SJC-13816

Commonwealth of Massachusetts
Supreme Judicial Court

COMMONWEALTH

v.

JOSE ARIAS

BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, THE CRIMINAL JUSTICE INSTITUTE AT HARVARD LAW SCHOOL, THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE NEW ENGLAND INNOCENT PROJECT

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NOVEMBER 2025

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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 Criminal Justice Institute is a law school clinic of Harvard Law School, a school within Harvard University, which is a 501(c)(3) organization. The Massachusetts Association of Criminal Defense Lawyers (MACDL) is a 501(c)(6) organization. The New England Innocence Project is a 501(c)(3) organization under Federal law and the laws of the Commonwealth of Massachusetts.

PREPARATION OF AMICUS BRIEF

Pursuant to Mass. R. App. P. 17(c)(5), amici make the following declarations. Neither party nor party's counsel aided in preparing this brief in whole or in part. Neither party nor party's counsel, or any other person or entity, other than amici curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of the brief. Other than CPCS, none of the amici represent or have represented either one of the parties to the present appeal in another proceeding involving similar issues, nor was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal. A public defender at CPCS, the statewide agency whose responsibility is to deliver legal services to people who cannot afford counsel, including indigent criminal defendants, previously represented the appellant in the trial court.[1]

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[1]Rule 17(c)(5) does not apply to CPCS because it is an agency of the Commonwealth. See Mass. R. App. P. 17(c), Reporter's Notes to Mass. R. App. P. 17(c) (2022).

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 **Criminal Justice Institute** (CJI) is the curriculum-based criminal defense clinical program of Harvard Law School, providing classroom instruction and hands-on experience for students who represent indigent adult and juvenile clients facing misdemeanor and felony charges in the Boston criminal courts. The Criminal Justice Institute does not represent the official views of Harvard Law School or Harvard University. Rather, we represent the collective interest of our clients—past, present, and future—in the development of law to advance their interests and their rights. CJI also researches issues in the criminal legal system, particularly those that impact poor people and people of color both nationally and in Massachusetts. CJI advances issues of importance to our clients, which may affect their rights in court, as well as broader issues that impact the administration of justice in the criminal legal system.

The **Massachusetts Association of Criminal Defense Lawyers** (MACDL) is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practice to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

The **New England Innocence Project** (NEIP) is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for legal and policy reforms that will reduce the risk of wrongful convictions, including by assuming 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, and by ensuring that criminal legal system actors, including police, are accountable to communities. NEIP is committed to bringing to light the racial disparities that exist within the criminal legal system and that have led to a disproportionate number of people of color who have been wrongfully convicted.

Summary of Argument

This case presents this Court with an opportunity to free the people of the Commonwealth from the arbitrary and excessive power that the authorization of pretextual traffic stops hands to police. Amici urge it to do so. The motion judge in this case explicitly found that the traffic violation cited as the reason for stopping Mr. Arias was a pretext for police to conduct a drug investigation, Def.Add.57; police either lacked reasonable and articulable suspicion for that investigation or were otherwise unwilling to submit their conduct to judicial review. The judge further concluded that the so-called "authorization rule" permitted that ruse, because police may stop a car whenever they see a traffic violation—or even, as in this case, a full day *after* they see a traffic violation. The authorization rule essentially became a general warrant that police could put in their back pocket at the time of the traffic violation and pull out when they decided it suited them to stop the driver.

The authorization rule is inconsistent with Article 14 of the Massachusetts Declaration of Rights, which bans general warrants and prohibits unreasonable searches. Police can find an ostensible traffic-related reason to stop any car on the road. *Infra*, 15-17. 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 provoked the American Revolution and inspired the drafting of art. 14. *Infra*, 13-15.

Overwhelming evidence demonstrates that this arbitrary power is exercised in a racially discriminatory way, including recent empirical research demonstrating that judicial approval of pretext stops contributes to racial

profiling. *Infra*, 19-22. Racial discrimination in traffic stops causes great harm, as this Court and its individual justices have repeatedly acknowledged. *Infra*, 22-24. Stops and seizures shown to be so infected with racial injustice cannot be considered "reasonable" within the meaning of art. 14. *Infra*, 24-26. And an individual stop which is actually motivated by race—or by unpopular political opinion, or any other pernicious, discriminatory reason—is inherently unreasonable. *Infra*, 26-28.

