COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-12743

Commonwealth of Massachusetts,
APPELLANT,

v.

Wilson Goncalves-Mendez,
DEFENDANT-APPELLEE.

ON THE COMMONWEALTH'S INTERLOCUTORY APPEAL
FROM AN ORDER OF THE BOSTON MUNICIPAL COURT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE APPELLEE

Chauncey B. Wood, BBO #600354
MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
50 Congress Street, Ste 600
Boston, MA 02109
(617) 776-1851
cwood@woodnathanson.com

Matthew R. Segal, BBO #654489
Jessica Lewis, BBO #704229
Jessie Rossman, BBO #670685
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110
(617) 482-3170
MSegal@aclum.org

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the American Civil Liberties Union of Massachusetts, Inc. (ACLUM) represents that it is a 501(c)(3) organization under the laws of the Commonwealth of Massachusetts. The Massachusetts Association of Criminal Defense Lawyers (MACDL) represents that it is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. ACLUM and MACDL do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in ACLUM or MACDL.

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INTRODUCTION

This Court has held that police impoundment of a vehicle is manifestly unreasonable, in violation of article 14 of the Massachusetts Declaration of Rights, if the police refuse a reasonable alternative to impoundment requested by the vehicle's owner or authorized driver. *Commonwealth v. Oliveira,* 474 Mass. 10, 10-11 (2016). The question in this case — whether the police must inform people of this option or instead be permitted to make statements suggesting that impoundment is compulsory — can be imagined as the tale of two hypothetical Bostonians: one a lawyer with years of legal training and one a nursery school teacher with no legal training whatsoever.

The lawyer and the teacher are driving separate cars down Massachusetts Avenue, and they are speeding to make dinner reservations with their respective spouses, who are seated next to them in the car. Both cars are pulled over by the police. And both the lawyer and the teacher are arrested on outstanding warrants. An officer tells each driver that the police will be impounding the car. The lawyer responds, "I have a right to request a reasonable alternative to impoundment, and I would like my spouse to take possession of my vehicle." Her car is

not impounded, and her spouse drives it away. The teacher, however, does not know her right to request a reasonable alternative and believes the officer's statement is a command. In consequence, her car is impounded and searched, she must scrounge together hundreds of dollars to retrieve it, and her spouse is stranded, all because she did not say the magic words.

Constitutional protections should not be locked behind secret passcodes. Far from a broad law enforcement entitlement to seize and search the vehicles of arrestees, vehicle impoundment is a limited exception to the warrant requirement that is permissible when it serves certain community caretaking purposes. *See Oliveira*, 474 Mass. at 13-14. Consistent with those limited purposes, *Oliveira* held that it is unreasonable to impound a car when its driver proposes a reasonable alternative. But that holding will be largely negated if police officers are authorized to prevent all but the savviest drivers from learning that they can propose such an alternative. Inevitably, impoundment will then primarily affect the people who can least afford the costs of retrieving their vehicles. For them, those costs can be devastating.

Reflecting the impact of impoundments and limited purposes of the inventory search, at least six state supreme courts—in Iowa[1], Washington[2], Montana[3], Tennessee[4], New Jersey[5], and West Virginia[6]—have held that officers must adequately and independently explore reasonable alternatives to impoundment, or seek consent, before they can impound a car and conduct an inventory search. As explained below, this Court should similarly hold that officers must inform owners and authorized drivers of their right to request reasonable alternatives to impoundment before officers may search and seize a vehicle under art. 14's inventory search exception.

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[1] *State v. Ingram*, 914 N.W.2d 794, 820 (Iowa 2018) (police must advise owner or operator of alternatives to impoundment).

[2] *State v. White*, 135 Wash.2d 761, 771 n. 11 (1998) (police may not conduct an inventory search without asking the owner if he or she will consent to search).

[3] State v. Sawyer, 174 Mont. 512, 518 (1977), overruled on other grounds by *State v. Long*, 216 Mont. 65 (1985) (officers may only inventory items in plain view).

[4] *State v. Lunsford*, 655 S.W.2d 921, 924 (Tenn. 1983) (before an inventory search, the officer must advise the defendant that the car will be impounded unless he can provide a reasonable alternative).

