents in these areas to be unjustly overrepresented in the criminal legal system.³³ Indeed, the same report credited by this Court in *Warren*

³¹ Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 Calif. L. Rev. 345 (2019); Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 Fordham Urb. L.J. 539, 540, 544–45 (2016) (“Minority neighborhoods experience higher levels of field interrogation and surveillance activity, controlling for crime and other social factors.”); Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 Am. U. L. Rev. 1587, 1592, 1592 n.21 (2008).

³² David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 677–78 (1994) (citation omitted) (“African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas.”); Lewis R. Katz, *Terry v. Ohio at Thirty Five: A Revisionist’s View*, 74 Miss. L.J. 423, 493–94 (2004) (“By sanctioning investigative stops on little more than the area in which the stop takes place, the phrase ‘high crime area’ has the effect of criminalizing race.”); David Seawell, *Wardlow’s Case: A Call To Broaden the Perspective of American Criminal Law*, 78 Denv. U. L. Rev. 1119, 1131 (2001).

³³ The Boston Indicators Project, MassINC & the Mass. Criminal Justice Reform Coalition, *The Geography of Incarceration: The Cost and Consequences of High Incarceration Rates in Vulnerable City Neighborhoods* 3 (2016), <https://massinc.org/wp-content/uploads/2016/11/The-Geography-of-Incarceration.pdf>.

found that, controlling for neighborhood crime rates, the Boston Police Department's investigatory practices targeted neighborhoods that were home to more Black residents.³⁴ In a parallel report, the ACLU of Massachusetts noted that, "given two otherwise identical Boston neighborhoods—with identical crime rates and total populations—[Boston police] initiated more street encounters in the neighborhood with more Black residents. Between 2007 and 2010, the mere presence of Black residents increased the numbers of police-civilian encounters."³⁵

Given the saturation of police in predominantly Black neighborhoods, it is no surprise that, between 2007 and 2010, "the targets of FIO reports were disproportionately male, young, and Black."³⁶ *Warren*, 475 Mass. at 539 n.15. Data collected more recently show that Black men continue to be stopped and frisked at rates far higher than their white counterparts, with even starker disparities than

³⁴ Jeffrey Fagan et al., *An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports* 8 (June 15, 2015), *cited in Warren*, 475 Mass. at 539 n.15; Fagan et al., *supra* note 31, at 592–93 ("The pattern of race effects suggests evidence of disparate treatment in FIO activity based on neighborhood racial composition. After controlling for local crime rates, we observe higher rates of FIO activity for census tracts based on their Black or Hispanic racial composition, whether in residents, arrestees, or the race of known crime suspects.").

³⁵ ACLU of Mass., *Black, Brown, and Targeted: A Report on Boston Police Department Street Encounters from 2007–2010*, at 7–9 (2014), <https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf>.

³⁶ "FIO" refers to the Field Interrogation and Observation program, the Boston Police Department's stop and frisk program.

those identified in *Warren*.³⁷ Moreover, significant racial disparities in traffic stops have existed in more than 70% of Massachusetts police departments.³⁸ In Boston, for example, Black drivers made up just 13.7% of the driving population, but received 32% of traffic citations. From 2014–2015, the Massachusetts State Police were 83.5% more likely to search Black drivers, and 143.4% more likely to search Hispanic drivers, than they were to search white drivers, even though searches of Black and Hispanic drivers turned up contraband less frequently than searches of white drivers.³⁹

Racial disparities are especially pronounced for Black teenagers. The Youth Violence Strike Force (“YVSF”), within the Boston Police Department, was established in 1993 as part of the super-predator panic “in response to the increased

³⁷ 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> (summarizing 2011–2014 data and describing 2016 data, in which almost 70% of FIOs targeted Black people); ACLU of Mass., *Facts Over Fear: The Benefits of Declining to Prosecute Misdemeanor and Low-Level Felony Offenses* 13, 13 n.31 (2019), https://www.aclum.org/sites/default/files/20180319_dtp-final.pdf (discussing 2012–2016 arrest data, showing 60% of license violation arrests targeted Black people).

³⁸ Amy Ferrell et al., *Northeastern U. Inst. on Race & Just., Massachusetts Racial and Gender Profiling Study: Final Report* 7, 26–27 (2004), <https://repository.library.northeastern.edu/files/neu:344627/fulltext.pdf>.