Where a judicially-created rule is shown to perpetuate inequity, stare decisis does not require its retention; instead, this Court has "the duty to reexamine" it. *Lewis v. Lewis*, 370 Mass. 619, 628 (1976). *Infra*, 31-32. 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*, 28-30.

This case also presents this Court with an opportunity to limit additional abuses of police power. When police executed the pretext stop in this case, a full day after observing the traffic violation that ostensibly legitimated it, Mr. Arias delayed for a matter of seconds—the time it took to travel less than a tenth of a mile—before stopping. That delay permitted a second pretext with an even more intrusive result: *arrest and search* for purportedly "refusing" or "neglecting" to stop, see G.L. c. 90, § 25. This Court should also hold that drivers who follow the directive of the Registry of Motor Vehicles, and attempt to safely pull out of the travel lane before stopping when signaled to stop by police, neither commit a

crime nor engage in behavior that can be considered suspicious. *Infra*, 32-34. And finally, this Court should hold that pretextual arrests—which represent an even greater intrusion than pretextual stops—are also inconsistent with art. 14, and are not permitted in the Commonwealth. *Infra*, 34-35.

ARGUMENT

I. The authorization rule violates Article 14 because it functions as a general warrant, because the overwhelming evidence that it facilitates racial profiling renders its continued retention unreasonable, and because a rule that would permit even a single stop based on a driver or passenger's race is unreasonable.

The authorization rule permits police to make traffic stops whenever a traffic violation is committed, regardless of their "underlying intent or motivations." *Commonwealth v. Buckley*, 478 Mass. 861, 865 (2018). This Court should abolish that rule because it confers on police broad and arbitrary power "comparable to the general warrants that were the impetus for art. 14," *Long*, 485 Mass. at 743 (Budd, J. concurring), thus directly contravening art. 14's purpose. With that unbridled power inevitably comes its discriminatory exercise, which is so well-established that permitting it to continue unchecked is unreasonable within the meaning of art. 14. Indeed, any rule that would permit a race-based police intrusion must be constitutionally unreasonable.

A. Pretext stops violate Article 14 because they function as general warrants.

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. See *id.* at 481-485. See also *Harris v. United States*, 331 U.S. 145, 157-158 (1969) (Frankfurter, J., dissenting); *Long,* 485 Mass. at 742-743 (Budd, J. concurring); *Commonwealth v. Rodriguez,* 430 Mass. 577, 585-586 (2000). 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).[2] Within weeks, Adams summarized Otis's argument in an abstract. *Id.* at 997. Otis contended that the writ of assistance Paxton sought was illegal because it was not "special" but "general." *Id.* at 999. And he condemned the writs of assistance because they were "universal," "perpetual," permitted intrusions "at will," and required only "bare suspicion": "It is a power, that places the liberty of every man in the hands of every petty officer." *Id.* at 999-1000. In short, Otis argued, the writs represented "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, 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 search and seizure practices," and the continued issuance of general writs of

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[2] "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.

assistance featured in Adams's law practice. *Id.* at 1004. Throughout his life, Adams regarded Paxton's Case as the start of the American Revolution. *Id.* at 1005.[3] It is thus no surprise that when he drafted art. 14, he ensured that "Otis' defense of privacy was enshrined." *Harris*, 331 U.S. at 158 (Frankfurter, J., dissenting). See also *Rodriguez*, 430 Mass. at 585. The first sentence of art. 14 guarantees the right to be free from unreasonable searches and seizures; the second abolishes general warrants.

The authorization rule confers just the kind of unchecked government power that Adams sought to prohibit in drafting art. 14. Driving is "an indispensable part of modern life," and one that this Court has held that people should not be expected "to forgo in order to avoid government surveillance." *Commonwealth v. McCarthy*, 484 Mass. 493, 508 (2020). Yet police willing to follow someone for long enough—in this case, for *six miles* on busy urban roads—will eventually observe a traffic violation. See Lawton, State Responses to the *Whren* Decision, 66 Case W. Res. L. Rev. 1039, 1044 (2016) (describing the considerable discretion granted to officers by *Whren v. United States,* 517 U.S. 806 (1996), such that they could tail a vehicle until they view a technical violation of the traffic code to justify a stop). Under current law, that is all that is required to seize the driver, no matter what the actual motivation for the stop is.

