COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-12868

COMMONWEALTH OF MASSACHUSETTS,

APPELLEE,

V.

EDWARD LONG,

DEFENDANT-APPELLANT

ON INTERLOCUTORY APPEAL FROM THE SUFFOLK SUPERIOR COURT

BRIEF OF *AMICI CURIAE* THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NEW ENGLAND INNOCENCE PROJECT, LAWYERS FOR CIVIL RIGHTS, AND THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AT HARVARD LAW SCHOOL IN SUPPORT OF THE DEFENDANT-APPELLANT AND REVERSAL

Oren N. Nimni
BBO #691821
Lawyers for Civil Rights
61 Batterymarch Street
5th Floor
Boston, MA 02110
(617) 988-0606
onimni@lawyersforcivilrights.org

Katharine Naples-Mitchell
BBO #704239
Charles Hamilton Houston Institute for Race & Justice, Harvard Law School, Areeda Hall, Room 522
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-5121
knaplesmitchell@law.harvard.edu

Counsel for *amici curiae* continued on next page

February 18, 2020

Additional counsel for *amici curiae*

Chauncey B. Wood
BBO #600354
Massachusetts Association of
Criminal Defense Lawyers
50 Congress Street, Suite 600
Boston, MA 02109
(617) 248-1806
cwood@woodnathanson.com

Radha Natarajan
BBO #658052
New England Innocence Project
120 Tremont Street, Suite 735
Boston, MA 02108
(617) 557-6584
rnatarajan@newenglandinnocence.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing 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 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.

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 ensuring that the presumption of innocence applies robustly and equally to all people, regardless of factors such as race. 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.

Lawyers for Civil Rights (LCR) has an interest in this case because LCR's mission is to foster equal opportunity and fight discrimination on behalf of people

of color and immigrants. LCR has a strong interest in ensuring that residents of the Commonwealth are not subject to the type of systemic discriminatory enforcement that is endemic to pretextual traffic stops. In particular, LCR is aware that Black people and other people of color are regularly the targets of pretextual traffic stops and that these stops lead to humiliation and potential bodily injury for those individuals. LCR regularly advocates for criminal justice reform in an effort to equalize the impacts of the criminal legal system and shift it to one where race and wealth are not determinate factors in arrest, prosecution, charging, bail, and punishment. (*See, e.g.*, *Commonwealth v. Buckley*, 478 Mass. 861 (2017); *Commonwealth v. Vallejo*, 480 Mass. 1001 (2018); *Commonwealth v. Espinal*, 482 Mass. 190 (2019); *Commonwealth v. Adams*, 482 Mass. 514 (2019)).

The **Charles Hamilton Houston Institute for Race and Justice** (CHHIRJ) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, 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, criminalization, and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed by these policies.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, MACDL represents that it is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. MACDL does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in MACDL. *Amici* LCR, NEIP, and CHHIRJ represent that they are all 501(c)(3) organizations under the laws of the Commonwealth of Massachusetts, do not issue any stock or have parent corporations, and no publicly held corporations own stock in *amici*.

RULE 17(C)(5) DECLARATION

Amici 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 the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief; and (d) neither *amici* 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.

STATEMENTS OF THE CASE AND FACTS

Amici adopt the statements of the case and facts as set forth by Defendant-Appellant Edward Long.

STATEMENT OF ISSUES

Given this Court's acknowledgment in *Buckley* that there may come a time when the adequacy of the *Lora* framework needs to be revisited in a case where a proper foundation is laid, *Commonwealth v. Buckley*, 478 Mass. 861, 871 (2018) (citing *Commonwealth v. Lora*, 451 Mass. 425, 444 (2008)), and given that the Appellant in this case did in fact lay a proper foundation that illustrates the inadequacy of the *Lora* protocol, should this Court now chart a new path to effectively address the problem of racially discriminatory pretextual stops?[1]

SUMMARY OF ARGUMENT

Data establish beyond any question that pretextual stops on Massachusetts roads are a frequent, significant problem that must be addressed in order to prevent humiliation, inconvenience, violation of constitutional rights, and in some cases injury or death for people of color when they engage in the mundane act of driving a car. (*Infra* at 19–23, 25.) This Court has acknowledged the seriousness of this

[1] This Court solicited *amicus* questions including, "whether the framework outlined in *Commonwealth v. Lora*, 451 Mass. 425 (2008), for addressing the issue of pretextual traffic stops motivated by race should be revised . . . ."

problem, and this brief assumes the Court is committed to remedying this injustice. (*Infra* at 18.) This case begs the Court to answer: what is the best way to address this vast constitutional problem? This brief serves to assist in that endeavor.

Given the weight of experience and data, *amici* urge this Court to contend with the reality that the *Lora* framework does not work to address pretextual stops motivated by race and must be replaced by a clear, workable test. This Court should abandon the "authorization rule" adopted in *Commonwealth v. Santana*, 420 Mass. 205, 209 (1995), and adopt a version of the "would have" test in use in Washington and New Mexico, which asks judges to evaluate whether a reasonable officer would have made a stop without a pretextual motivation. (*Infra* at 34–41.)

The *Lora* framework rests on insupportable assumptions and has failed to deter the practice of racial profiling or enable defendants to successfully challenge it. Overwhelming empirical evidence of pervasive racial disparities in traffic enforcement mandates abandoning the presumption of regularity as applied to traffic stops and the authorization test it spawned in *Santana*. Unbridled officer discretion in how to enforce the wide variety of traffic offenses, combined with implicit biases linking blackness and criminality, invariably and demonstrably leads to selective enforcement. Such disparate enforcement compromises public safety, undermining community trust of law enforcement and endangering people of color. (*Infra* at 18–30.) Because the *Lora* framework places the burden on

defendants to prove intentional discrimination by statistical analysis that is often impossible to generate, it simply cannot achieve the goal for which it was intended; indeed, in the past dozen years since *Lora* was decided, there has not been a single published decision presenting a successful *Lora* claim. *Buckley*, 478 Mass. at 871. Even at its best, it is a costly, case-by-case approach to a clearly identified systemic issue—and with new limits on data collection plus new traffic laws, the problem of pretextual enforcement may only grow. (*Infra* at 30–34.)