[5] *State v. Slockbower*, 79 N.J. 1, 3 (1979) (officers must either obtain consent to search or give driver opportunity to make alternative arrangements).

[6] *State v. Noel*, 236 W. Va. 335, 345 (2015) (Benjamin, J. concurring) (quoting *State v. Perry*, 174 W.Va. 212, 217 (1984)) (ordinarily driver must be given opportunity to arrange removal).

STATEMENT OF INTEREST OF AMICI

The American Civil Liberties Union of Massachusetts, Inc. (ACLUM), an affiliate of the national ACLU, is a statewide membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. The rights that ACLUM defends through direct representation and amicus briefs include the right to be free from unreasonable searches and seizures. *See, e.g.*, *Commonwealth v. Johnson*, 481 Mass. 710 (2019); *Commonwealth v. Augustine*, 467 Mass. 230 (2014).

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is the Massachusetts affiliate of the National Association of Criminal Defense Lawyers and 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 Commonwealth's criminal justice system, including by filing amicus curiae briefs in cases raising questions of importance to the administration of justice.

STATEMENT OF THE CASE AND FACTS

Below, amici summarize the facts of this case and provide information about the impact of vehicle impoundment on low-income families.

I. The trial judge granted Mr. Goncalves-Mendes' motion to suppress because the police failed to ask whether his licensed, sober passenger could drive the car before impounding the vehicle.

On August 4, 2017, Boston Police Department Officers Zachary Crossen and Michael Ridge pulled over a car driven by Mr. Goncalves-Mendes[7], purportedly on the ground that it had a defective tail light. Appellee Br. at A27-28.[8] Instead of ordering Mr. Goncalves-Mendes to pull to the side of the road, the officers chose to stop the car in the far travel lane. *Id.* at A29. During the stop, the officers learned that Mr. Goncalves-Mendes was "the registered owner of the car who had a valid driver's license, but also had a default warrant." *Id*. at 28.

The officers also learned that the passenger in the car, Mr. Rodriguez, had a valid driver's license and was

[7] Before the lower court, defendant's name is spelled "Goncalves-Mendes." Amici use that spelling throughout.
[8] As it turned out, "the rear tail light was not actually broken [but] only inadvertently blocked by a piece of cardboard that had slipped down in the rear window." Appellee Br. at A28.

not under the influence of any substances. *Id.* at A28. Nevertheless, as the officers arrested Mr. Goncalves-Mendes, they did not ask whether he would like Mr. Rodriguez to take custody of his car. *Id.* at A28-29. Instead, the officers told Mr Goncalves-Mendes, "[d]ue to the active warrant . . . *we [will] be towing the car*." *Id.* at A28 (original emphasis). They then located a firearm during the subsequent inventory search. *Id.*

Mr. Goncalves-Mendes moved to suppress all evidence seized from his car on the grounds that the search was unlawful under the Fourth and Fourteenth Amendments to the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights. *Id.* at A27. The trial judge granted the motion, finding that the law is clear that a car may not be seized when there is a reasonable practical alternative. *Id.* at A33. Because the officers failed to ask Mr. Goncalves-Mendes if he would like Mr. Rodriguez to take or move the car, the court concluded that the search and seizure were unconstitutional. *Id.* at A33-34.

II. Vehicle impoundment imposes a severe financial burden on low-income residents and families.[9]

Vehicle impoundment can profoundly impact low-income individuals. As described below, in 2018 police-ordered tows in Massachusetts cost roughly $234 on average, and in many instances hundreds of dollars more. These are amounts that individuals working for minimum

[9] This section relies upon annual financial statements and bulletins received from the Department of Public Utilities through a public records request as well as testimony submitted to DPU to aid in its assessment of proposed fee raises. *See* https://data.aclum.org/request-to-ma-dept-of-public-utilities-on-towing-profits/.

This Court may take judicial notice of these documents. Under Mass. R. Evid. § 201(b), a court may judicially notice adjudicative facts that are not subject to reasonable dispute because they "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Judicial notice of DPU financial statements, bulletins, and records of public testimony is appropriate because they are documents maintained by a government agency. *See Tilcon-Warren Quarries Inc. v. Commissioner of Revenue*, 392 Mass. 670, 671 n. 4 (1984) (allowing judicial notice of a statutorily mandated list sent out by the Commissioner of Revenue because it was a public document); *Gent v. CUNA Mut. Ins. Society*, 611 F. 3d 79, 84 n. 5 (1st Cir. 2010) (quoting Fed. R. Evid. 201(b), (f)) (taking judicial notice of information on CDC website).

wage, or living near the poverty line, can scarcely afford.