³⁹ Tom Relihan, *State police more likely to search non-white drivers, less likely to discover contraband*, *The Enterprise* (Aug. 21, 2017), <https://www.enterpriseneeds.com/news/20170820/state-police-more-likely-to-search-non-white-drivers-less-likely-to-discover-contraband>.

use of violence amongst youth in the City of Boston.”⁴⁰ Less than three percent of the more than 5,300 unique names in the Boston Regional Intelligence Center Gang Database—populated by YVSF officers and used as leads for shooting investigations—represent white people.⁴¹ Seventy-five percent are Black men or teens.⁴² These striking disparities result from YVSF’s exercise of discretion to operate mainly in racially segregated and predominantly Black neighborhoods, even though it is officially a citywide unit.⁴³ The mostly white and male officers who patrol with YVSF do not live in these neighborhoods, and their interactions with residents often reflect a distorted view of the community.⁴⁴ Consequently,

⁴⁰ Bos. Police Dep’t, *Boston Police Department Rules and Procedures, Rule 335 – Gang Assessment Database* (Mar. 23, 2017), <https://static1.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/593a8cb5e6f2e1d2faf8f4c3/1497009333424/rule335+%28gang+database%29.pdf>.

⁴¹ See, e.g., Shannon Dooling, *Here’s What We Know About Boston Police’s Gang Database*, WBUR (July 26, 2019), <https://www.wbur.org/news/2019/07/26/boston-police-gang-database-immigration>; Berkeley Brown et al., Harvard Kennedy Sch., Tech and Innovation in Government, DPI 663: Team Boston Police Department: User Insights at 10–11 (2017), <https://static1.squarespace.com/static/56ae4eb5e707eb6849391d16/t/5a0ba5919140b7e76ccc8133/1510712733332/2017+Boston+Police++User+Insights#page=10> (“The Gang Unit is in constant communication with the BRIC.”).

⁴² 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/>.

⁴³ See RA at 0140–0159 (describing the YVSF as plainclothes citywide unit, but depicting focus on “hotspots” in neighborhoods of Roxbury, Dorchester, and Mattapan).

⁴⁴ Berkeley Brown et al., *supra* note 41, at 13 (noting that “[g]ang unit officers are frequently in unfamiliar neighborhoods” because “[u]nlike other cities,

many YVSF officers ignore that “so-called high crime areas are inhabited and frequented by many law-abiding citizens who are entitled to be protected against being stopped and frisked just because of the neighborhood where they live, work, or visit.” *Commonwealth v. Johnson*, 454 Mass. 159, 163 (2009).

Behind these empirical realities are hundreds, if not thousands, of individual young men and youth subjected to police suspicion and control—stories that have inspired widespread community outrage and organizing against police abuse.⁴⁵ In 2018, the Boston Police Department came under national scrutiny when a young Black man named Keith Antonio was stopped by police on his way to a Dorchester barbershop in the middle of the day and asked who he was, where he lived, what he did for work, and what he was doing after he had already explained that he was

officers do not need to live in the neighborhood they patrol”); *cf.* Kate Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 *Rev. of Econ. & Stat.* 163, 175–76 (2009) (“[I]n districts in which a relatively large proportion of the population is [B]lack, a relatively large proportion of the officers assigned to that district is [B]lack, and the same pattern holds for Hispanics.”); *see also* Meghan E. Irons, *Women allege discrimination, retaliation on male-dominated Boston police force*, *Bos. Globe* (May 5, 2019, 6:31 PM), <https://www.bostonglobe.com/metro/2019/05/05/lawsuits-women-allege-discrimination-retaliation-male-dominated-boston-police-force/65vGv4MCUG7Qyqc4ocenVM/story.html> (“[O]nly men run the elite homicide unit and the Youth Violence Strike Force, commonly known as the gang unit.”); Antonio Planas, *Arrested Diversity at BPD*, *Bos. Herald* (Apr. 4, 2018), <https://www.bostonherald.com/2018/04/04/arrested-diversity-at-bpd>.

⁴⁵ *See, e.g.*, Nicole Eigbrett, *Mass Action in Boston Against Police Brutality: “It’s about all of us,”* *Weave News* (Apr. 7, 2018), <http://www.weavenews.org/stories/2018/4/7/mass-action-in-boston-against-police-brutality-its-about-all-of-us>.

not the person police were looking for.⁴⁶ The stop was captured on video, prompting outcry from the Black community and its allies, who saw confirmation of a well-known pattern of unwarranted suspicion, invasive interrogation, and police disrespect for Black Bostonians.⁴⁷ Another high-profile incident occurred in 2015, when a mother called 911 to help her son, Terrence Coleman, who suffered from schizophrenic paranoia.⁴⁸ The police arriving on the scene ultimately shot and killed Mr. Coleman, a young Black man, in his own home, claiming that he was holding a knife and endangering the emergency medical technicians—an assertion disputed by Mr. Coleman’s family.⁴⁹ Incidents of police brutality, like the killing