The most effective solution to the problem is to adopt the "would have" test, which asks whether a reasonable officer would have stopped the driver *but for* the pretextual motive. The defendant must first establish a *prima facie* pretextual stop based on the totality of the circumstances. Judges evaluate pretext based on common-sense factors, such as whether the officer departed from normal procedures or ordinary duties, the sequence of events prior to and after the alleged discriminatory action, and whether another motivation for the stop existed (an ongoing investigation, a person known to the officer) that could not independently support a lawful stop. This test was commonly used prior to the Supreme Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), is currently used in Washington and New Mexico, and was recently advanced by three dissenting Justices in *State v. Brown*, 930 N.W.2d 840 (Iowa 2019); *id.* at 869 (Cady, C.J., dissenting); *id.* at 927 (Appel, J., dissenting). The experiences of other jurisdictions

in administering the test provide ample guidance to Massachusetts trial courts. (*Infra* at 34–41.)

If the defendant makes a *prima facie* case, a presumption of unconstitutional pretext attaches. The burden then shifts to the Commonwealth to rebut the presumption with clear and convincing evidence that the officer conducted the stop for a legitimate, non-pretextual, and race-neutral reason. This standard does not hinder law enforcement's ability to enforce traffic laws; instead, it encourages equality in the enforcement of these laws, builds community-law enforcement trust as a result, and incentivizes law enforcement transparency and record-keeping in order to prove non-discriminatory enforcement. Where the motion judge, weighing all the evidence, determines that a traffic stop was conducted for an investigatory purpose unrelated to the purported traffic violation, the exclusionary rule must apply to deter conduct that violates our Constitution. (*Infra* at 41–44.)

In *Lora* itself this Court noted that concerns with racial profiling "would not be alleviated by a standard that nominally allows a defendant to make [a] claim of selective enforcement of traffic laws, but forecloses such a claim in practice." *Lora*, 451 Mass. at 437. The current standard effectively forecloses most, if not all, claims. This Court should therefore overrule *Santana* and adopt *amici*'s proposed standard in light of all available data and evidence in this case.

ARGUMENT

I. Assumptions that generated the *Lora* framework are not supported and must be reexamined. To achieve *Lora*'s goal of deterring racial bias in traffic enforcement, this Court must overturn *Santana*'s authorization rule and abandon the presumption of regularity in traffic enforcement.

Racial disparities in traffic stops are a serious, pervasive problem. For decades, this Court has recognized that pretextual stops—investigatory stops made in the absence of reasonable suspicion or probable cause of a crime, justified based on a traffic infraction—may invite the harmful and constitutionally proscribed practice of racial profiling.[2] *See, e.g.*, *Commonwealth v. Larose*, 483 Mass. 323, 335 (2019); *Buckley*, 478 Mass. at 871; *Commonwealth v. Amado*, 474 Mass. 147, 151 n.4 (2016); *Commonwealth v. Betances*, 451 Mass. 457, 460 (2008); *Lora*, 451 Mass. at 444; *Commonwealth v. Gonsalves*, 429 Mass. 658, 663 (1999). A mountain of research developed since the 1996 decision in *Whren* demonstrates beyond any doubt that pretextual stops inevitably allow racial profiling and

---

[2] The Court's *amicus* solicitation was limited to "pretextual traffic stops motivated by race." *Lora* should remain the framework for claims of selective enforcement or prosecution in other contexts, including situations where there has been no search or seizure, *see, e.g.*, Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 Am. Crim. L. Rev. 1107, 1135–36 (2000) ("[T]he Equal Protection Clause operates independently to prevent and remedy racial and other invidious discrimination by governmental actors. As the *Avery* court aptly noted: 'This protection becomes relevant even before a seizure occurs.'" (footnotes omitted)).

produce racial disparities. The only response that is consistent with constitutional guarantees is to bar pretextual stops.

A. Racial disparities flourish because *Lora* has failed to rein in highly discretionary enforcement of easily violated traffic laws.

This Court is conversant in the myriad studies that confirm widespread racial disparities in traffic stops. *See*, *e.g.*, *Buckley*, 478 Mass. at 877 (Budd, J., concurring) ("In 2017, the Stanford Open Policing Project found that police stopped African–American drivers more than Caucasian drivers, controlling for population makeup, both nationally and in Massachusetts. (citing Stanford Open Policing, Stop Rates, 2017, https://openpolicing.stanford.edu/findings/; United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Special Report, Police Behavior During Traffic and Street Stops, 2011, at 3 (rev. October 27, 2016), https://www.bjs.gov/content/pub/pdf/pbtss11.pdf)). The Stanford researchers cited by Justice Budd in *Buckley* found that Black drivers are not only more likely to be stopped than white drivers but also more likely to be ticketed; less likely to have contraband when searched; and are subject to a lower search threshold, requiring less suspicion, a "double standard [that] is evidence of discrimination."[3]

---

[3] *Findings*, Stanford Open Policing Project, https://openpolicing.stanford.edu/findings/ (last visited Feb. 6, 2020).

Racial disparities in traffic enforcement have been proven in Massachusetts for as long as we have collected reliable data. As Justice Ireland explained in *Lora*, after the Legislature authorized collection and analysis of data "[i]n response to concerns over racial (and gender) profiling in traffic stops," a 2004 analysis by experts at Northeastern University "found that of the 366 Massachusetts law enforcement agencies reporting data for analysis, 249 of them had substantial disparities in at least one of four measurements used." 451 Mass. at 448 (Ireland, J., concurring).[4] The Northeastern researchers found that in Boston, Black drivers made up 13.7% of the driving population, but 32% of citations.[5] Similar patterns emerged in other large cities like Springfield, Lawrence, Brockton, and Lowell: drivers of color were at least 1.5 times more likely to be cited than white drivers. From 2014-2015, Black and Hispanic drivers were searched by the Massachusetts State Police at higher rates than white drivers, yet searches turned up contraband in fewer cases.[6]

---

[4] Amy Farrell 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.

