

January 8, 2021

**Via Electronic Mail and Electronic Filing**

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Re: *Amici Curiae* letter in support of Defendant's Request for  
Further Appellate Review in *Commonwealth v. Bailey-Sweeting*  
(FAR-28003)<sup>1</sup>

To whom it may concern:

Lawyers for Civil Rights ("LCR") and the American Civil Liberties Union of Massachusetts, Inc. ("ACLUM"), (collectively, "amici"), respectfully submit this *amici curiae* letter in support the Defendant's Request for Further Appellate Review in the matter referenced above.

The Appeals Court's decision highlights the need for further guidance from this Court concerning when police may conduct a patfrisk, which is "a 'serious intrusion on the sanctity of the person [that] is not to be undertaken lightly.'" *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 36 (2020) (quoting *Commonwealth v. Almeida*, 373 Mass. 266, 270–71 (1977)) (alternation in original). If left unreviewed, this decision could cause Black people and neighborhoods in the Commonwealth to be subjected to increasingly disparate and invasive policing. As a result, *amici* ask this Court to take this case up on FAR for at least two reasons.

*First, the Appeals Court's decision risks causing a retreat from the standard articulated by this Court in Torres-Pagan.* In *Torres-Pagan*, this Court specified that a "patfrisk is permissible only where an officer has reasonable suspicion that the suspect is armed and dangerous," and that "surprise in response to unexpected behavior is not the same as" this required level of suspicion. 484 Mass. at 36, 40.

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<sup>1</sup> The court below mistakenly reversed surnames; this letter uses the name as reflected in the Defendant-Appellant's own brief.

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Yet the Appeals Court majority relied on a “hunch” from police officers that Mr. Paris’ behavior indicated criminal conduct—rather than justifiable anger toward police harassment—notwithstanding evidence that he had already been subjected to repeated stops where the police had no evidence of criminal conduct. The majority then went one step further and accepted that the basis of suspicion for *Mr. Paris* could be imputed to justify a patfrisk of *Mr. Bailey-Sweeting*. In addition to relying on less evidence than *Torres-Pagan* requires, this analysis risks being interpreted to allow for the imputation of criminality to anyone in the presence of a person expressing frustration with police harassment, which could chill verbal criticism of such police activity for fear that it will incite officers to search the speaker or their companions. *But see City of Houston v. Hill*, 482 U.S. 451, 461-463 (1987) (“[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers” and “[t]he freedom of individuals to verbally oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police station”). Further guidance to the lower courts concerning the *Torres-Pagan* standard is therefore warranted.

*Second, the Appeals Court’s reasonable suspicion analysis improperly relies on purported gang affiliation.* This Court has already noted that because the designation “high crime area” could be “used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business,” such a characterization “cannot justify the diminution of the civil rights of its occupants.” *Commonwealth v. Evelyn*, 485 Mass. 691, 709 (2020) (citing *United States v. Wright*, 485 F.3d 45, 54 (1st Cir. 2007)). The unreliability and racially-disparate application of gang designations similarly cautions against heavy reliance on this factor in a reasonable suspicion analysis. The Appeals Court’s decision demonstrates the need for this Court to provide clear instruction to officers and lowers courts regarding what, if any, weight gang designations should hold in contrast to more particularized factors in a reasonable suspicion analysis.

Because the Appeals Court was sharply divided in its decision, and because this case presents important issues of law, *amici* respectfully submit that further appellate review is warranted in this case. If such review is granted, LCR and ACLUM expect that they would submit a brief *amici curiae* to address the issues outlined above.

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January 8, 2020

Sincerely,

/s/ Oren Nimni

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#### **CERTIFICATE OF SERVICE**

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

/s/ Oren Nimni

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