⁴⁶ Julia Jacobo, *Video of Boston officer questioning black pedestrian draws criticism from civil rights activists*, ABC News (Feb. 27, 2018), <https://abcnews.go.com/US/video-boston-officer-questioning-black-pedestrian-draws-criticism/story?id=53396609>; *Video of Boston police stop of black pedestrian draws ire from activists*, CBS News (Feb. 28, 2018), <https://www.cbsnews.com/news/video-of-boston-police-stop-of-black-pedestrian-draws-ire-from-activists/>; Alanna Durkin Richer, *Activists decry video of Boston police stop of black man*, Associated Press (Feb. 28, 2018), <https://www.boston.com/news/local-news/2018/02/28/activists-decry-video-of-boston-police-stop-of-black-man>.

⁴⁷ See, e.g., Rahsaan Hall, *Mistaken Identity*, ACLU of Mass. (Mar. 5, 2018), <https://www.aclum.org/en/news/mistaken-identity>; Meghan E. Irons, *Video of police stop of black man sparks outrage among civil rights activists*, Bos. Globe (Feb. 27, 2018), <https://www3.bostonglobe.com/metro/2018/02/26/video-police-stop-black-man-sparks-outrage-among-civil-rights-group/sBh5bEnfiVWowZJkQVAsPN/story.html>.

⁴⁸ Simón Rios, *Boston Cops, Man’s Mother Offer Differing Descriptions Of Fatal Shooting*, WBUR (Oct. 31, 2016), <https://www.wbur.org/all-things-considered/2016/10/31/south-end-fatal-shooting-disputed>.

⁴⁹ *Id.* The Suffolk County District Attorney’s office found the shooting justified, but the family filed a civil rights lawsuit in the spring of 2018. Kristin

of Terrence Coleman, have become flashpoints for community organizing against the decades of systematic police abuse, with community calls for civilian oversight of the Boston Police Department and an end to their racially-biased enforcement practices.⁵⁰

This record of police abuse is not without broader social consequence. Too often, young Black men and youth grow up as targets for police violence. Living in segregated and hyper-policed neighborhoods, they become accustomed to being seen as suspects.⁵¹ They reasonably come to expect unfair treatment—or, worse,

LaFratta, *Suffolk DA finds Boston officer justified in fatal shooting*, Mass Live News (Sept. 2, 2017), https://www.masslive.com/news/boston/2017/09/suffolk_da_finds_boston_office.html; Benjamin Swasey & Simón Rios, *Mother Whose Son Was Fatally Shot By A Boston Cop Files A Civil Rights Lawsuit*, WBUR (Apr. 4, 2018), <https://www.wbur.org/news/2018/04/04/coleman-shooting-lawsuit>.

⁵⁰ See, e.g., *Boston's Legacy of Racist Policing & Media Coverage of Crime: 30 Years after Chuck Stuart*, Medium (Oct. 30, 2019), <https://medium.com/houstonmarshall/bostons-legacy-of-racist-policing-media-coverage-of-crime-30-years-after-chuck-stuart-b64ebfd7928>; Shira Schoenburg, *Racial justice advocates tell of 'driving while black'*, Mass Live News (Oct. 23, 2019), <https://www.masslive.com/news/2019/10/racial-justice-advocates-tell-of-driving-while-black.html>; Yawu Miller, *Mayor makes changes to police review board; Civil rights activists see little benefit to changes*, Bay State Banner (June 7, 2017), <https://www.baystatebanner.com/2017/06/07/mayor-makes-changes-to-police-review-board/>.

⁵¹ See, e.g., Rod K. Brunson & Jody Miller, *Gender, Race, and Urban Policing: The Experience of African American Youths*, 20 *Gender & Soc'y* 531 (2006); Brunson & Weitzer, *supra* note 10.

grave bodily injury or death—as they manage their fear and anxiety while trying to minimize the risk of harm during the police interaction.⁵²

Courts have begun to recognize that “[t]he idea of universal suspicion without individual evidence is . . . what black men in America must constantly fight. It is pervasive in policing practices” *Floyd*, 959 F. Supp. 2d at 667. Indeed, this Court has expressly acknowledged this discrimination, noting “ample empirical evidence” of disparate treatment of Black men in the criminal justice system, *Commonwealth v. Williams*, 481 Mass. 443, 451, 451 n.6 (2019), and a