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[3] 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.*

That "[v]ery few drivers can traverse any appreciable distance without violating some traffic regulation," *Long*, 485 Mass. at 739 (Budd, J., concurring) (citation, quotation marks omitted), is not surprising, given the breadth and depth of our traffic laws. 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." *Id.* at 739 n.4. And what the dozens of sections of Chapters 89 and 90 fail to cover, municipalities fill in with their own regulations. The City of Boston's Traffic Rules and Regulations are 97 pages long.[4]

Our speed limits alone could ensnare most 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).

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 the car driving 90 miles per hour. And as with general warrants, under the authorization rule police can make those decisions based merely on a hunch that

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[4] https://perma.cc/SYF3-9CT8.

they want to investigate, however unsupported—or for any other reason. See *Commonwealth v. Santana*, 420 Mass. 205, 209 (1995).

Lurking in the background of this case is the fact that police were "looking to stop" Mr. Arias's car "for a drug investigation." Def.Add.66. The authorization rule obviated the need for the police to develop probable cause of a drug crime and for the Commonwealth to prove that to a judge's satisfaction. Here, this is exemplified by the fact that the officers did not issue Mr. Arias a citation as soon as they saw him leave the house the next day but instead waited until he got behind the wheel of the car. It is reasonable to infer that they wanted him in a car so that they would have the broader authority afforded to officers making traffic stops. See *Long*, 485 Mass. at 743 (Budd, J., concurring) ("under the authorization test, the moment a driver commits…a motor vehicle violation, the occupants of a vehicle are exposed to the very same investigatory stops we rightly prohibit when they are on foot -- stops based on unsupported hunches, discrimination, harassment, or any other purpose lacking reasonable articulable suspicion of criminal activity").

It is true that pretext stops sometimes turn up evidence of crimes, as in this case. But so would a general warrant. "[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." *Id.* at 737.

This Court has held other police practices to be unconstitutional by virtue of their resemblance to general warrants. 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. Similarly, permitting police to "trawl through [body-worn 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, 395 (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).

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 claimed that a traffic stop made pursuant to the authorization rule "cannot be 'arbitrary,' because it is predicated on a driver violating a traffic law." *Buckley*, 478 Mass. at 869. That view 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. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/arbitrary (defining arbitrary as, inter alia, "chosen, decided, etc. seemingly at random or on a whim...not restrained or limited in the exercise of power...marked by or resulting from the unrestrained and often tyrannical

exercise of power"). This unrestrained power has resulted in overwhelming evidence of racial bias in pretext stops.

B. The authorization rule violates art. 14 because of the overwhelming evidence of racial bias in pretext stops, and because a rule that permits stops for any reason, including race, is inherently unreasonable.

1. Pretextual targeting of drivers of color is the primary cause of racial disparities in traffic stops and its authorization causes great social harm.

A mountain of evidence establishes that police routinely use pretextual traffic stops in a racially discriminatory way, disproportionately stopping drivers of color, particularly Black drivers. In *Long*, this Court recognized that "[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." 485 Mass. at 717, quoting *Buckley*, 478 Mass. at 876-877 (Budd, J., concurring). In support of that assertion, the Court pointed to a 2020 national study of 95 million traffic stops showing that Black drivers are more likely to be stopped than white drivers and that the disparity is due at least in part to 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). Similar findings have been made time and again in jurisdictions around the country.[5]

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[5] For a collection of studies finding racial disparities in traffic stops—in the rates of stops, as well as in post-stop searches and the likelihood of finding contraband (hit rates)—up to June 2020, see Balko, There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof, Wash. Post (updated June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#Policing (collecting national

