SJC-13147

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

COMMONWEALTH

v.

ERICKSON DAVEIGA

BRIEF OF AMICI CURIAE COMMITTEE FOR PUBLIC COUNSEL SERVICES, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NEW ENGLAND INNOCENCE PROJECT IN SUPPORT OF THE DEFENDANT & REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, amici make the following disclosures: The Committee for Public Counsel Services (CPCS) is a statutorily created agency established by G.L. c. 211D, § 1. The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) is a subsidiary of Harvard University, a 501(c)(3) organization. The Massachusetts Association of Criminal Defense Lawyers (MACDL) is a 501(c)(6) organization. The American Civil Liberties Union of Massachusetts and the New England Innocence Project (NEIP) are 501(c)(3) organizations under Federal law and the laws of the Commonwealth of Massachusetts. *Amici* do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in any *amici*.

PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), amici and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money to fund preparing or submitting the brief;

(c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

STATEMENTS OF INTEREST OF AMICI

The Committee for Public Counsel Services (CPCS) is a statutorily created statewide agency established by G.L. c. 211D, §§ 1 et seq., whose responsibility is "to plan, oversee, and coordinate the delivery" of legal services to certain indigent litigants, including defendants in criminal cases and juveniles in delinquency and youthful offender proceedings. G.L. c. 211D, §§ 1, 2, 4. This brief addresses issues related to police practices, including pretext stops, which perpetuate racial injustice. Many CPCS clients are people of color who are disproportionately subjected to police intrusion because of these practices. As a result, this Court's decision in this case will affect the interests of CPCS's present and future clients. See *Patton v. United States*, 281 U.S. 276, 304 (1930) ("Whatever rule is adopted affects not only the defendant, but all others similarly situated.").

The American Civil Liberties Union of Massachusetts, Inc. (ACLUM), an affiliate of the national ACLU, is a statewide nonprofit membership organization dedicated to the principle of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. ACLUM has a longstanding interest in eliminating racially disparate police practices. See, e.g., *Commonwealth v. Buckley*, 478 Mass. 861, 870 (2018) (amicus arguing that pretextual traffic stops violate art. 14); Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010, ACLU Foundation of Massachusetts (Oct. 2014); Stop and Frisk Report Summary, ACLU Foundation of Massachusetts (Oct. 2014), cited in *Commonwealth v. Warren*, 475 Mass. 530, 539 n.13 (2016).

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

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

The **Massachusetts Association of Criminal Defense Lawyers** (MACDL) is an incorporated association of more than 1,000 experienced lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL seeks to improve the criminal legal system by supporting policies to ensure fairness in criminal matters and devotes much of its energy to attempting to correct problems in the criminal legal 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 judicial 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 and at all stages of the criminal legal system, from the moment of their encounter with the police

through trial. It also includes ensuring that all evidence, regardless of its source or pedigree, is subjected to appropriately rigorous scrutiny and bears sufficient indicia of reliability before it is used against criminal defendants. Finally, in recognition of the grossly disproportionate number of members of communities of color who have been wrongfully convicted, NEIP's mission includes ensuring that explicit or implicit racial bias does not operate in ways that serve to undermine the presumption of innocence.

SUMMARY OF THE ARGUMENT

As the motion judge observed, this case "tests the limits of what are known as 'pretext' car stops." D. Add. 46. The trial prosecutor acknowledged the pretextual nature of the stop here, telling the judge "I'm certainly not going to stand before the court and say that anti-crime car, [with officers] in plain clothes, was, you know, really after parking tickets that night. Obviously the officers had another subjective motivation for stopping the car." MTS. Tr.63.

That subjective motivation was a hunch falling far short of reasonable suspicion of criminal activity. The officers merely thought that Mr. Daveiga, a passenger in a double-parked Chrysler Pacifica, was unusually subdued, and that it was odd that, after they told the driver he could pull into a parking spot up the street to stop blocking the road, he instead drove away. But, relying on the so-called "authorization test,"[1] which permits investigatory car stops based on hunches so long as police can also point to some traffic violation, however minor, officers stopped the car and seized all its occupants for the double-parking violation they had just waved off. This was unlawful for at least two reasons.

First, even under the authorization rule, the officers' authority to conduct a stop based on the double-parking infraction ended when they successfully resolved that infraction during the initial encounter. See *Commonwealth v. Cordero*, 477 Mass. 237, 241-242 (2017). There was no traffic violation to legitimate their subsequent stop of the car. This was a pretext stop without a lawful pretext. *Infra* at 12-15.

[1] See *Commonwealth v. Santana*, 420 Mass. 205, 209 (1995).

Second, as the Commonwealth's brief acknowledges, the authorization rule is "concerning" and is not "consistent with the values espoused by [this] Court." C.B. 15 n.2. It is also inconsistent with Article 14 of the Massachusetts Declaration of Rights, which bans general warrants and prohibits unreasonable searches. Pretext stops violate both of these provisions.

Police can find an ostensible traffic-related reason to stop any car on the road. That reality has made pretext stops the modern-day general warrant; they grant police exactly the kind of arbitrary government power as the dreaded writs of assistance that inspired the drafting of art. 14. *Infra* at 15-22.