[5] Northeastern U. Inst. on Race & Just., Massachusetts Racial and Gender Profiling Project: Preliminary Tabulations 209 (2004), https://repository.library.northeastern.edu/downloads/neu:378461?datastream_id=co%20tent#page=212.

[6] Black drivers were 83.5% more likely to be searched, and Hispanic drivers were 143.4% more likely to be searched, but police were roughly 19% less likely to find

Racial disparities persist because of highly discretionary enforcement that allows unregulated pretextual stops. It is easy to violate the traffic laws. According to data collected and published by the Massachusetts Trial Court, more than one-third of *all criminal charges* across district, municipal, juvenile, and superior courts filed in the Commonwealth in fiscal year 2019 were motor vehicle offenses—more than 114,000 charges in total.[7] This tabulation does not include the vast array of civil motor vehicle infractions that may also justify a traffic stop.[8] Given officer discretion in whose license plates to run; who to warn, cite, or ticket; and who and when to seek consent to search, it is easy for traffic stops to be used in a pretextual and discriminatory manner. Judges and scholars alike lament that traffic enforcement is the modern-day general warrant.[9] Like peremptory strikes in

---

contraband during a search of either. Tom Relihan, *State Police More Likely to Search Non-White Drivers, Less Likely to Discover Contraband*, Enterprise (Aug. 21, 2017, 5:33 PM), https://www.enterprisenews.com/news/20170820/state-police-more-likely-to-search-non-white-drivers-less-likely-to-discover-contraband.

[7] Massachusetts Trial Court, Charges Dashboard, https://public.tableau.com/profile/drap4687#!/vizhome/MassachusettsTrialCourtChargesDashboard/MassachusettsTrialCourtChargesDashboard (last visited Feb. 7, 2020).

[8] More than 660,000 traffic violations were issued in Massachusetts in 2016 alone, fewer than in each of the seven years prior. *See* Todd Wallack, *Mass. police issuing fewer traffic violations*, Bos. Globe (June 20, 2017, 11:35 AM), https://www.bostonglobe.com/metro/2017/06/20/mass-police-issuing-fewer-traffic-violations/wcde0HJspHIsNjBdDjdmqI/story.html.

[9] 1 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 1.4(e), at 173 (5th ed. 2012); *Brown*, 930 N.W.2d at 914–15 (Appel, J., dissenting)

jury selection, pretextual stops by nature invite "those to discriminate who are of a mind to discriminate." *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)) (cleaned up).

By declining to review the propriety of "authorized" stops, courts sanction selective enforcement.[10] A study of Kansas City traffic stops distinguished between traffic-safety stops and pretextual "investigatory" stops. Charles R. Epp et al., Pulled Over: How Police Stops Define Race and Citizenship (2014) [hereinafter *Pulled Over*]), *cited by Brown*, 930 N.W.2d at 920 (Appel, J., dissenting). The researchers found that Black drivers are 2.7 times more likely than white drivers to be stopped for pretextual reasons; observed racial disparities were almost entirely attributable to pretextual stops, rather than traffic-safety stops. *Pulled Over* at 64.

In *Santana*, this Court held that investigatory stops justified by a traffic violation do not violate art. 14. *Santana*, 420 Mass. at 209. As long as the driver

---

(collecting cases premised on minor pretextual violations, reviewing the 245 pages of the Iowa traffic code, and concluding that "unfettered authority to engage in traffic stops is the equivalent of the hated general warrant").

[10] *Brown*, 930 N.W.2d at 864 (Cady, C.J., dissenting) ("The *Whren* doctrine is wrong largely because it gives police officers too much authority, which has led to the misuse of that authority and has allowed police officers to engage in fishing expeditions based on offensive motivations. . . . In effect, the decision masks an officer's improper racial motivations when making a traffic stop. Impure motivations are deemed justified by finding a traffic violation was committed, however minor that violation may be. For this reason, *Whren* has been widely criticized as legalizing racial profiling in the context of traffic stops.").

committed a traffic infraction, no judge would question the officer's true motives or investigatory purpose. The Court limited the "authorization rule" in *Lora*, holding that if the explicit subjective reason for a stop was the race of the people in the car, any evidence collected as a result of that stop must be suppressed. *Lora*, 451 Mass. at 435. But *Lora*'s intended safety valve for the "authorization rule" is irreparably clogged. To fulfill the purposes of *Lora*—deterring unconstitutional behavior and guaranteeing equal protection of the laws, *id.* at 439—this Court must dispense with the "authorization rule."

B. Widespread pretextual stops that have a disproportionate impact on black and brown people undermine, rather than enhance, public safety.

This Court has previously justified the authorization rule based on public safety. *See, e.g.*, *Buckley*, 478 Mass. at 869 (citing *Commonwealth v. Rodriguez*, 472 Mass. 767, 773 (2015) ("[M]any of the traffic violation laws serve a public safety purpose, and allowing police to stop moving vehicles that are violating them in order to issue traffic citations is one mechanism of promoting safety on our roads.")). While it may seem like common sense that enforcement of all laws *increases* public safety, the impact of pretextual stops demonstrates that they actually *harm* the goal of public safety. The data undermine the assumption that more stops lead to more safety.

Specifically, (1) data show that pretextual stops are less likely to lead to an arrest for criminal activity than stops based on reasonable suspicion of criminal activity[11] and that resources used to enable pretextual stops will be diverted from the enforcement of crimes that more seriously endanger community safety;[12] and (2) pretextual stops compromise the safety and health of people of color and erode trust in law enforcement, both of which impact community safety.