Crucially, research has also repeatedly established that racial disparities in traffic stops are almost entirely attributable to pretext stops. In a 2014 study described at the time as "the most thorough and comprehensive study that has ever been done on traffic stops in the United States,"[6] researchers found that police are not more likely to stop Black drivers when simply enforcing traffic safety laws but are 2.7 times more likely to stop Black drivers than white drivers for pretextual reasons. Epp et al., Pulled Over: How Police Stops Define Race and Citizenship 13-14, 64-66 (2014). A 2022 report showed that Boston police were 2.5 times more likely to stop Black drivers than white drivers—but that rate rose to 3.9 times when considering only stops for non-traffic safety reasons, like equipment violations. Flingai et al., An Analysis of Racial Disparities in Traffic Stops in Suffolk County, Massachusetts, from 2010 to 2019, Vera Institute of Justice 6, 8 (June 2022). See also Parker, et al., Driving Change: Evaluating Connecticut's Collaborative Approach to Reducing Racial Disparities in Policing, National Bureau of Economic Research

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studies as well as studies from Los Angeles, CA; Cincinnati, OH; Charleston, SC; Portland, OR; Indianapolis, IN; Connecticut; North Carolina; St. Louis County, MO; Kansas City; Vermont; Rhode Island; San Diego, CA; Bloomfield, NJ, and more). More recent studies continue to identify similar patterns of racial disparity. See, e.g., Xu et al., The racial composition of road users, traffic citations, and police stops, Proceedings of the National Academy of Sciences 121, 3 (2024); Vito et al., "Does daylight matter"? An examination of racial bias in traffic stops by police, 43 Policing: An Int'l J. 675 (2020); Smith et al., Benchmarking Disparities in Police Stops: A Comparative Application of 2nd and 3rd Generation Techniques, 38 J.Q. 513 (2019).

[6] Young & Petersilia, Keeping Track: Surveillance, Control, and the Expansion of the Carceral State, 129 Harv. L. Rev. 1318, 1319 (2016).

(2024) (Connecticut program reduced racial disparities in traffic stops by reducing non-traffic safety stops that are commonly pretextual).[7]

"[J]udicial 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.[8] They found that the 2012 decision was "associated with a statistically significant 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

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[7]That disparities in traffic stops are largely explained by racial profiling in pretext stops is not surprising given that that there is no reliable evidence "establishing that motor vehicle violations are more frequently committed by any particular race of driver." *Long*, 485 Mass. at 734, quoting *Commonwealth v. Lora,* 451 Mass. 425, 442 n.30 (2008) (further citation omitted).

[8] In *State v. Arreola,* 290 P.3d 983, 991-992 (Wash. 2012) (en banc), the Washington Supreme Court abandoned a prior prohibition on pretextual traffic stops 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.

stops contributes to racial profiling." *Id.* [9] See also generally Bell & Rushin, Limits on Traffic Stops: Saving Lives by Constraining Police Authority, 57 Ariz. St. L.J. 45, 50, 58, 88 (2025).

2. Racial disparities in pretext stops undermine the safety and dignity of people of color and perpetuate further disparities in the criminal system.

For more than 25 years, this Court and its individual members have recognized that "[t]he discriminatory enforcement of traffic laws . . . cause[s] great harm." *Long*, 485 Mass. at 718. See also, e.g., *Commonwealth v. Sweeting-Bailey*, 488 Mass. 741, 756 (2021); *id.* at 756 (Lowy, J., concurring) ("concerns" about racial profiling in traffic stops are "serious ones that must be recognized and addressed"); *id.* at 757 (Wendlandt, J., concurring) ("racial disparities in the criminal justice system" are "stark and unacceptable"); *id.* at 770-771 (Budd, J., dissenting) (discussing persistent racial disparities in criminal justice system); *Buckley*, 478 Mass. at 871 ("shar[ing]" in "considerable, legitimate concerns regarding racial profiling and the impact of such practices on communities of color"); *Lora*, 451 Mass. at 444-445 ("Justices of this court have expressed considerable concern about the practice of racial profiling in prior decisions"); *Commonwealth v. Feyenord*, 445 Mass. 72, 88 (2005) (Greaney, J., concurring) (racial profiling "is humiliating, painful, and unlawful"); *Commonwealth v. Gonsalves*, 429 Mass. 658,

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[9] Conversely, the same researchers found that when the Supreme Court limited the circumstances under which police could conduct a vehicle search incident to arrest in *Arizona v. Gant*, 556 U.S. 332 (2009), stops of drivers of color declined more dramatically than stops of white drivers. Edwards & Rushin, Police Vehicle Searches and Racial Profiling: An Empirical Study, 91 Fordham L. Rev. 1, 6, 34-35 (2022). In other words, when the judiciary eliminates incentives for pretextual tactics, it reduces racial profiling.