A. Massachusetts towing companies can charge numerous fees for involuntary tows.[10]

By statute, towing companies can charge $35 per 24 hours of storage of an impounded car. G.L. c. 159B, § 6B. In addition, the Department of Public Utilities ("DPU"), has exercised its statutory authority to set charges for several other aspects of involuntary tows. *Id.* For example, DPU set the maximum charge for a tow of up to five miles round trip and one hour of service or wait time at $108. 220 CMR 272.03(1).

As the mileage or the wait time increases, so too does the allowable charge. Under DPU regulations, companies may charge up to $42 for every half-hour over an hour of wait time. 220 CMR 272.03(2). And every mile towed in excess of five miles can incur a surcharge of $3.60. 220 CMR 272.03(4). DPU also authorizes tow companies to charge a fuel surcharge, set monthly, whenever the average cost of diesel fuel in New England

[10] Amici use the term "involuntary tow" to encompass tows ordered by police or other public authorities. G.L. c. 159B. § 6B. When referring to only those tows ordered by police, the term "police-ordered tow" is used.

exceeds $2.622 per gallon. *See* 220 CMR 272.05; *see also Fuel surcharge for vehicles involuntarily towed*.[11]

These additional fees are routinely charged. The Statewide Towing Association, Inc. ("STA")[12] estimated that in 2011 the average length of an involuntary tow was 9.4 miles, meaning that on average, people paid an additional $15.84 in mileage fees above the $108 "maximum." STA's Responses to Second Set of Information Requests of the Department of Public Utilities, D.P.U. 13-124, at 2 (May 22, 2014) ("STA 2014 Responses").[13] Additionally, for the past two years, there has been a fuel surcharge every single month, varying from 0.3 to 1.7 percent.[14] Finally, towing companies can also set their own rates for "certain additional services commonly provided by tow companies[,]" including administrative fees, postage or mailing fees, license plate and battery removal, and debris clean-up. DPU

[11] https://www.mass.gov/info-details/fuel-surcharge-for-vehicles-involuntarily-towed.
[12] STA is a formal association of towers who advocate for changes within the industry.
[13] https://data.aclum.org/request-to-ma-dept-of-public-utilities-on-towing-profits/.
[14] 2019 Fuel Surcharge Rates, https://www.mass.gov/info-details/fuel-surcharge-for-vehicles-involuntarily-towed#2019-fuel-surcharge-rates-.

Bulletin, Maximum Charges for Involuntary Towing and Storage of Motor Vehicles (Sept. 12, 2012) at 1.[15]

What is more, impoundment can expose individuals to exploitation by tow companies that charge more than the law permits. Every year, DPU conducts a random audit of a subset of tow companies by reviewing 90 days' worth of tow slips and invoices. *See* DPU Bulletin, Department Tow Audit Program (March 20, 2017) at 1.[16] In 2017, it found that each and every one of the 41 audited companies violated the law, collectively charging excessive fees that amounted to over $500,000.[17] *Id.* Last year, DPU fined nearly half of the audited companies for violations. DPU, 2018 Annual Report.[18]

[15] https://data.aclum.org/request-to-ma-dept-of-public-utilities-on-towing-profits/.
[16] https://data.aclum.org/request-to-ma-dept-of-public-utilities-on-towing-profits/.
[17] There is some evidence that consumers who file complaints are refunded fees charged in violation of the law. *See* DPU, 2012 Annual Report at 45 (showing DPU ordered the refund of almost $3,000 based on 18 consumer complaints). However, it is doubtful these complaint and audit mechanisms resolve the excessive fees issue.
[18] https://www.mass.gov/files/documents/2019/02/14/DPU%202018%20ANNUAL%20REPORT%20-%20WEB.pdf.