---

[11] Racial disparities in enforcement result from pretextual stops. *Pulled Over* at 64. Contraband is found in a smaller percentage of stops targeting people of color, even though the search threshold is lower for people of color. *See supra* at 19–23.

[12] Pretextual stops impede public safety by diverting funds from efforts that keep communities safe. "It should trouble this Court . . . that a Gang Unit officer targeting the Dorchester, Mattapan, and Roxbury neighborhoods of Boston conducts a 'thousand' traffic stops in a year that go unrecorded, untracked, and unreviewed." Def. Br. at 54 (footnotes omitted). This fact is troubling not only because unreviewable stops cannot be probed for racial discrimination, but also because it suggests officers spend significant time on pretextual stops. The Boston Police Department accounts for one-fifth of the city's budget. Mike Kotsopoulos, *Boston City Council passes mayor's $3.49 billion budget*, Bos. Globe (June 26, 2019, 7:30 PM), https://www.bostonglobe.com/metro/2019/06/26/boston-city-council-passes-mayor-billion-budget-unanimous-vote/gaI8uAZoGOy3BHZX7VprZK/story.html. Resources spent making investigatory stops premised on minor violations are siphoned away from proven community safety initiatives like public health violence prevention, affordable housing, job training, mental health services, youth programming, or drug treatment. *See generally* Ctr. for Popular Democracy et al., Freedom to Thrive: Reimagining Safety & Security in Our Communities (2017), https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf.

For more than twenty years, members of this Court have identified the dignitary harm and threat to life or limb that may result from the toxic mix of racial profiling and "routine" traffic stops. *Larose*, 483 Mass. at 340–41 (Lenk, J., dissenting) ("[E]ven when traffic stops do not result in any criminal charges[,] they still can be humiliating, terrifying, and, at times, lethal for African-American drivers, as well as for members of other marginalized groups."); *Buckley*, 478 Mass. at 876–77 (Budd, J., concurring) ("[R]ecent tragic events have shown 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. Feyenord*, 445 Mass. 72, 88 (2005) (Greaney, J., concurring); *Gonsalves*, 429 Mass. at 670 (Ireland, J., concurring). Studies find that aggressive policing of people of color—especially interactions which are perceived to be unfair—negatively impact individual and population-level health,[13] and may even create

[13] Jacob Bor et al., *Police killings and their spillover effects on the mental health of black Americans: a population-based, quasi-experimental study*, 392 Lancet 302 (2018); Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 Am. J. Pub. Health 2321 (2014); Ram Sundaresh et al., *Exposure to the U.S. Criminal Legal System and Well-Being: A 2018 Cross-Sectional Study*, 110 Am. J. Pub. Health S116 (2020).

criminal activity in response to the mental and emotional distress from the feeling of being targeted.[14]

"Pretextual investigative stops also make people less likely to trust police. Social psychology suggests that where people believe the system is discriminatory or unfair, they support it less and view it as less legitimate." *Brown*, 930 N.W.2d at 922 (Appel, J., dissenting); *see, e.g.*, Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case W. Res. L. Rev. 931, 932 (2016); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 Criminology 253, 273–74, 276 (2004). In 2015, after releasing the study cited by this Court in *Warren* that showed a pattern of targeting young, Black males, *Commonwealth v. Warren*, 475 Mass. 530, 539, 539 n.15 (2016), the Boston Police Department adopted a "Bias-Free Policing Policy,"[15] which explains, "Actual or perceived bias by police undermines this trust and damages relationships with the

---

[14] Juan Del Toro et al., *The criminogenic and psychological effects of police stops on adolescent black and Latino boys*, 116 PNAS 8261 (2016).

[15] Evan Allen, *Boston police to step up antibias measures*, Bos. Globe (July 3, 2015, 11:25 PM), https://www.bostonglobe.com/metro/2015/07/03/boston-police-institute-new-antibias-policies-after-critical-report-policing-minority-communities/7PxecpL5o5qCWDEQ5x0HzL/story.html.

community – relationships that are at the heart of an effective community policing approach."[16]

By contrast, requiring law enforcement to act based only on objective safety motives *enhances* public safety. *Brown*, 930 N.W.2d at 868 (Cady, C.J., dissenting) ("[T]he suggestion that requiring officers to justify their objective reasoning would greatly hinder law enforcement is cause for concern, particularly because officers should only be utilizing objective reasoning when effectuating a traffic stop. . . . Adopting a reasonableness standard would not hinder law enforcement's ability to enforce traffic laws. Instead, it encourages equality in the enforcement of these laws.").

C. The presumption of regularity ignores that racial disparities are caused not only by discriminatory intent but also by implicit biases that affect us all, including law enforcement.

The *Lora* Court held that because arrests are "ordinarily cloaked with a presumption of regularity," the defendant should "bear[] the initial burden of demonstrating selective enforcement." *Lora*, 451 Mass. at 437. The *Lora* protocol rests on the presumption of regularity typically afforded arrests and prosecutions.

---

[16] Boston Police Department Rules and Procedures, Rule 113A, Bias-Free Policing Policy (July 2, 2015), https://static1.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/56a2562ba12f4413bc08c86e/1453479467565/rule113A.pdf.

Commonwealth v. Franklin, 376 Mass. 885, 894 (1978). That presumption is undermined by overwhelming real-world data that detail a systemic problem and statistical fact: if a person of color is stopped for an investigatory purpose unsupported by reasonable suspicion, it is statistically likely that the racially disparate use of pretextual traffic stops played a role in that stop. *See supra* at 19–23. Given the substantial evidence of discriminatory traffic enforcement, the law should not presume that a pretextual stop was unaffected by racial bias.