And overwhelming evidence shows that this arbitrary power is exercised in a racially discriminatory and disparate fashion, including new empirical research demonstrating that judicial approval of pretext stops contributes to racial profiling. *Infra* at 22-26. Stops and seizures shown to be so infected with racial injustice cannot be considered "reasonable" within the meaning of art. 14. To "deter racial profiling and eliminate the tool most often used to accomplish it," this Court should now "combin[e]" its "improved test for identifying particular cases of race-based stops with a broader prohibition on pretextual stops" that adopts the workable "would have" test. *Commonwealth v. Long*, 485 Mass. 711, 756 (2020) (Budd, J., concurring). *Infra* at 27-30.

Finally, this case features another police practice that this Court should deter because of its racial justice implications: targeting young men of color like Mr. Daveiga (who is Cape Verdean) for repeated encounters in their own neighborhoods, and then leveraging the purported "demeanor" changes that are the inevitable consequence of that targeting. Here, a police officer was permitted to tell

the jury that he had "encountered" Mr. Daveiga *thirty times* prior to the night in question—including ten interactions that were not "cordial." This evidence was highly prejudicial, as it would have caused at least some jurors to draw negative inferences about Mr. Daveiga. The inference that the Commonwealth ostensibly drew from it—that Mr. Daveiga was unusually quiet when police encountered him in the Pacifica because he was in possession of the gun they later found in the car—was so speculative as to have minimal probative value. The evidence should not have been admitted. *Infra* at 30-34.

ARGUMENT

I. Because officers resolved the alleged traffic violation during their first encounter with the car in which Mr. Daveiga was travelling, they could not later stop the car based on the same violation.

On the question as to which this Court solicited amicus briefs—whether police may subsequently stop a car for a traffic infraction that they have previously resolved without citation—the answer is "no."

Mr. Daveiga and the Commonwealth disagree about whether he was seized on Monadnock Street when police "squeezed . . . right up next to" the Pacifica in which he was a passenger and told the occupants that they were blocking the street.[2] That police had to back up to allow the Pacifica to drive away[3] resolves this dispute in Mr. Daveiga's favor. See *Commonwealth v. King*, 389 Mass. 233, 241 (1983)

[2] MTS Tr.6-7; C.B.17-18; D.B.27.

[3] MTS Tr.8.

(positioning police cruiser to block car "constituted a show of authority and force that would lead a reasonable person to conclude that he was not free to go").[4]

But, regardless of whether the initial encounter between police and the Pacifica's occupants constituted a seizure, the subsequent stop of the car on Dudley Street was illegal. Though the police readily conceded that the *reason* they stopped the car on Dudley Street was a hunch—purportedly based on Mr. Daveiga's demeanor—that "something [was] up,"[5] the only *justification* for the subsequent stop offered by the police, or the Commonwealth on appeal, is the pretext that the Pacifica had blocked the flow of traffic on Monadnock Street.[6] But once the officers told the driver of the Pacifica to move, and he did, that justifica-

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[4] The Commonwealth implicitly concedes this issue while arguing the contrary: "When the driver agreed to move the car, Officer McDonough backed up to let the driver do so . . . thus affirmatively impl[ying] that the car could and should leave, . . . not . . . [that] he would compel the car's occupants to stay." C.B.18. But *until* the police and driver reached an agreement that he could leave, and while the police car was blocking the Pacifica, the car's occupants were seized.

[5] MTS Tr.13.

[6] MTS Tr.37, C.B.16. (The prosecutor below contended that there was "reasonable suspicion . . . that the occupants were armed and dangerous" before the stop on Dudley Street, MTS Tr.64, but the Commonwealth has abandoned that argument on appeal.)

The Commonwealth relies on a regulation prohibiting "driv[ing] in such a manner as to obstruct unnecessarily the normal movement of traffic on any street or highway." City of Boston Traffic Rules and Regulations, Article VI, § 7. Here, police came upon the Pacifica at four a.m., as its occupants sat waiting for a friend. MTS Tr.21,28. There was no testimony that the officers waited for any amount of time before pulling up next to the Pacifica to tell the driver to move, or that the Pacifica blocked any other cars. It is thus far from clear that this regulation actually prohibited the conduct here.

tion expired. "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' – to address the traffic violation that warranted the stop." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). "Police authority to seize an individual ends 'when tasks tied to the traffic infraction are—or reasonably should have been—completed.'" *Cordero*, 477 Mass. at 242, quoting *Rodriguez*, 575 U.S. at 354. The rule set forth in *Rodriguez* and *Cordero* establishes an important constraint on the significant police power to conduct traffic stops. That constraint applies not based on whether the initial interaction constituted a seizure, but on whether continued police action is necessary to resolve the traffic violation.

Thus, just as police may not "earn bonus time to pursue an unrelated criminal investigation" by "completing all traffic-related tasks expeditiously," *Rodriguez,* 575 U.S. at 357, they may not earn an extra stop by initiating a "consensual" traffic encounter, declining to issue a citation, and placing the traffic violation in their proverbial back pocket for use at a later time. This case perfectly illustrates the problem: While the pretextual purpose of the second stop was to issue a citation for the previously un-cited infraction, there is no evidence that police actually did so. MTS Tr.49-50. Had the officers failed to confirm their hunch on Dudley Street, could they have let the driver go again, only to invoke the alleged traffic-blocking to stop him a third time? The Commonwealth seems to think so. See C.B.17 (arguing that even if the initial encounter was a seizure it would not "invalidate the subsequent traffic stop").

What is more, our Legislature enacted G.L. c. 90C, § 2 (the "no-fix" statute) to require that police fill out a citation "as soon as possible" and cite the driver "at

the time and place of the violation"—precisely because "[t]he nature of traffic citations renders them uniquely suited to manipulation and misuse," including "susceptibility . . . to unequal and arbitrary disposition." *Commonwealth v. Pappas*, 384 Mass. 428, 431 (1981). Here, police ignored the statute's requirements.