B. Empirical and anecdotal evidence demonstrate that involuntary tows burden vehicle owners with significant costs.

The charges discussed above quickly add up. All told, impoundment can cost individuals hundreds of dollars. *See, e.g., Silva v. Todisco Servs., Inc.*, No. 1684CV02778BLS2, 2019 WL 2334173, at *10 (Mass. Super. Apr. 4, 2019) ($169 for an involuntary tow); *In re Petralia*, 559 B.R. 275, 280 (Bankr. D. Mass. 2016) ($472 under 2011 rate scheme for a police-ordered tow)[19]; *Lantum v. Exp. Enterprises, Inc.*, 69 Mass. App. Ct. 1101, 2007 WL 1376080 at *1 (2007) ($844 under 2011 scheme for an involuntary tow).

Under G.L. c. 159B, § 6B, tow companies must submit annual financial statements to DPU "reflecting the net profits for the preceding year from [involuntary] towing." A review of the 2018 annual statements submitted by the 328 companies in Massachusetts that performed police-ordered tows and reported a revenue reveal that the average per-tow revenue for police-ordered tows was approximately $234, including storage

[19] The maximum rates in effect in 2011 were $90 for the first 5 miles, $3 for each extra mile, and $35 for each half-hour of additional service/waiting time.

and administrative fees.[20] But the median charge was roughly $253.62 per tow, and some charged far more. The total revenue from one company in Northampton was $4,696 from just two police-ordered tows; that's a $2,348 per tow average. Five other companies reported more than $1,000 in *average* revenue per police-ordered tow. One of those five companies, located in Waltham, performed 676 total tows at a per-tow revenue average of $1,478.53 (or $999,488 total revenue). Thus, the costs of a tow can be substantial, made even more so depending in part on the financial resources of the affected individual and the charging practices of the selected tow company.

C. Tow costs impose a severe financial burden on low-income individuals and families.

These charges have real meaning for low-income individuals. 2018's average cost per police-ordered tow of $234 translates to 19.5 hours of work at the current minimum wage of twelve dollars an hour. G.L. c. 151 § 1. Unless an individual is able to gather the necessary funds within one day—a feat made all the more difficult without a car—another $35 of storage fees will accrue,

[20] Amici calculated per-tow revenue by dividing the total combined revenue of all 328 companies ($31,683,253.27) by the total number of tows (135,445) to derive the estimated revenue per tow of $233.92.

which translates to another three hours of work. The table below shows how many hours a person earning the Massachusetts minimum wage must work to pay off the cost of involuntary towing.[21]

Cost of involuntary towing	**$ 12/hour (Regular employees)**
$ 158.84 (9.4-mile tow and 1-day storage)	13.3 hours
$ 234 (avg. cost in 2018)	19.5 hours
$ 253 (median cost in 2018)	21.1 hours
$ 472 (Cost in *In re Petralia*, 559 B.R. at 279)	39.3 hours
$ 844 (Cost in *Lantum*, 69 Mass. App. Ct. 1101)	70.3 hours

For the thousands of Massachusetts residents living at or below the federal poverty line, the financial burden is even more severe. The U.S. Census Bureau estimates the population of Massachusetts to be 6,902,149 as of July 1, 2018, and further estimates that 10% of Massachusetts residents live in poverty.[22] That is, approximately 690,215 residents live at or below the poverty threshold. As calculated by the U.S. Department of Health and Human Services ("HHS"), the 2019 federal poverty threshold for a household of two persons is

[21] The calculations do not account for income taxes and thus underestimate the actual number of hours that must be worked.

[22] *See* U.S. Census Bureau, Massachusetts Quick Facts, https://www.census.gov/quickfacts/MA.

$16,910 annually.[23] That equates to roughly $325 per week.[24] The cost of a police-ordered tow can require such a household to spend over 70% of its entire weekly income, or more, to recover an impounded vehicle. The table below illustrates the impact on families:

Family size	**Poverty threshold (annual income)**	**Weekly income**	**$ 234 as % of weekly income**
1 person	$ 12,490	$ 240	97.5
2 persons	$ 16,910	$ 325	72.0
3 persons	$ 21,330	$ 410	57.1
4 persons	$ 25,750	$ 495	47.2

SUMMARY OF ARGUMENT

Under article 14, a police officer may search a vehicle pursuant to the inventory search exception only if the decision to impound the vehicle is reasonable based on the totality of the circumstances. And "where the driver ha[s] offered the police an alternative to impoundment that was lawful and practical under the circumstances, it [i]s unreasonable and thus unconstitutional to impound the vehicle and conduct an inventory search." *Oliveira,* 474 Mass. at 10-11. But reasonableness cannot turn on whether an individual intuits that she can offer an alternative to the police.