670 (1999) (Ireland, J., concurring) (addressing "widespread concerns about police profiling, commonly referred to as 'DWB-driving while black'").

That harm includes the possibility of violence; traffic stops give rise to "justified . . . fear," as "African-Americans have been killed during routine traffic stops." *Long*, 485 Mass. at 718, quoting *Buckley*, 478 Mass. at 876–77 (Budd, J., concurring). See also *Commonwealth v. Larose*, 483 Mass. 323, 340–41 (2019) (Lenk, J., dissenting) ("[E]ven when traffic stops do not result in any criminal charges[,] they still can be humiliating, terrifying, and, at times, lethal for African-American drivers, as well as for members of other marginalized groups."). In some of the most high-profile cases of people killed by police officers at traffic stops, including Philando Castile in Minnesota, the victims were repeatedly stopped by police for civil traffic infractions before being killed.[10]

Because some percentage of traffic stops will lead to arrests, disparities in pretext stops also help propel disparities in prosecutions and convictions.[11] See generally Forman, Locking Up Our Own: Crime and Punishment in Black America 212-213 (2017). In part because of the sheer scale of racially disparate traffic

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[10] LaFraniere & Smith, Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions, N.Y. Times (July 16, 2016), https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html.

[11] Drivers of color are also more likely to be searched when stopped by police, even though police are less likely to find contraband in those searches. In 2014 and 2015, Massachusetts State Police were 134% more likely to search motorists of color than white drivers, but 18% less likely to find contraband when they did so. Relihan, State Police More Likely to Search Non-White Drivers, Less Likely to Discover Contraband, Enterprise (Brockton) (Aug. 21, 2017), https://www.enterprisenews.com/story/news/crime/2017/08/20/state-police-more-likely-to/19402070007.

enforcement, the ten crimes in the Commonwealth with the greatest racial disparities in conviction rates are all contraband-related offenses,[12] which are particularly likely to be discovered during traffic stops.

The ever-present threat of violence and compounding racial disparities are not the only harms caused by racial profiling in investigatory stops. A "procedural indignity…is suffered when the government singles out an individual for a privacy invasion without a sufficient evidentiary foundation." Colb, Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence, 96 Colum. L. Rev. 1456, 1464 (1996). That harm is exacerbated "when the person targeted believes, on the basis of widely known patterns, that he or she has been selected because of race." Epp, *supra*, at 5.[13]

3. The authorization rule violates art. 14 because it enables so many racially motivated stops and because even a single racially motivated stop is inherently "unreasonable."

Racial profiling is a "systemic problem that has 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). Art. 14's requirement that

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

[13] Researchers have found that Black drivers are *more* likely to perceive traffic stops as fair when they are lectured by police on traffic safety, because such a lecture is a cue that the purpose of the stop was genuinely traffic safety enforcement, rather than to check out a hunch that the driver was up to no good. *Id.* at 129-131.

searches and seizures be "reasonable" offers a systemic solution: any police practice so infected with racial bias is inherently unreasonable.

This Court has previously rejected the notion that art. 14 has any role to play in guarding against racial discrimination in pretext stops. See *Long*, 495 Mass. at 726-729 (holding that equal protection principles are the exclusive constitutional protections against racial discrimination); *Buckley*, 478 Mass. at 870 ("to the extent we do consider the purpose of a stop when assessing its validity, we do so pursuant to the equal protection principles of arts. 1 and 10—not art. 14's guarantee against unreasonable seizures"). Amici urge the Court to reconsider that conclusion in light of the overwhelming and persistent evidence of racial bias in pretextual stops.