Because police resolved the traffic issue by permitting the Pacifica to drive away, there was no legitimate traffic purpose for a later stop. The officers' actions were therefore unreasonable even under the authorization test, because the pretextual stop here lacked a legitimate pretext. Cf. *Commonwealth v. Buckley*, 478 Mass. 861, 865-866 (2018) (holding that *where there is a legal justification* for a traffic stop, it will not be deemed unreasonable because it is pretextual).

II. This Court should abolish pretext stops, which are arbitrary and unreasonable in violation of article 14.

"[P]retextual stops are unconstitutional under art. 14 of the Massachusetts Declaration of Rights because they allow for the investigatory stop of an individual without reasonable suspicion of the crime sought to be investigated." *Long*, 485 Mass. at 737 (Budd, J., concurring). The broad and arbitrary power that pretext stops assign to police make them "comparable to general warrants," *id.* at 743, directly contravening the purpose of article 14. And with that unbridled power comes its discriminatory exercise, which is by now so well-established that permitting it to continue unchecked is unreasonable within the meaning of article 14.

a. *Because pretext stops function as general warrants, they violate art. 14.*

Revulsion at the "general warrants known as writs of assistance," which gave "customs officials blanket authority to search where they pleased for goods

imported in violation of British tax laws," *Stanford v. State of Tex.,* 379 U.S. 476, 481 (1965), was both a cause of the American Revolution and the impetus for art. 14 and the Fourth Amendment.[7] Prominent among the episodes that stoked colonial opposition to these expansive and arbitrary powers was Paxton's Case in 1761, in which James Otis famously challenged the renewal of the writs of assistance following the death of King George II, with a young John Adams watching in a Boston courtroom. See Clancy, *The Framers' Intent: John Adams, His Era, And the Fourth Amendment*, 86 Ind. L.J. 979, 992-1006 (2011).[8] Within weeks of the argument, Adams summarized it an abstract. *Id.* at 997. He described Otis's argument that the writ of assistance Paxton sought was illegal because it was "general": "It is a power, that places the liberty of every man in the hands of every petty officer . . . Everyone with this writ may be a tyrant . . . it is perpetual; there is no return . . . Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a writ of assistance." *Id.* at 999-1000. In short, Otis argued, the writs represented "the worst instrument of arbitrary power, the most destructive of English liberty . . . that ever was found in an English law book." *Stanford*, 379 U.S. at 481.

Otis lost Paxton's Case, but its impact reverberated in the decades to come. "Massachusetts remained the main battleground in the colonies regarding British

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[7] See *id.* at 481-485; *Harris v. United* States, 331 U.S. 145, 157-158 (1969) (Frankfurter, J., dissenting); *Boyd v. United States*, 116 U.S. 616, 624-625 (1886); *Long,* 485 Mass. at 742-743 (Budd, J. concurring); *Commonwealth v. Rodriguez,* 430 Mass. 577, 585-586 (2000); *Commonwealth v. Cundriff*, 382 Mass. 137, 143-146 (1980).

[8] "Charles Paxton was the customs official who sought the new writs." The case is also referred to as "the Writs of Assistance Case." *Id.* at 992 & n.79.

search and seizure practices," and the continued issuance of general writs of assistance featured in Adams' law practice. *Id.* at 1004. Throughout his life, Adams regarded Paxton's Case as "the beginning of the American Revolution." *Id.* at 1005.[9] It is no surprise, then, that "Otis' defense of privacy was enshrined" by Adams in art. 14. *Harris*, 331 U.S. at 158 (Frankfurter, J., dissenting). See also *Rodriguez*, 430 Mass. at 585. Article 14 guarantees the right to be free from unreasonable searches and seizures in its first sentence, and abolishes general warrants in its second.

Pretext stops represent the kind of unchecked government power that motivated Adams to draft article 14. Because it is nearly impossible to drive without violating at least one traffic law, police can stop virtually anyone on reasonable suspicion of a traffic violation if they so desire.[10] And they know it.[11]

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[9] Recounting Otis's argument almost sixty years later, Adams wrote: "Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Id.*

[10] See, *e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting) ("The practical effect of our holding in *Whren* [*v. United States*, 517 U.S. 806 (1996)] . . . is to allow the police to stop vehicles in almost countless circumstances"); *Long*, 485 Mass. at 739 (Budd, J., concurring) ("[v]ery few drivers can traverse any appreciable distance without violating some traffic regulation") (citation, quotation omitted).

[11] See Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 554, 559 (1996-1997) (quoting police officers in 1967 on the ease of "get[ting] a guy legitimately on a traffic violation if you tail him for a while").