Moreover, the presumption of regularity requires a defendant to prove intentional invidious discrimination. *Lora*, 451 Mass. at 437. This ignores the complexity of bias in the enforcement of traffic laws.[17] Where violations of minor traffic laws are ubiquitous, curbing racial profiling is not simply a matter of identifying intentional discrimination among isolated officers, which *Lora* presumes, or even latent prejudices possessed by a tainted few. Stereotypes and unconscious biases influence us all. *Buckley*, 478 Mass. at 878 (Budd, J.,

---

[17] David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 326 (1997) ("Equal protection doctrine treats claims of inequitable policing the same as any other claim of inequity; it gives no recognition to the special reasons to insist on evenhanded law enforcement, or to the distinctive concerns with arbitrariness underlying the Fourth Amendment. As a result, challenges to discriminatory police practices will fail without proof of conscious racial animus on the part of the police. For reasons discussed earlier, this amounts to saying that they will almost always fail.").

concurring) ("[E]ven people who do not believe themselves to harbor implicit bias may in fact act in ways that disfavor people of color."); *Commonwealth v. McCowen*, 458 Mass. 461, 499 (2010) (Ireland, J., concurring); *see also, e.g.*, Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 Harv. L. Rev. 1979, 1994 (2018) ("[A]s a result of implicit racial biases, officers are more likely to focus their attention on black, rather than white, individuals. This is true even when the officers are consciously egalitarian, reject racial profiling, or are black themselves."). Empirical evidence demonstrates that widespread implicit bias combined with broad police discretion to stop virtually any driver at any time creates racial disparities in traffic enforcement. *Racial Bias and Disparities in Proactive Policing*, *in* Proactive Policing: Effects on Crime and Communities 251, 275–86 (David Weisburd & Malay K. Majmundar eds., 2018), https://www.nap.edu/read/24928/chapter/9#275 (collecting studies). Stops made as a result of this form of discrimination are no less pernicious to the person stopped and no less offensive to the Constitution.

Even the *Lora* Court recognized that a defendant would be unable to "detect racial profiling" and raise a reasonable inference of bias by comparing an officer's record of citations to their peers if "racial profiling discrimination is a department-wide problem." *Lora*, 451 Mass. at 445 n.32 (citation omitted). Only in rejecting the presumption of regularity in traffic enforcement and overruling *Santana* will

this Court have any hope of countering the very real discrimination at issue in the many pretextual stops resulting from unconscious biases that take hold amidst discretionary policing and investigatory stops.

At the very least, the presumption of regularity is inappropriate where police units engage in "proactive" policing, essentially admitting to using the pretext of a traffic violation to conduct an otherwise unconstitutional criminal investigation. Pretextual policing strategies are especially common among units like the Youth Violence Strike Force. *See, e.g.*, Def. Br. at 15 ("The Gang Unit . . . seeks to address violence 'before it happens.' Officers Rodrigues and Lopes focus on 'hot spot' areas in Dorchester, Mattapan, and Roxbury." (citations omitted)). In a similar street crimes unit focused on hot spots in Milwaukee, one officer testified that pretextual stops are part of the unit's function: "part of our initiative is to look for smaller infractions and hope that possibly they may lead to bigger and better things." *United States v. Johnson*, 874 F.3d 571, 576 (7th Cir. 2017) (Hamilton, J., dissenting) (raising concerns of the inevitability of discriminatory enforcement and "police overreach" when courts sanction this kind of policing under the Fourth Amendment).

II. In practice, *Lora* has proven unduly burdensome on defendants, unworkable, and untenable going forward.

There is no question that Mr. Long should prevail here. His own brief and the brief of *amici* CPCS and the ACLU of Massachusetts leave no doubt that his

evidence satisfies the *Lora* standard. At the very least, he has raised a reasonable inference of discrimination that shifted the burden to the Commonwealth to prove a race neutral reason for the officers' conduct in this case, which the Commonwealth did not do. But even assuming this Court is persuaded and reverses here, Mr. Long's case evidences two practical deficiencies in the *Lora* framework: *Lora* is too burdensome on defendants and the court system and *Lora* may be untenable going forward given new barriers to accessing data.[18]

Even at its theoretical best, *Lora* is an inefficient and costly case-by-case approach to the systemic problem of racial profiling in traffic enforcement. Were the Court to hold that Mr. Long has made an adequate showing under *Lora*, this case would then become a blueprint to challenge racially motivated pretextual stops. In a best case scenario under the current framework, by reversing here, the Court would signal a demand for involved and costly participation from experts in traffic stop cases: defendants will send out public records requests for evidence of the racial make-up of all FIOs and citations by the officer(s) in question, hire a statistician to analyze the data and conduct census benchmarking—at a cost of over

---

[18] *Amici* are aware of no published cases suppressing evidence under *Lora*, and only one unpublished case, *Commonwealth v. Thomas Vargas*, Middlesex Superior Court No. 1481 CR 1135, Mem. of Decision and Order on Defendant's Motion to Suppress Evidence (Aug. 16, 2019).

$10,000 per case—and make a time-consuming presentation of these findings in an evidentiary hearing. Instead of making common-sense judgments based on a reasonableness standard, judges will continue to be mired in technocratic evaluations of complex statistical methods.