[23] *See* HHS Poverty Guidelines for 2019 (Jan. 11, 2019), https://aspe.hhs.gov/poverty-guidelines.
[24] Annual income figures divided by the number of weeks in a year.

Instead, under a totality of circumstances analysis, it is unreasonable for police to ignore reasonable alternatives by failing to inform owners or authorized drivers of their right to propose such alternatives before impounding a vehicle. Requiring such disclosure better serves the community caretaking interests underlying the inventory search exception, while failing to do so unreasonably discriminates against the majority of persons who do not know their rights. [pp. 23 – 32].

In the alternative, if this Court does not hold that police must always inform the owner or someone clearly authorized to drive about their right to offer a reasonable alternative, it should at least hold that officers must do so where, as here, there is a licensed and sober passenger in the car. Emphasizing that an individual's silence was "not dispositive," this Court has already held that it was unreasonable to seize a bag where there was an apparent alternative. *Commonwealth v. Abdallah*, 475 Mass. 47, 53 (2016). It should affirm that same standard here. [pp. 32 – 34].

ARGUMENT

I. In order for an inventory search to comport with art. 14, officers must first inform the owner or clearly authorized driver of their right to offer a reasonable alternative to impoundment.

The threshold inquiry for any inventory search is the propriety of the initial impoundment. *Commonwealth v. Ellerbe*, 430 Mass. 769, 772-73 (2000). The "guiding touchstone" for this analysis is "reasonableness," *Commonwealth v. Eddington*, 459 Mass. 102, 108 (2011), as determined by the "totality of the evidence." *Oliveira*, 474 Mass at 14.

Applying this test to an impoundment where the driver did *not* have clear authority to drive the car, now-Chief Justice Gants posited that, when the driver *is* the car's owner or an authorized driver, a police officer contemplating impoundment must: "(1) inform the driver that the vehicle will be [impounded] unless the driver directs the officer to dispose of it in some lawful manner, and (2) comply with an alternative disposition if that alternative is reasonable." *Eddington*, 459 Mass. at 112 (Gants, J. concurring).[25] This Court should now

[25] This standard comports with the Model Rules of Law Enforcement, Searches, Seizures and Inventories of Motor Vehicles "[w]hen a person is arrested in or around a vehicle which he owns or has been authorized to use . .

adopt this rule and make clear that officers contemplating impoundment must *inform* authorized drivers of their right to propose an alternative, reasonable disposition of the vehicle.

A. Informing drivers of the right to request alternatives is the only way to ensure reasonable impoundment decisions.

Instead of assessing the surrounding facts or informing Mr. Goncalves-Mendes of his right to suggest an alternative to impoundment, the arresting officers in this case suggested that he had no such right, by flatly telling him that his car would be towed. Appellant Br. at 26. These actions fly in the face of this Court's prior holdings that impoundments must be reasonable based on the totality of the circumstances. *Eddington*, 459 Mass. at 108, 109 n.12; *Oliveira*, 474 Mass. at 15. Indeed, this Court has already concluded that it is "unreasonable and thus unconstitutional to impound [a] vehicle" where the driver has "offered the police an alternative to impoundment that was lawful and practical

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. [he] shall be advised that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner." Model Rules 603(B) (1974), https://www.policefoundation.org/wp-content/uploads/2015/08/197727214-LaSota-J-A-Et-Al-Model-Rules-Searches-Seizures-and-Inventories-of-Motor-Vehicles.pdf.

under the circumstances." *Oliveira*, 474 Mass. at 10-11. But these alternatives were no less a part of the surrounding circumstances here; Mr. Goncalves-Mendes simply, and understandably, did not raise them after the officers' informed him that his car would be towed. To avoid alternatives by failing to inform drivers of their right to suggest them—and further discouraging disclosure of alternatives by informing drivers that their cars will be towed—is unreasonable under the totality of circumstances.