Our traffic statutes, codified primarily in Chapters 89 ("Law of the Road") and 90 ("Motor Vehicles and Aircraft") of the General Laws, "regulate[] nearly every aspect of operating a motor vehicle." *Long*, 485 Mass. at 739 n.4 (Budd, J., concurring). Chapter 90 covers not only "obvious moving violations" like "failing to stop at red lights", *id*., but more obscure regulations, see, e.g., G.L. c. 90, § 17 (prohibiting cars from driving over fifteen miles per hour within a tenth of a mile of "a vehicle used in hawking or peddling merchandise and which displays flashing amber lights"). And what the dozens of sections of Chapters 89 and 90 fail to cover, municipalities may fill in with their own regulations. For example, the City of Boston's Traffic Rules and Regulations are eighty-four pages long.[12]

The sheer number of rules governing drivers makes it easy for police to find a pretextual reason to stop any car. Our speed limits alone could ensnare the vast majority of drivers. "[O]bserved data show that only about 5% of drivers operate at or below speed limits on interstate highway segments posted at 55 mph, and that as few as 23% of drivers operate at or below the posted speed limit on non-freeway facilities." Mannering, *An Empirical Analysis of Driver Perceptions of the Relationship Between Speed Limits and Safety* 2, Transportation Research Part F: Traffic Psychology and Behavior (2008).[13]

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[12] Available at https://www.cityofboston.gov/images_documents/Traffic%20Rules%20and%20Regulations_tcm3-1654.pdf.

[13] Available at https://perma.cc/GPN3-KHUC. See also *State v. Soto*, 324 N.J. Super. 66, 70 (Law Div. 1996) (four day observational study on stretch of New Jersey Turnpike showed 98% of cars exceeded speed limit); General Accounting Office, GAO/GGD-00-41 Racial Profiling Limited Data Available on Motorist Stops, 9 (March 13, 2000) (92% of motorists observed on I-95 in northeast Maryland violated speed limit), available at https://www.gao.gov/assets/ggd-00-41.pdf.

The endless number of potential traffic violations is coupled with broad police discretion to decide which rules to enforce and in which circumstances. Police can't stop *every* driver who breaks a traffic law, but they can stop *any* driver who does so. They can stop the car driving 67 miles per hour in a 65-mile zone as readily as they can the car driving 90 miles per hour. The same law that prohibits weaving across lanes permits police to seize a driver who briefly crosses the fog line;[14] they can stop a driver who fails to signal a right turn from the right lane on the same authority as one who dangerously cuts someone off.[15] And as with general warrants, under the authorization rule police can make those decisions based not on safety concerns but merely on a hunch, however unsupported, that they want to investigate—or for any other reason. See *Santana*, 420 Mass. at 209.

Consequently, our courts have affirmed police stops—some overtly pretextual—for all kinds of *de minimis* violations, including, e.g.:

- "loud music" was coming from the car, *Commonwealth v. Ortiz*, 478 Mass. 820, 821 (2018).
- "registration plate was not properly affixed"; police were following car for explicitly pretextual reasons, *Commonwealth v. Amado*, 474 Mass. 147, 148 (2016).
- car traveled in the left lane for less than a mile while the center and right lanes were empty, *Commonwealth v. Lora*, 451 Mass. 425, 427 (2008).
- car made two turns in light traffic without signaling, while being followed for explicitly pretextual reasons, *Commonwealth v. Damon*, 82 Mass. App. Ct. 164, 166 (2012).

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[14] G.L. c. 89, § 4A.

[15] G.L. c. 90, § 14B.

- "screeching" tires in violation of G.L. c. 90, §16 (prohibiting driver from making "a harsh, objectionable, or unreasonable noise), though car not alleged to be exceeding speed limit, *Commonwealth v. Young*, 78 Mass. App. Ct. 548, 551 (2011).
- "reasonable suspicion" of "windshield standard" violation, which Commonwealth could not ultimately prove, *Commonwealth v. Jackson*, 71 Mass. App. Ct. 1117, *2 (2008) (unpublished).[16]

This Court has held that residents are not and cannot be expected to forego driving, "an indispensable part of modern life," in order to avoid government surveillance. *Commonwealth v. McCarthy*, 484 Mass. 493, 508 (2020). But the facts of this case illustrate that, when it comes to drivers and their passengers, the authorization rule cedes unbridled power to police. Even after the driver complied with their traffic order, the officers here exploited his purported prior infraction to pursue an otherwise unsupported criminal investigation—not of him, but of his passenger, Mr. Daveiga.

This Court has previously found police practices to be unconstitutional by virtue of their resemblance to general warrants. In perhaps the closest parallel to pretext stops, this Court concluded that art. 14 forbids the use of drug interdiction roadblocks because they "essentially give to police the same power with respect to individuals in their automobiles as the writs of assistance granted to the British officials with respect to individuals in their homes." *Rodriguez*, 430 Mass. at 585.

[16] The fact that a traffic stop is authorized not only when police observe a violation but also when they merely have reasonable suspicion of one also greatly extends their discretion to stop. For example, if police reasonably believe that car windows' tint exceeds legal limits, a stop is authorized even if they turn out to be mistaken. See *Commonwealth v. Baez*, 47 Mass. App. Ct. 115, 118 (1999).

Just last month, this Court held that to permit police to "trawl through [body-warn camera] footage to look for evidence of crimes unrelated to the officers' lawful presence in the home when they were responding to a call for assistance is the virtual equivalent of a general warrant." *Commonwealth v. Yusuf*, 488 Mass. 379, 394 (2021). And in prohibiting the warrantless recording of private conversations on one-party consent, this Court reasoned that the "vice of the consent exception is that it institutionalizes the historic danger that art. 14 was adopted to guard against"—general warrants—by "put[ting] the conversational liberty of every person in the hands of any officer lucky enough to find a consenting informant." *Commonwealth v. Blood,* 400 Mass. 61, 71–72 (1987).