Further, even the expensive, time-consuming showing Mr. Long prepared may be impossible going forward given limited data collection on traffic stops. *Buckley*, 478 Mass. at 880 (Budd, J., concurring) ("Statistics on traffic stops . . . are now even more difficult to come by."). Data are likely to become even more limited in the future because of a recent change in the law. Specifically, new "Hands Free Driving" legislation will require data collection only for stops that result in a warning or citation; will only publish aggregate data; and will prohibit identifying officers,[19] functionally barring an analysis like Mr. Long's that exposes the history of stops by specific officers. Adding to the difficulty of obtaining

[19] The new law appears to have been written to foreclose an interpretation requiring the collection of individual officer data. *Cf. Bos. Police Patrolmen's Ass'n, Inc. v. Police Dep't of Bos.*, 446 Mass. 46, 52–53 (2006) ("In order to fulfil the Act's objective of eliminating profiling by police officers, the only statutory interpretation that renders the legislation in harmony with common sense and sound reason is one that allows the collection of officer identification information . . . ."). Whereas the prior act aimed to "combat instances of profiling by individual police officers," *id.* at 52, the Hands Free Driving law instead focuses on "the law enforcement agency" and repeatedly forbids identifying individual officers. *See* G.L. c. 90, § 63(b), (d)–(f).

accurate data, the Boston Police Department recently stopped publishing aggregate data on FIOs.[20]

When the restriction of data about traffic stops is combined with the continuing proliferation of new driving offenses, efforts to monitor racially disparate treatment will grow more difficult as opportunities for pretextual stops may only increase. Citations for texting while driving increased even before the new law was passed,[21] and as the state increases patrols to enforce the new law,[22] officers can easily assert they believed they saw a phone in a driver's hand. In short, due to the limited data collection contemplated in the law, the problem of racially motivated pretextual stops may get worse—both more pervasive and more difficult to prove. It is essential, therefore, that this Court adopt a standard that

---

[20] Gal Tziperman Lotan, *Boston police no longer releasing data on street investigations*, Bos. Globe (Jan. 1, 2020, 8:58 PM), https://www.bostonglobe.com/metro/2020/01/01/boston-police-longer-releasing-data-street-investigations/WcrfT9iPmth0SCGjsnMfOK/story.html.

[21] Kathy McCabe, *Police to crack down on texting while driving*, Bos. Globe (Apr. 7, 2016, 4:45 PM), https://www.bostonglobe.com/metro/2016/04/07/police-launch-statewide-crackdown-texting-while-driving/7A6SAmWlXVmSW0v6ZMpMeN/story.html.

[22] *Mass. State Police Will Have Extra Patrols Enforcing New Distracted Driving Law*, CBS Bos. (Feb. 14, 2020, 12:21 PM), https://boston.cbslocal.com/2020/02/14/massachusetts-distracted-driving-law-cell-phone-hands-free-february-23-state-police-extra-patrols/.

recognizes both the scope of the problem of racially discriminatory pretextual stops and the practical realities that foreclose its deterrence through the *Lora* protocol.

III. Because the *Lora* protocol has failed to address racial profiling in traffic stops, this Court should adopt a workable standard – the "would have" test – that incorporates modern understandings of the purpose and practice of pretextual traffic stops.

This Court has long interpreted art. 14 as more protective than the federal Fourth Amendment. *See, e.g.*, *Commonwealth v. Clermy*, 421 Mass. 325, 329 n.2 (1995) (quoting *Commonwealth v. Madera*, 402 Mass. 156, 160 (1988)); Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 Val. U. L. Rev. 405, 408–13 (2004); *see also Commonwealth v. Wilson*, 389 Mass. 115, 118 (1983) (holding that by statute Massachusetts rejected federal precedent and declined to extend the reach of traffic stops to investigatory searches incident to arrest). Consistent with that substantial protection, the Court should overrule *Santana* in favor of a rule that deters constitutionally unreasonable stops, and does not presume, contrary to available data, that a pretextual stop was unaffected by racial bias.[23] The solution is

---

[23] *Amici* propose this test under art. 14 because racially discriminatory pretextual stops are patently, and constitutionally, unreasonable. However, *amici* do not ask the Court to overrule *Lora*; *amici* propose a specific test for pretextual traffic stops that would overturn *Santana*'s authorization rule and supplant *Lora* in this context.

straightforward: the Court should abandon the presumption of regularity in traffic stops where there is a *prima facie* showing of a pretextual stop and adopt a totality of the circumstances test, as it has in the context of challenges to discrimination in jury selection. *See Batson*, 476 U.S. at 96; *see also Commonwealth v. Jones*, 477 Mass. 307, 322 (2017); *Commonwealth v. Calderon*, 431 Mass. 21, 26 (2000); *Commonwealth v. Soares*, 377 Mass. 461, 486 (1979).

Amici propose reinvigorating an old, commonplace standard to replace the "authorization rule" and cure the faults of the *Lora* protocol. Before *Whren*, a growing number of state courts adopted a version of the "would have" test to curtail pretextual stops. *Brown*, 930 N.W.2d at 902 (Appel, J., dissenting) ("Prior to *Whren*, many state courts that considered the issue believed the proper test for whether an allegedly pretextual stop was valid was whether an objective police officer would have made the stop notwithstanding the pretextual motivation.").[24]

The *Lora* framework would remain in force for other claims of selective enforcement or prosecution under arts. 1 and 10 which have not yet proven unworkable. *See Commonwealth v. Dilworth*, Suffolk Superior Court No. 1884 CR 0453 (Jan. 18, 2019).

[24] *See* Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After* Whren v. United *States: The New York and New Jersey Responses Compared*, 63 Alb. L. Rev. 725, 735–38 (2000); *see also* Lawrence W. Williamson, Jr., *Profiling, Pretext, and Equal Protection: Protecting Citizens from Pretextual Stops Through the Fourteenth Amendment*, 42 Washburn L.J. 657, 677–79 (2003).

This standard remains in force in a handful of states with constitutions more protective than the federal constitution, like Washington and New Mexico. *State v. Ladson*, 979 P.2d 833, 836 (Wash. 1999) (en banc); *State v. Ochoa*, 206 P.3d 143, 146 (N.M. Ct. App. 2008); *see also State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012) (noting Washington's rule has "not been toothless" in practice and that Washington courts "will continue to review challenged traffic stops for pretext").

The proposed test accomplishes *Lora*'s goals: equal protection in the day-to-day enforcement of our laws and respect for co-equal branches of government. *See Lora*, 451 Mass. at 446. It also accounts for *Lora*'s practical limitations: the effects of new traffic laws and newly limited data, the history of the failures of the *Lora* protocol, and the demonstrated unworkable burden it places upon defendants. *Amici* propose the following framework to address art. 14 problems raised by pretextual stops and the lack of clarity of the current rule.