⁵² See, e.g., Rod K. Brunson, “Police don’t like black people”: African-American young men’s accumulated police experiences, 6 *Criminology & Pub. Pol’y* 71 (2007); Patrick J. Carr, Laura Napolitano & Jessica Keating, *We never call the cops and here is why: A qualitative examination of legal cynicism in three Philadelphia neighborhoods*, 45 *Criminology* 445 (2007); Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police violence and citizen crime reporting in the black community*, 81 *Am. Soc. Rev.* 857 (2016); Brittany N. Fox-Williams, *The Rules of (Dis) engagement: Black Youth and Their Strategies for Navigating Police Contact*, 34 *Soc. F.* 115 (2019); Cynthia J. Najdowski, Bette L. Bottoms & Phillip Atiba Goff, *Stereotype threat and racial differences in citizens’ experiences of police encounters*, 39 *L. & Hum. Behav.* 463 (2015); Weitzer & Brunson, *supra* note 17; see also Rod K. Brunson & Ronald Weitzer, *Negotiating unwelcome police encounters: The intergenerational transmission of conduct norms*, 40 *J. Contemp. Ethnography* 425 (2011). See also Maria Cramer & Jan Ransom, *Despite drop in crime, some neighborhoods still feel besieged*, *Bos. Globe* (July 6, 2017, 10:15 AM), <https://www.bostonglobe.com/metro/2017/07/06/despite-drop-crime-some-boston-neighborhoods-still-feel-besieged/Ncoqh6Xb0ZL2TLq3Ne28RM/story.html> (“Residents, especially young men, often refuse to cooperate with officers who are investigating killings and shootings, either wary of the police or concerned about potential reprisals.”); ACLU of Mass., *supra* note 35, at 13 (collecting Boston youth testimonials about experiences of policing).

pattern of racial profiling, particularly of young, Black males, in street stops and frisks in Boston, *Warren*, 475 Mass. at 539–40, 539–40 nn.13–16 (2016); *accord Commonwealth v. Gonsalves*, 429 Mass. 658, 670 (1999) (Ireland, J., concurring) (summarizing statistics that “show that such racial profiling occurs throughout the nation”). Given Black youth’s largely negative and possibly dangerous experiences with police, courts would have to ignore widely known facts to examine a Black youth’s police encounter from a whitewashed perspective that fails to consider race.

CONCLUSION

This Court has been clear for years: context matters when analyzing police encounters under the Fourth Amendment and Article 14. The actions by police in this case cannot be examined in a vacuum. The very fact of exiting a vehicle to question someone after multiple failed attempts to elicit responses takes on additional layers of coercion when the person being targeted by police is a young, Black teenager in a racially segregated, Black neighborhood of Boston that has been saturated by police and where Black residents have been routinely subject to police abuse. Thus, for the foregoing reasons, *amici curiae* respectfully request that this Court examine the moment of Defendant-Appellant Tykorie Evelyn’s seizure from the perspective of a reasonable Black teenage boy and find that he was seized at the moment the officer exited the police vehicle.

Dated: December 17, 2019

Respectfully submitted,

/s/ Katharine Naples-Mitchell

Katharine Naples-Mitchell,

BBO #704239

**CHARLES HAMILTON HOUSTON
INSTITUTE FOR RACE & JUSTICE**

Harvard Law School

Areeda Hall, Room 522

1545 Massachusetts Avenue

Cambridge, MA 02138

(617) 495-5121

knaplesmitchell@law.harvard.edu

Jin Hee Lee*

Ashok Chandran*

**NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.**

40 Rector Street, 5th Floor

New York, NY 10006

(212) 965-2200

jlee@naacpldf.org

achandran@naacpldf.org

**Pro Hac Vice* application pending

MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including Mass. R. App. P. 16, 17, and 20. It is typewritten in 14-point, Times New Roman font, and complies with the length limit of 20(a)(2)(c) because it was produced with a proportionally spaced font and does not contain more than 7,500 non-excluded words. This document contains 6,733 non-excluded words as counted by the word-processing system used to prepare it.

/s/ Katharine Naples-Mitchell
Katharine Naples-Mitchell

CERTIFICATE OF SERVICE

I, Katharine Naples-Mitchell, do certify under the penalties of perjury that on this 17th day of December, 2019, I caused a true copy of the foregoing document to be served by electronic mail, via e-file, on the following counsel:

K. Hayne Barnwell
401 Andover Street
Suite 201-B
North Andover, MA 01845

Cailin M. Campbell
David Bradley
Office of the Suffolk County District Attorney
One Bulfinch Place
Boston, MA 02114

/s/ Katharine Naples-Mitchell
Katharine Naples-Mitchell