The history of art. 14 "should not require retelling. But old and established freedoms vanish when history is forgotten." *Rodriguez*, 430 Mass. at 585 (citation omitted). Because the police can stop virtually anyone in any car, they wield the kind of arbitrary "power that places the liberty of every man in the hands of every petty officer." This Court has said that the authorization rule means that "a traffic stop cannot be 'arbitrary,' because it is predicated on a driver violating a traffic law." *Buckley*, 478 Mass. at 869. That argument relies on too narrow a definition of "arbitrary:" the point is not merely that the police power permitted by pretext stops is random, but that it is unrestrained and subject to capricious exercise. Because "[w]hat was intolerable in 1780 remains so today," *Blood*, 400 Mass. at 72, this Court should abolish pretext stops.

b. *The overwhelming evidence of racial bias in pretext stops renders them unreasonable within the meaning of article 14.*

Pretext stops should also be abolished because they unreasonably invite racial discrimination and produce racial disparities. When Adams wrote article 14, "the primary abuse thought to characterize the general warrants and the writs of assistance was their indiscriminate quality, the license that they gave to search Everyman without particularized cause." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 366 (1974). But our founders also had "not merely an appreciation but a concern that one evil of the existence of arbitrary power is the inevitability of its discriminatory exercise." *Id.* & n.195 (noting that Adams' abstract of Otis's argument against the writs of assistance included the criticism that they empowered customs officials to act out of "malice or revenge"). That concern finds validation in the empirical evidence on pretext stops.

As this Court has noted, "[y]ears of data bear out what many have long known from experience: police stop drivers of color disproportionately more often than Caucasian drivers for insignificant violations (or provide no reason at all)." *Long*, 485 Mass. at 717, quoting *Buckley,* 478 Mass. at 876-877 (Budd, J., concurring). A national study of 95 million traffic stops found that "'[B]lack drivers were, on average, stopped more often than white drivers,' and that Black drivers comprised a smaller share of drivers stopped at night, when it is harder for officers to detect race, 'suggest[ing] [B]lack drivers were stopped during daylight hours in part because of their race.'" *Long*, 485 Mass. at 717-718, quoting Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Human Behavior 736, 737 (2020).

Massachusetts is not immune to this problem; when reliable information has been collected in our Commonwealth, it has confirmed racial disparities in traffic enforcement. After the Legislature authorized collection and analysis of data in response to concerns about racial profiling, a 2004 Northeastern University study "found that of the 366 Massachusetts law enforcement agencies reporting data for analysis, 249 had substantial disparities in at least one of four measurements used." *Lora*, 451 Mass. at 448 (Ireland, J., concurring). In Boston and Springfield, police cited drivers of color for traffic violations twice as often as white drivers.[17] State police stopped drivers of color 1.8 times as often as white drivers.[18] And racial discrimination infects not just stops themselves, but what happens next: in 2014 and 2015, Massachusetts State Police were 134% more likely to search motorists of color than white drivers—but 18.6% less likely to turn up contraband when they did so.[19]

That drivers of color are more likely to be subjected to particularly intrusive traffic stops is, sadly, no surprise, given the research showing that racial disparities in traffic stops are almost entirely attributable to pretext stops, rather than true traffic safety stops. See Epp, et al., *Pulled Over: How Police Stops Define Race and*

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[17] See Northeastern U. Inst. on Race & Just., Massachusetts Racial and Gender Profiling Project: Preliminary Tabulations 167, 175 (2004), https://repository.library.northeastern.edu/downloads/neu:378461?datastream_id=content.

[18] *Id.* at 175.

[19] Relihan, *State Police More Likely to Search Non-White Drivers, Less Likely to Discover Contraband,* Enterprise (Brockton) (Aug. 21, 2017), https://www.enterprisenews.com/news/20170820/state-police-more-likely-to-search-non-white-drivers-less-likely-to-discover-contraband.

Citizenship 13-14 (2014). Police are not more likely to stop Black drivers when enforcing traffic safety laws, but are "dramatically more likely" to do so when carrying out investigatory pretext stops. *Id.* at 14, 64-66. Black drivers are 2.7 times more likely than white drivers to be stopped for pretextual reasons. *Id.* at 64. Young black men are four times as likely as white women their age to be targeted by pretext stops. *Id.* at 66-67.

Disparities in pretext stops have a huge social cost. As this Court has recognized, "[t]he discriminatory enforcement of traffic laws . . . cause[s] great harm." *Long*, 485 Mass. at 718. That harm includes humiliation for drivers of color and "justified . . . fear," as "African-Americans have been killed during routine traffic stops." *Id.* (citation omitted). And pretext stops lead directly to the disparities in prosecutions and convictions that plague our criminal legal system, which members of this Court have pledged to reexamine. Letter from the Seven Justices to Members of the Judiciary and Bar (June 3, 2020).[20] "Traffic stops are by far the most common point of direct contact between citizens and the police." Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of A Doomed Drug Interdiction Technique*, 28 Ohio N.U.L. Rev. 1, 20 (2001). Because drivers of color are more likely to be subjected to those stops, and more likely to be searched during them, and because some percentage of those searches will lead to arrest, pretext stops propel disparities in prosecutions and convictions. See generally Forman, *Locking Up Our Own: Crime and Punishment in Black America* 212-213 (2017).

[20] https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and

This is true even though, as noted above, police are actually *less* likely to find contraband when they search drivers of color than white drivers. In part because of the sheer scale of racially disparate traffic enforcement, the ten crimes in the Commonwealth with the greatest racial disparities in conviction rates are all contraband-related offenses,[21] which are particularly likely to be discovered during traffic stops.