A. The Defendant must make a *prima facie* showing based on the totality of the circumstances that a traffic stop was pretextual. Then a presumption of impropriety would attach.

The first step under the proposed framework is for a defendant to make a *prima facie* showing that, based on the totality of the circumstances, the stop at issue was pretextual. *Cf. Jones*, 477 Mass. at 322 ("When evaluating whether the party challenging the strike has met the relatively low bar of a *prima facie* showing, a trial judge is to consider all of the relevant facts and circumstances.");

see, e.g., *Ladson*, 979 P.2d at 843. This standard deviates from *Lora* in two respects. First, under the *Lora* protocol the defendant has the burden to overcome the presumption of regularity by making a *prima facie* statistical showing of discrimination. Second, in order to make a showing of discrimination, *Lora* requires that the defendant produce data on other stops and the racial demographics of the relevant surrounding population. In contrast, under *amici's* straightforward and practical test, the focus of the first step is the stop itself and any evidence that it was a pretext for an unrelated criminal investigation.

Both deviations from *Lora* are justified. As this case and other available data uniformly demonstrate, pretextual traffic stops are plagued by disparate enforcement. *See supra* at 19–23. Given the substantial evidence of discriminatory traffic enforcement, the law should not presume that a pretextual stop was unaffected by racial bias. Under the new test, the Commonwealth would not be entitled to the presumption of regularity. Once a defendant made a *prima facie* showing that the stop was pretextual, the defendant would be entitled to a rebuttable presumption that the stop conforms to the system-wide pattern of selective enforcement.[25] *See Batson v. Kentucky*, 476 U.S. 79, 96 (1986) ("[T]the

[25] This is consistent with our jury selection law: "judges have 'broad discretion' to seek explanations for peremptory challenges 'without having to make the

defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (quoting *Avery*, 345 U.S. at 562)).

To make a *prima facie* showing that a stop is pretextual, the defendant need not produce a geographically specific, officer-identified statistical or census benchmark data analysis.[26] Rather the defendant would be required to identify, and courts directed to examine, the specific circumstances of the stop at issue, obviating the need for costly statistical analysis. Courts have identified objective

---

determination that a pattern of improper exclusion exists.'" *Commonwealth v. Robertson*, 480 Mass. 383, 396 n.10 (2018).

[26] Such evidence would be admissible but not required at the first phase of the burden-shifting protocol. This is consistent with jury selection jurisprudence, which adopts a totality of the circumstances approach, *see Robertson*, 480 Mass. at 397 (citing *Sanchez v. Roden*, 753 F.3d 279, 302 (1st Cir. 2014)) but allows a defendant to present statistical evidence, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) ("We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a *prima facie* case of racial discrimination in jury selection cases . . . ." (citations omitted)). As in jury selection cases, statistical proof need not be extreme to be accepted. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*.").

factors to determine whether a reasonable officer would have made the traffic stop in the absence of a pretextual motive, including:[27]

- the seriousness of the traffic violation that purportedly justified the stop, including whether "the stop was necessary for the protection of traffic safety," *Ochoa*, 206 P.3d at 156; *see also State v. Heath*, 929 A.2d 390, 403 (Del. Super. Ct. 2006);
- "whether the defendant was arrested for a crime unrelated to the stop," *Ochoa*, 206 P.3d at 156;
- "whether patrolling or enforcement of the traffic code were among the officer's typical employment duties," *id.*; *see also* Heath, 929 A.2d at 403;
- "whether the officer had information, which did not rise to the level of reasonable suspicion or probable cause, relating to another [criminal] offense," *Ochoa*, 206 P.3d at 156;
- "the manner of the stop, including how long the officer trailed the defendant before performing the stop, how long after the alleged suspicion arose or violation was committed the stop was made, how many officers were present for the stop," *id.* and
- "the conduct, demeanor, and statements of the officer during the stop," *id.*

Other useful factors that bear on this analysis could include:

- whether police ran the car's license plate or the record of the registered owner of the car prior to observing the purported traffic violation, and if so, whether a justification that this was done "randomly" is supported by the record;

---

[27] Cases that no longer govern in their jurisdictions still provide useful factual applications of factors that tend to show an officer's motives were pretextual. New York, for example, developed a substantial body of law in intermediate appellate courts applying the "would have" test until the New York Court of Appeals post-*Whren* decided *People v. Robinson*, 767 N.E.2d 638, 643 (N.Y. 2001). *See, e.g.*, *People v. Flanagan*, 56 A.D.2d 658, 659 (N.Y. App. Div. 1977); *People v. Llopis*, 125 A.D.2d 416, 417 (N.Y. App. Div. 1986); *People v. Smith*, 181 A.D.2d 802, 803 (N.Y. App. Div. 1992); *People v. Roundtree*, 234 A.D.2d 612, 613 (N.Y. App. Div. 1996) (collecting other cases); *see* Abramovsky & Edelstein, *supra* note 24, at 735–38; Williamson, *supra* note 24, at 677–79.

- whether the driver or a passenger of the car was known to police prior to the stop, *see Amado*, 474 Mass. at 151; and
- whether police sought consent to search the car, and if so, whether they did so without making any observations after the traffic stop that gave rise to a reasonable suspicion that criminal activity was afoot.

The above list demonstrates that the typical stop will involve many objective facts a judge can readily assess in determining whether the stop was pretextual.[28] Trial judges routinely address the question of pretext in other contexts where less information may be available in making the determination. *See, e.g.*, *Calderon*, 431 Mass. at 26 (peremptory strikes); *Commonwealth v. Benoit*, 382 Mass. 210, 219 (1981) (inventory and administrative searches). Years of cases applying the "would have" test prior to the Supreme Court's decision in *Whren* demonstrate that the proposed framework is administrable and gives ample guidance to trial courts. That case law showcases concrete factual applications that may guide lower courts. *See Brown*, 930 N.W.2d at 902 (Appel, J., dissenting) (collecting cases from Arkansas, Florida, Illinois, Maine, Minnesota, Nebraska, Nevada, New York, North Dakota, Ohio, and Washington which, "[w]ith minor variations" "adopted the 'would have' test").