The cases cited by the Commonwealth as examples of lawful impoundments do not suggest otherwise. In those cases, either police officers asked questions and found that no alternatives to impoundment existed. *see Ellerbe*, 430 Mass. at 770, 774 (holding "the police had no practical available alternative" where they "asked the only passenger in the car whether she had a driver's license and was told that she did not have it with her"), or the driver lacked clear authorization to drive the car, *see Commonwealth v. Ehiabhi*, 478 Mass. 154, 163 (2017) (noting "the expired rental agreement created some question whether the defendant had lawful authority to operate the vehicle"); *Eddington*, 459 Mass. at 105

(driver had neither a license nor the car's registration).[26]

The Commonwealth's observation that this Court "has repeatedly said" that officers "are under no obligation to locate or telephone the registered owner to determine his or her wishes, or to wait with the vehicle until a licensed driver can be located," Appellant Br. at 25 (citations omitted), is similarly inapposite. Requiring police officers to *inform* drivers of their rights to offer alternatives does not require officers to implement proposed alternatives that are unreasonable. *Cf. Eddington*, 459 Mass. at 109 n.12; *Oliveira*, 474 Mass. at 15.

B. Police inquiry into available alternatives better serves the community caretaking interests underlying inventory searches.

Like other exceptions to the warrant requirement, the inventory search exception is "severely circumscribed." *See Commonwealth v. Sondrini,* 48 Mass. App. Ct. 704, 707 (2000) (citing *Katz v. United States*,

[26] In *Commonwealth v. Caceres*, 413 Mass. 749, 751-52 (1992), the Court noted that "if there is generally such an obligation on the police" to "ask the defendant if he wished to propose a reasonably prompt alternative to seizure of the vehicle," "before an inventory search can be reasonable," it was satisfied where the police found that the only alternative was a passenger who was not able to drive.

389 U.S. 347, 357 (1967)). And the need for this exception to remain narrowly drawn is clear: given the ubiquity of traffic offenses, unchecked inventory searches could effectively transform this exception into a general warrant because it could justify the search and seizure of almost any vehicle. *Cf. Ingram*, 914 N.W.2d at 815; *see also Oliveira*, 474 Mass. at 14 (inventory search cannot be allowed to become cover for investigative search).[27]

As a result, inventory searches are generally justified only when supported by one of the three community caretaking interests: "to protect the vehicle and its contents from the threat of theft and vandalism; to protect the police and the tow company from false claims; [or] to protect the public from dangerous items that might have been left in a vehicle." *Commonwealth v. Davis*, 481 Mass. 210, 218 (2019). These functions are

[27] Other jurisdictions have used unchecked-inventory search powers as a means to conduct investigative searches. *See State v. Tyler*, 177 Wash. 2d 690, 704-05 (2013) (describing email from deputy county sheriff in which he encourages use of inventory searches as a means to circumvent *Arizona v. Gant*, 556 U.S. 332 (2009)); Nicholas Stampfli, *After Thirty Years, Is it Time to Change the Vehicle Inventory Search Doctrine?*, 30 Seattle U. L. Rev. 1031, 1034 n. 14 (2007) (stating that a government attorney described inventory searches as a means to coerce consent for evidentiary searches).

"invoked for the protection of people." *Commonwealth v. Brinson*, 440 Mass. 609, 615 (2003). But the people are best protected if the authorized driver is informed of her right to offer alternatives to impoundment.

That is because the community caretaking interest to protect property weighs in favor of requiring officers to inform drivers of the right to suggest reasonable alternatives. Where the owner or authorized driver is available, it would be anomalous to justify a search based on a fiction that it protects her interests without informing the driver of her right to *articulate* those interests herself. *See Sawyer*, 174 Mont. at 517. The property owner or authorized driver "is an adequate judge of the treatment of the property that would most benefit him," *id.*, and there should be no difficulty allowing the owner or driver the option to make reasonable, alternative arrangements to protect his property. *Ingram*, 914 N.W.2d at 820.

At the same time, neither of the remaining two caretaking interests are harmed by first informing an owner or authorized driver of her right to suggest reasonable alternatives before impounding a car. There is simply no reason that the public would be less protected from harm or the police would be less protected

from false claims as a result of such a statement. That is particularly so because there is no "empirical evidence that false claims are a serious problem," *Ingram,* 914 N.W.2d at 817, and to the extent there is a problem, a written inventory is not a very effective way of dealing with it because "[a] party determined to make a false claim may simply allege that the valuables were not included in the written inventory." *Id.* at 817-18. Similarly, "the public is [equally] endangered by cars parked on the streets or other public or semi-public places." Wayne R. LaFave, 3 *Search & Seizure* § 7.4(a), n.18 (5th ed. 2019).