First, while the Court took an important step by easing the evidentiary burden on defendants attempting to prove racial profiling in violation of the equal protection provisions of our state constitution, see *Long*, 485 Mass. at 721-726, that decision has proven to be an incomplete remedy. Amici are aware of only *three* cases in which a trial court judge has allowed, in the first instance, a motion to suppress on equal protection grounds in the five and a half years since *Long* was decided. Meanwhile, a recent study estimates that Massachusetts police make approximately 5,000 excess stops per year of Black and Latino drivers—stops that would not occur in the absence of racial profiling. Ross, Northeastern University School of Public Policy and Urban Affairs, Massachusetts Traffic Stops Analysis, 2014-2022 (Nov. 2, 2023). Obviously, most of these stops do not turn up evidence of a crime. But surely with almost 30,000 excess stops of drivers of color since *Long* was decided, there have been more than three instances where racial

profiling impermissibly led to criminal charges. See *Long*, 485 Mass. at 756 n.20 (2020) (Budd, J., concurring) ("A focus on individual instances of race-based stops without addressing the rule that enables them cannot be considered a systemic approach, no matter how well-meaning it may be.").

Second, as then-Justice Budd noted in her concurrence in *Long* and contrary to the majority's view in that case, there is simply no reason to conclude that only one constitutional principle can be relevant to tackling the problem of racial profiling. See *id.* ("there is no need to compare" equal protection and art. 14 solutions). "[A]ll available remedies" should be considered to redress a problem of this magnitude. *Id.* at 748 n.12.

This Court should abolish the authorization rule as "unreasonable" under art. 14 because the evidence is so clear that the endorsement of pretextual traffic stops is also the facilitation of racial profiling. In addition, this Court should abolish the authorization rule because to do otherwise is to hold that it is reasonable within the meaning of art. 14 for a police officer to stop a particular driver because of his race. This Court's separate rejection of race-based stops under *Lora*, *Long*, and their progeny does not ameliorate the art. 14 problem. "Because of the recognized gravity of racially selective traffic enforcement," this Court should hold that "no 'amount' of racial motivation in traffic enforcement is compatible" with the reasonableness requirement of art. 14 and abolish pretextual stops. Cf. *Commonwealth v. Diaz*, 496 Mass. 210, 220 (2025). Such a holding would be consistent with past art. 14 jurisprudence in which this Court has appropriately acknowledged the role of race in shaping police and community behavior and fashioned rules that take race into account, rather than arbitrarily relegating considerations of race to

equal protection analysis alone. See, e.g., *Commonwealth v. Evelyn*, 485 Mass. 691, 693, 708-709 (2020); *Commonwealth v. Warren*, 475 Mass. 530, 540 (2016).[14]

In his classic article Perspectives on the Fourth Amendment, Anthony Amsterdam asked whether the Fourth Amendment would permit border agents empowered to search every person crossing the Mexican border to instead search "only long-haired hippie types." 58 Minn. L. Rev. 349, 366 (1974). He reasoned that the constitutional prohibition on general warrants suggested that the answer was no, "if we ascribe to the framers not merely an appreciation but a concern that one evil of the existence of arbitrary power is the inevitability of its discriminatory exercise." *Id.* But he argued that "the route to the conclusion is surely straighter and more compelling" if we ask "whether any system of values that we are prepared to accept could be concerned with indiscriminate searches but not with discriminatory ones." *Id.* It is time for this Court to say that the system of values reflected in art. 14 does not tolerate police intrusion motivated by discrimination. See *Long*, 485 Mass. at 754 (Budd, J., concurring) ("surely a stop based on race is an unreasonable seizure under art. 14").