---

[28] Any factor-based test may result in some variation when applied by lower courts. Variation does not make this test unworkable: "the inconsistency and uncertainty created by the new test for pretext . . . are the kind of inconsistency and uncertainty widely thought acceptable if not inevitable in the application of new legal rules." Sklansky, *supra* note 17, at 329 n.189.

B. The Commonwealth must rebut the presumption of impropriety once the Defendant has demonstrated the pretextual nature of the stop.

If the Defendant is able to demonstrate a *prima facie* case that the specific stop was pretextual, the presumption of discrimination attaches and the burden shifts to the Commonwealth to demonstrate, by clear and convincing evidence, that there was a race-neutral reason for the stop and that the officers would have made the stop regardless of any pretextual motivation. The Commonwealth must produce evidence to support a clear, specific, legitimate, non-discriminatory reason for the stop. *See Batson*, 476 U.S. 79, 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' . . . The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried." (citations omitted)); *Commonwealth v. Benoit*, 452 Mass. 212, 221 (2008) (noting the judge must evaluate the Commonwealth's neutral reason for both "adequacy and genuineness" and "not conflate the two into a simple consideration of whether the explanation was 'reasonable' or 'group neutral'" (citation omitted)); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506–07 (1993) (discussing Title VII employment discrimination claims, in which a plaintiff's *prima facie* case shifts the burden to the defendant to "clearly set forth" an explanation and produce admissible evidence of a legitimate, nondiscriminatory reason for terminating

employment); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (noting that the explanation of legitimate reasons must be "clear and reasonably specific" in order to rebut the inference of discrimination arising from the *prima facie* case and afford "a full and fair opportunity" to demonstrate pretext).

Under *Lora*'s framework the Commonwealth must demonstrate a "race-neutral explanation for the statistical disparities or explain a compelling government interest in treating members of one race differently from another." *Lora*, 451 Mass. at 432 (cleaned up). *Amici's* proposed test requires the Commonwealth to focus its rebuttal on the specific case at hand and clarifies the standard of proof that the Commonwealth must meet. Further, if the reason offered by the Commonwealth "sound[s] superficial, defense counsel should [be] permitted the opportunity to rebut the proffered explanation as suggesting pretext." *Calderon*, 431 Mass. at 26 (citing *Commonwealth v. Futch*, 38 Mass. App. Ct. 174, 177–78 (1995)).

Lower courts are well-equipped to examine proffered race-neutral reasons for police conduct as they regularly do in other contexts, including jury selection, *see, e.g.*, *Calderon*, 431 Mass. at 26–27 ("[T]he judge was required to make an independent evaluation of the prosecutor's reasons and to determine specifically whether the explanation was bona fide or a pretext. This latter step involves more than a rubber stamping of the proffered reasons; it requires a meaningful

consideration whether the challenge has a substantive basis . . . ." (citations omitted)), and employment discrimination, *Hicks*, 509 U.S. at 510–11 ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination."). This second step safeguards legitimate, non-pretextual police action, while also allowing trial courts to inquire into the proffered justification for a specific action and weigh available statistical and non-statistical evidence. The clear and convincing evidence standard is appropriate to deter pervasive racial discrimination; courts regularly apply heightened standards to questions of racial bias due to the immutability of race and the prevalence and history of racial disparities, *Warren*, 475 Mass. at 531. Furthermore, this standard is appropriate because of the enormity of the problem here, the failure of current law to address it, and the practical reality that police departments have the means to record and produce data demonstrating that their enforcement of traffic laws is unbiased.

CONCLUSION

The *Lora* protocol has not been effective in curtailing the racially disparate use of pretextual stops. As a result, this Court should presumptively exclude evidence discovered as a result of pretextual stops unless the Commonwealth can effectively rebut the evidence that the stop was in fact pretextual. The practice of

pretextual stops permits police to do indirectly what they could not do directly. This Court should no longer tolerate this end-run around the requirements of article 14 and should hold that in order to stop a car for an investigatory purpose, police must have reasonable suspicion of criminal activity. Application of the exclusionary rule in this context is necessary not only to curb an arbitrary and intrusive police practice that has affected drivers of color disproportionately, but also to keep our courts from becoming complicit in the many harms that arise from that practice. With the weight of available data that this Court can now access, article 14 allows no result other than the presumptive exclusion of evidence discovered as the result of pretextual traffic stops.

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

/s/ *Oren Nimni*
Oren Nimni
BBO #691821
LAWYERS FOR CIVIL RIGHTS
61 Batterymarch Street, 5th Floor
Boston, MA 02110

(617) 988-0606
onimni@lawyersforcivilrights.org

/s/ *Chauncey B. Wood*
Chauncey B. Wood
BBO #600354
MASSACHUSETTS ASSOCIATION OF CRIMIAL DEFENSE LAWYERS
50 Congress Street, Suite 600
Boston, MA 02109
(617) 248-1806
cwood@woodnathanson.com

/s/ *Radha Natarajan*
Radha Natarajan
BBO #658052
NEW ENGLAND INNOCENCE PROJECT
120 Tremont Street, Suite 735
Boston, MA 02108
(617) 557-6584
rnatarajan@newenglandinnocence.org

Dated: February 18, 2020

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 7,485 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 18th day of February, 2020, I caused a true copy of the foregoing document to be served by electronic mail, via e-file, on the following counsel:

John Warren
55 Union Street, Fourth Floor
Boston, MA 02108

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

/s/ *Katharine Naples-Mitchell*
Katharine Naples-Mitchell