Consequently, "[i]f the police goal is truly not investigative but to protect property and avoid false claims," as it must be to be a reasonable impoundment, "the owner or driver of the vehicle should have the ability to opt for alternatives that do not interfere with public safety other than police impoundment." *Ingram*, 914 N.W.2d at 820.

C. Requiring drivers to disagree with officers and assert alternatives to towing is unreasonable.

To protect essential Fifth and Sixth Amendment rights, the United States Supreme Court held that officers must affirmatively inform individuals of those

rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). To protect essential art. 14 rights, officers must similarly inform drivers of their right to suggest an alternative to impoundment in order to protect the majority who do not know their rights. "Only through such a warning is there ascertainable assurance that the accused was aware of this right." *Miranda*, 384 U.S. at 472.

A seizure cannot be reasonable if it is based on the assumption that civilians will know their right to offer an alternative to impoundment and will assert that right after an officer informs them that their vehicle *will* be towed. *See* Appellant Br. at 26. Surveys suggest that the majority of American residents do not know their basic constitutional rights. As a result, "the imposition of the requirement" that drivers affirmatively raise alternatives "would discriminate against" the many people "who do[] not know [their] rights." *See Miranda*, 384 U.S. at 471 (citation omitted).

"Accumulating empirical evidence suggests that public knowledge of the law is embarrassingly low." Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. Cal. L. Rev. 159, 163-64 (1994). For example, a recent survey

conducted by the American Bar Association ("ABA") shows that the public has "a lack of basic knowledge about the rights and responsibilities accorded under the Constitution." ABA Survey of Civil Literacy (May 1, 2019) at 3.[28] Nearly 1 in 5 of persons surveyed said the First Amendment does not protect freedom of the press or the right to peaceably assemble. *Id.* at 5. Similarly, the University of Pennsylvania's Annenberg Public Policy Center, which conducts an annual "Constitution Day Civics Survey," found through its 2017 survey that only 48 percent of people surveyed knew that the First Amendment guaranteed freedom of speech.[29]

The enjoyment of constitutional rights should not hinge on the possibility of an arrested individual having more knowledge than average, especially as it concerns more obscure rights like the one at issue here. Further, such a requirement may disproportionately affect foreign nationals and non-native English speakers.

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[28] https://www.americanbar.org/content/dam/aba/images/news/2019/05/ABASurveyOfCivicLiteracy.pdf.
[29] https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/.

Indeed, it is unlikely that persons similarly situated to Mr. Goncalves-Mendes would possess the legal knowledge necessary to request an alternative to towing. Mr. Goncalves-Mendes is a twenty-year old Cape Verdean national who has been in the United States for about four years. Appellee Br. at A37. English is not his first language. *Id.* at A29. He has little prior experience dealing with police in this country. *Id.* at A30-31. The trial judge found no credible evidence that he had any familiarity with his constitutional rights. *Id.* at A37. It is unreasonable to expect him and others like him to affirmatively suggest alternatives to the police in order to protect their art. 14 rights.

II. Officers must at the very least inform owners and authorized drivers of their right to offer a reasonable alternative to impoundment when there is a passenger in the car who is able to drive.

Even if the Court does not hold that police officers must always inform owners and authorized drivers about their right to offer a reasonable alternative to impoundment, officers should at least be required to do so where, as here, there is a passenger in the car who is able to drive.

This Court has frequently considered the absence or presence of a third party who could drive the car when

analyzing the reasonableness of impoundment. *Commonwealth v. Daley*, 423 Mass. 747, 750 n. 4 (1996). *See also, e.g.*, *Ehiabhi*, 478 Mass. at 165 ("officers had determined that neither the defendant nor the passenger could safely operate the vehicle"); *Eddington*, 459 Mass. at 110 ("We also find significant [that the passenger] had been drinking and was not known to be authorized to drive the automobile"); *Ellerbe*, 430 Mass. at 775 ("there was no one immediately available who could remove the vehicle from the lot"); *Caceres*, 413 Mass. at 752 (because "the evidence justified a reasonable conclusion that the passenger was not authorized to operate a motor vehicle in Massachusetts, there was no alternative but to seize the vehicle").