Just this year, new evidence has emerged demonstrating "empirically that judicial doctrines permitting police officers to engage in pretextual traffic stops contribute to a statistically significant increase in racial profiling of minority drivers." Rushin & Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 643 (2021). Researchers examined over eight million Washington state traffic stops between 2008 and 2015 to understand the impact of a 2012 Washington Supreme Court ruling easing restrictions on pretext stops.[22] They found that the 2012 decision was "associated with a statistically significant

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[21] See Report by the Criminal Justice Policy Program, Harvard Law School, Racial Disparities in the Massachusetts Criminal System 42-43 (Sept. 2020).

[22] In 1999, the Washington Supreme Court held that pretextual traffic stops violate their state constitution, and adopted a test that considered the "totality of the circumstances," including both the "objective reasonableness of the officer" and the officer's "subjective intent." *State v. Ladson*, 979 P.2d 833, 843 (Wash. 1999) (en banc). In *State v. Arreola,* 290 P.3d 983, 991-992 (Wash. 2012) (en banc), the court changed course and concluded that even an admittedly pretextual stop is permissible so long as the officer also asserts an independent, "appropriate" determination that it was necessary to address the traffic violation—"even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop." *Arreola* "effectively legaliz[ed] the use of tactics akin to pretextual stops." Rushin & Edwards, *supra*, at 643.

increase in traffic stops and searches of non-white drivers relative to white drivers." *Id.* at 644. Moreover, "most of the increase in traffic stops of nonwhite drivers . . . occurred during the daytime, when police officers could more easily ascertain a driver's race." *Id*. In short, "judicial approval of pretextual stops contributes to racial profiling." *Id.*

Pretext stops lead directly to intentional racial profiling, and to racial disparities that may or may not be intentional but remain pernicious. These are "systemic problem[s]" that have "flourished under the rules that this court has set. A systemic solution . . . requires a reevaluation of the rules that enable and incentivize officers to make pretextual race-based stops in the first place." See *Long*, 485 Mass. at 756 (Budd, J. concurring). Article 14's requirement that searches and seizures be "reasonable" offers a systemic solution: any police practice that is so infected with racial bias is inherently unreasonable.

In easing the evidentiary burden on defendants attempting to prove racial profiling in violation of the Equal Protection Clause of the Fourteenth Amendment, the majority opinion in *Long* took an important step toward racial justice. See *Long*, 485 Mass. at 723-726. But this remedy is incomplete. The empirical evidence shows that progress will be hampered so long as pretext stops are permitted. This Court should use all of the tools at its disposal to redress the harm of racially targeted and racially disparate policing, and hold that pretext stops violate art. 14. See *Long*, 485 Mass. at 763 n. 20 (Budd, J., concurring). "[S]ystemic change [is] needed to make equality under the law an enduring reality for all." Letter from the Seven Justices, *supra*.

c. *A rule abolishing pretext stops – a "would have" test – is workable.*

Courts declining to abolish pretext stops have expressed concern about the administrability of an alternative rule. See *Whren v. United States*, 517 U.S. 806, 814–15 (1996); *Buckley*, 478 Mass. at 867-868. But the authorization rule has proved to be manifestly harmful and unconstitutional for the countless individuals who have been stopped, and there are readily available alternatives that would be fairer to those individuals and administrable for courts and police. In fact, this case illustrates the workability of a "reasonable officer" or "would have" test, which would hold that "an alleged pretextual stop is valid only if a reasonable police officer 'would have' made the stop in the absence of an ulterior motive; that is, a reasonable officer would have made the stop solely to enforce the motor vehicle infraction." *Long*, 485 Mass. at 745 (Budd, J., concurring).

Case law from jurisdictions that prohibited pretext stops before *Whren,* or that barred them on state constitutional grounds after *Whren*, articulates factors that can readily be used to decide whether a reasonable officer would have made the stop, absent an ulterior motive. Applying those factors to the stop in this case shows that, even if the police had not been so forthright about their pretextual motives, it would still be apparent that such motives explain why they sent the car on its way only to stop it later for a previously unenforced parking violation:

- *Seriousness of the traffic violation.* See *State v. Ochoa*, 146 N.M. 32, 45 (Ct. App. 2008). See also *People v. Flanagan*, 56 A.D.2d 658, 660 (N.Y. App. Div. 1977).[23]

[23] *Flanagan* and the other New York cases cited here were overruled by *People v. Robinson,* 97 N.Y.2d 341, 350 (2001) after *Whren* was decided, but they remain instructive on the application of the "would have" test.

The brief double-parking here was not a particularly serious traffic violation, if it was a violation at all, see *supra* n.6; the stop was certainly not "necessary for the protection of traffic safety."

- *Whether the defendant was arrested for a crime unrelated to the stop*, as Mr. Daveiga was. See *Ochoa*, 146 N.M. at 45.

- *Whether enforcement of the traffic code was among the officer's typical duties. Id.* See also *State v. Montes-Malindas*, 144 Wash. App. 254, 261 (2008). Officer McDonough and his partner were in plain clothes and an unmarked car, D.Add.43. The only reasonable inference is that they were not assigned to traffic enforcement. [24]

- *Whether police had a criminal investigatory purpose not based on reasonable suspicion.* See *Ochoa*, 146 N.M. at 45; see also *People v. Smith*, 181 A.D.2d 802, 803 (N.Y. App. Div. 1992). Police here had the barest of hunches, based on Mr. Daveiga's demeanor.