That makes sense. Where there is an apparently available driver, the totality of circumstances indicates that it would not be reasonable to ignore this alternative without asking the owner or clearly authorized driver if they would like this third party to drive the car. It is simply unreasonable for officers to seize property when there is such an immediate and practical alternative to seizure.

This Court explicitly reached just this conclusion within the context of a bag-seizure in *Abdallah*. In

Abdallah, the Court considered whether the police acted reasonably by seizing a bag in the defendant's possession at the time of his arrest in a hotel room. 475 Mass. at 51-52. The defendant argued that the officers acted unreasonably because they could have left his bag "in the custody of the hotel clerk who had agreed to secure the rest of his possessions," which had been left in the room. *Id.* Notably, at the time of the arrest, the defendant did not ask the officers to leave his bag with the hotel. *Id.* at 53. Yet, despite this silence, *Abdallah* held that the decision to seize the bag was unreasonable because "there was a third party present who was willing to take possession of the defendant's belongings." *Id.* at 52.

The Appeals Court has already applied *Abdallah* to the context of impoundment, concluding

> Applied in the context of motor vehicles, *Abdallah* stands for the proposition that the reasonable inquiry must be undertaken . . . in deciding whether the car must be impounded. *Abdallah* instructs . . . the defendant should be asked his preference as to the disposition of his property. If there is a practical and available alternative that the defendant expressly or impliedly approves, the police must choose it. Otherwise, they may proceed with an inventory search.

Commonwealth v. Nicoleau, 90 Mass. App. Ct. 518, 522 n.2 (2016). This Court should do the same.

CONCLUSION

The impoundment of vehicles is a substantially costly event, especially for the Commonwealth's low-income residents. Accordingly, for the reasons explained above, this Court should hold that article 14 requires police to inform the owner or authorized driver of a vehicle of her right to request a reasonable alternative to impoundment before impounding the vehicle. This is particularly true where, as in this case, the police informed the driver that they would be towing the car, even though there was a passenger present and apparently able to drive.

Respectfully submitted,

/s/ Chauncey B. Wood
Chauncey B. Wood,
BBO #600354
MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
50 Congress Street, Ste 600
Boston, MA 02109
(617) 776-1851
cwood@woodnathanson.com

/s/ Jessica Lewis
Matthew R. Segal, BBO #654489
Jessica Lewis, BBO #704229
Jessie Rossman, BBO #670685
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110
(617) 482-3170
MSegal@aclum.org
JLewis@aclum.org
JRossman@aclum.org

Counsel for Amici Curiae

MASS. R. APP. P. 17(C)(9)

I hereby certify that this brief complies with Mass. R. App. P. 17 and 20. It is typewritten in 12-point, Courier New font, and complies with the length limit of 20(a)(2)(C) because it was produced with monospaced font and has 29 non-excluded pages.

/s/ Jessica Lewis
Jessica Lewis

AFFIDAVIT OF SERVICE

I, Jessica Lewis, counsel for the ACLU of Massachusetts, Inc., do hereby certify under the penalties of perjury that on this 17th day of October, 2019, I caused a true copy of the foregoing document to be served by electronic email on the following counsel:

Patrick Levin, Attorney for Wilson Goncalves-Mendes
Committee for Public Counsel Services
Public Defender Division
44 Bromfield Street, Boston, MA 02108
(617) 482-6212
plevin@publiccounsel.net

Julianne Campbell, Attorney for the Commonwealth
Assistant District Attorney
For the Suffolk District
BBO# 691188
One Bulfinch Place, Boston, MA 02114
(617) 619-4070
julianne.campbell@State.MA.US

/s/ Jessica Lewis
Jessica Lewis

No. SJC-12743

Commonwealth of Massachusetts,
APPELLANT,
v.

Wilson Goncalves-Mendez,
DEFENDANT-APPELLEE.

ON THE COMMONWEALTH'S INTERLOCUTORY APPEAL
FROM AN ORDER OF THE BOSTON MUNICIPAL COURT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE APPELLEE