- *Whether the defendant was known to police prior to the stop,* as Mr. Daveiga was. See *People v. Reynolds*, 185 Misc.2d 674, 675-676 (Monroe Co. Ct., NY 2000); see also *Amado*, 474 Mass. at 151.

- *Whether police issued a traffic citation for the violation that ostensibly gave rise to the stop*. See *State v. Hoang,* 101 Wash. App. 732, 742 (2000); *People v. Roundtree*, 234 A.D.2d 612, 613 (N.Y. App. Div. 1996). Here, they did not; Officer McDonough was not even certain that he had a citation book on him that night.

- *Manner of the stop.* See *Ochoa*, 146 N.M. at 45. The fact that officers here handled the traffic violation and permitted the driver to leave before deciding to stop the car again strongly indicated its pretextual nature.

[24] The prosecutor conceded as much when he told the judge, "I'm certainly not going to stand before the court and say that anti-crime car, in plain clothes was . . . really after parking tickets that night." MTS Tr. 63.

- *Officer's testimony as to the reason for the stop. Id.* While the test amici propose here is an objective one, the admission of pretext in this case is relevant to a consideration of whether a reasonable officer would have made the stop for traffic safety reasons.[25]

Trial court judges applying a "would have test" would be well-positioned to apply these factors. The question that test poses—would a reasonable officer, in view of all available facts, have conducted a traffic safety stop for the observed traffic infraction—is not so dissimilar from the kind of analysis judges undertake all the time under *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) ("would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?"). And trial judges are routinely asked to address the question of pretext in other contexts where there is likely to be less available information. See, e.g., *Commonwealth v. Calderon*, 431 Mass. 21, 26 (2000) (discussing jury selection requirement that, once prima facie case is made that peremptory challenge was based on race, judge determines whether proffered reason for challenge is pretextual).

Shortly after *Whren* held that the Fourth Amendment countenances pretext stops, Justice Kennedy acknowledged that its "practical effect" was "to allow the police to stop vehicles in almost countless circumstances." *Maryland v. Wilson,* 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting). And he lamented that, together

[25] Additional factors that could inform the "would have" test 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, see *Reynolds*, 185 Misc.2d at 675; the length of time police trail a car before stopping it, *Ochoa*, 146 N.M. at 45; and, amici submit, whether police seek consent to search the car after the stop, particularly if they do so without making any post-stop observations giving rise to reasonable suspicion of criminal activity.

with *Wilson*, which held that Fourth Amendment permits police to order passengers as well as drivers out of cars during traffic stops, *Whren* "puts tens of millions of passengers at risk of arbitrary control by the police." *Id.*

This Court wisely rejected *Wilson*'s holding, on art. 14 grounds, in *Commonwealth v. Gonsalves*, 429 Mass. 658, 659 (1999). But passengers and drivers throughout the Commonwealth nonetheless remain "at risk of arbitrary control by the police" because of the awesome power vested in them by judicial approval of pretext stops. A rule abolishing pretextual stops is required by art. 14, and a "would have" test, which asks whether a reasonable officer would have made a traffic safety stop under the circumstances, is straightforward and workable. This Court should adopt both.

III. Evidence that the police officer who stopped the car had thirty prior interactions with Mr. Daveiga was unfairly prejudicial and should not have been admitted at trial.

The trial court incorrectly admitted highly prejudicial evidence with minimal relevance to its claimed purpose. The police officer who stopped the Pacifica, Officer McDonough, knew Mr. Daveiga. Though they were not neighbors, or friends, they had met roughly thirty times prior to the night in question, suggesting a kind of police targeting that is not consonant with this Court's commitment to racial justice.[26] At trial, the Commonwealth was permitted to exploit this trou-

[26] As this Court has noted, a 2014 Boston Police Department report found that Black men in the city are "disproportionally targeted for repeat police encounters," and that "five per cent of the individuals repeatedly stopped or observed accounted for more than forty per cent of the total interrogations and observations

bling history, ostensibly to show that Mr. Daveiga's demeanor that night was different than in the past, which, in turn, purportedly suggested that he possessed the gun police found in the car. R.24-25; Tr.I/120; Tr.II/44.[27]

The Commonwealth's claim that Officer McDonough's testimony would have left "no basis for the jury to infer" prior bad acts blinks reality.[28] See C.B.21. The implication that Mr. Daveiga had thirty run-ins with a single police officer would undoubtedly have caused at least some jurors to draw negative inferences about him. Jurors from neighborhoods not targeted by police may go years without an encounter with any police officer; at least some of them would likely draw the conclusion that a young man who has had thirty interactions with just one officer is involved in crime.[29]

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conducted by the police department." *Commonwealth v. Warren*, 475 Mass. 530, 539-40 & n.16 (2016).

[27] The Commonwealth argued in a motion in limine that because Officer McDonough and Mr. Daveiga "had developed an almost cordial relationship, with the defendant often jokingly referring to Officer McDonough as 'Baldy,'" the fact that on the night in question Mr. Daveiga "stared straight ahead and re[p]lied only in an uncharacteristically low tone" was "probative of the defendant's knowledge of the gun in the car." R.24-25.

[28] The Commonwealth's citation to *Commonwealth v. Leach*, 73 Mass. App. Ct. 758, 768 (2009) to support its assertion that "[a]s a general matter, mere evidence of police familiarity is not propensity evidence," C.B.21, borders on the disingenuous. In *Leach*, the Appeals Court held that the testimony of a school police officer assigned to the defendants' high school that he was familiar with their voices did not improperly suggest prior bad acts. That testimony was obviously innocuous, unlike Officer McDonough's testimony here.

[29] See note 26, *supra*, discussing Boston Police data showing that 40% of police stops and "observations" involve the same 5% of residents. See also Weitzer &

Moreover, despite the judge's admonition that no prior bad acts evidence should be presented, Tr.II/44, Officer McDonough told the jury that "two-thirds" of his interactions with Mr. Daveiga were "pretty cordial." Tr.II/45. His testimony therefore divulged that Mr. Daveiga had ten interactions with police that were *not* cordial. That was not only prejudicial, but also entirely undercut the premise underlying the Commonwealth's theory that this evidence was admissible—that his demeanor in past interactions was so consistently friendly that his subdued mood on the night of the stop was evidence that he possessed the gun.[30]

That premise was already questionable, relying, as it did, on the shaky proposition that Mr. Daveiga's quiet response when McDonough tried to engage him could best be understood as evidence of gun possession. There are numerous rea-

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Brunson, *Policing Different Racial Groups in the United States*, 35 Cahiers Poliestudies Jaargang 129, 135-136 (2015) (collecting studies showing that "policing is typically more aggressive in neighborhoods that are both economically disadvantaged and populated by a subordinate ethnic minority"); Desilver, et al., *10 things we know about race and policing in the U.S.*, Pew Research Center (June 3, 2020) (discussing surveys showing that white Americans are far more likely to hold police in high regard and far less likely to report having been stopped because of their race than Black Americans), available at https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/.

[30] Officer McDonough testified that, when he approached the Pacifica on Monadnock Street, Mr. Daveiga was "staring straight ahead" and did not speak or make eye contact. However, when Officer McDonough asked him if everything was alright, Mr. Daveiga turned to look at him and said, "yeah, I'm cool," albeit in a "low and monotone voice." Officer McDonough claimed that this interaction was inconsistent with prior interactions because Mr. Daveiga was "usually more talkative." Tr.II/48-49.

sons that Mr. Daveiga might not have been particularly animated on seeing Officer McDonough at four o'clock in the morning. Perhaps Mr. Daveiga was tired. Perhaps he was subdued because of some life event—a breakup, a job loss, or just a bad day—that Officer McDonough would never be privy to. Or perhaps Mr. Daveiga was tired of feigning affection for a cop who would not stop targeting him.[31]

The inference that the Commonwealth wanted the jury to draw—that Mr. Daveiga was quiet because he possessed the gun in the car—is simply too speculative to be especially probative. And because the testimony about repeat police interactions, including ten that were not cordial, functioned as prior bad acts evidence, this Court should ask only whether that minimal probative value was even slightly outweighed by its prejudice, which it undoubtedly was. See *Commonwealth v. Crayton*, 470 Mass 228, 249 n.27 (2014). But even on the more general standard, which asks whether the probative value of the evidence is substantially outweighed by its prejudicial effect, *id.*, Mr. Daveiga should prevail. The probative value of the evidence was thin at best, and it was highly prejudicial, particularly given the prosecutor's emphasis on Officer McDonough's "vast experience" with Mr. Daveiga in his closing argument. Tr.II/25.

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[31] See Carbado, *E(racing) the Fourth* Amendment, 100 Mich. L. Rev. 946, 966 (2002) for a discussion of how people of color engage in "particular kinds of performances for the police . . . in an attempt to preempt law enforcement discipline," "intended to signal acquiescence and respectability." See also Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104(12) Am. J. Pub. Health 2321-2327 (2014) (describing mental health toll of repeated police encounters). Mr. Daveiga and the other occupants of the car are all Cape Verdean. MTS. Tr.25.

Amici invoke the prior bad acts standard in light of how the jury likely perceived Officer McDonough's testimony about his repeated encounters with Mr. Daveiga. But it bears emphasis that the testimony did not establish bad acts by Mr. Daveiga. Rather, it suggested his repeated targeting by police. This Court should treat police claims that a defendant's behavior was inconsistent with their past interactions—and the Commonwealth's arguments that such inconsistency is consciousness of guilt evidence—with much skepticism. All of us behave differently at different times. But if officers are permitted to establish suspicion based on assertions of changed demeanor, it will largely affect those who are subject to repeated police targeting—that is, young men of color who live in poor neighborhoods.

Conclusion

Even in a regime in which pretext stops are permitted, the stop here was impermissible because the alleged traffic violation on which it was based had already been resolved. But the blatantly disingenuous nature of the stop—conceded by motion prosecutor, judge, and appellate prosecutor—demands a response from this Court. Because pretext stops permit police to stop any driver, and their passengers, they violate article 14's prohibition on general warrants. And given the mountain of evidence of their racially discriminatory use, pretext stops offend article 14's ban on unreasonable seizures. Finally, this Court should not condone a police practice which targets young men of color for repeated interactions and then exploits purported demeanor differences to claim evidence of consciousness of guilt.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief complies with Rules 17 and 20 of the Massachusetts Rules of Appellate Procedure. The brief is set in 14-point Athelas font and contains 7,339 non-excluded words, as counted by the word-processing system used to prepare it.

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Certificate of Service

I hereby certify that I have today made service of this amicus brief by directing copies through the electronic filing service provider to Assistant District Attorney Ben Shorey of the Suffolk County District Attorney's Office and to Attorney Susan Taylor, counsel for Mr. Daveiga.

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