Of course, Professor Amsterdam's hypothetical did not imagine an officer acting on racial bias, but one motivated by political or cultural animus. This is the

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[14] Indeed, the entire history of the Warren Court's expansion of Fourth Amendment rights has a specific racial context, with constitutional interpretation made in recognition of police abuses targeting Black community members. *See Terry v. Ohio*, 392 U.S. 1, 14 & n.11 (1968); see also Katz, *Mapp* After Forty Years: Its Impact on Race in America, 52 Case W. Res. L. Rev. 471, 473 (1997); Kamisar, How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice, 3 Ohio St. J. Crim. L. 11, 25 (2005). See also *Commonwealth v. Dew*, 492 Mass. 254, 267 n.28 (2023).

final reason that the authorization rule must be abolished: the Court's current equal protection-only approach "preserves the permissibility of pretextual stops based on any other ulterior motive," whether to investigate a crime for which there is no real suspicion, to punish someone for disapproved political views, or for any other arbitrary reason. See *id.*, 485 Mass. at 748, 755 n.19. When a police officer sees two drivers traveling slightly over the speed limit and can choose to stop the one whose car displays a bumper sticker that offends him, or when police can target people leaving a disfavored political meeting or protest for pretextual traffic stops, that power is "arbitrary" in the most pernicious sense of the word. It is precisely the danger our founders sought to protect us from in adopting art. 14. Yet the authorization rule permits it. Because "[w]hat was intolerable in 1780 remains so today," *Blood*, 400 Mass. at 72, this Court should abolish the authorization rule.

C. A "would have" test is workable.

It is sometimes obvious that a traffic stop is pretextual; in this case, it is undisputed. Where it is disputed, this Court has questioned the ability of courts to "discern not only whether the police initially possessed some underlying motive that failed to align with the legal justification for their actions, but also whether police were acting on that 'improper' motive (i.e., the pretext), as opposed to the 'proper' motive." *Buckley*, 478 Mass. at 867. But judges considering equal protection claims must do exactly that. And this Court's discussion in *Long* of how the totality of the circumstances surrounding a traffic stop might inform that determination provides a helpful, if not all-inclusive, list of factors that are also relevant

to determining whether a reasonable officer would have made the traffic stop for true traffic enforcement reasons. 485 Mass. at 724-725. See *Commonwealth v. Robinson-Van Rader*, 492 Mass. 1, 23 (2023) ("There may be substantial overlap between an inquiry into the reasonableness of a stop and the officer's motivation for stopping a suspect.") And that list can be supplemented with case law from jurisdictions that prohibited pretext stops before the Supreme Court approved them in *Whren v. United States*, 517 U.S. 806 (1996) or that barred them on state constitutional grounds after *Whren*. Those factors include:

- "The safety interests in enforcing the motor vehicle violation." *Long*, 485 Mass. at 725. See also *State v. Ochoa*, 146 N.M. 32, 45 (Ct. App. 2008); *People v. Flanagan*, 56 A.D.2d 658, 660 (N.Y. App. Div. 1977).[15]
- Whether the defendant was arrested for a crime unrelated to the stop. See *Ochoa*, 146 N.M. at 45.
- "[T]he regular duties of the officer involved in the stop"– in particular, whether their "primary assignment…involve[s]the enforcement of traffic laws." *Long*, 485 Mass. at 724 & n.8.
- "The sequence of events prior to the stop," including whether, as here, "officers observed or followed a vehicle for an extended period of time prior to making the stop." *Long*, 485 Mass. at 724 & n.9.
- Whether police had a criminal investigatory purpose not based on reasonable suspicion, as in this case. See *Commonwealth v. Amado*, 474 Mass. 147, 151 (2016); *Ochoa*, 146 N.M. at 45; *People v. Reynolds*, 185 Misc.2d 674, 676 (Monroe Co. Ct., NY 2000).
- Whether the defendant was known to police prior to the stop. See *Amado*, 474 Mass. at 151.

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[15] The 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.

- 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).[16]

The question that a "would have" test poses—would a reasonable officer, in view of all available facts, have conducted a traffic safety stop based on the observed traffic infraction—is not dissimilar from the analysis judges undertake all the time under *Terry*, 392 U.S. at 21-22 ("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, including in situations where there is likely to be less available information. See, e.g., *Commonwealth v. Lek*, 99 Mass. App. Ct. 199, 203 (2021) ("Inventory searches of motor vehicles, however, may not be undertaken as a pretext for investigation."); *Commonwealth v. Calderon*, 431 Mass. 21, 26 (2000) (once prima facie case is made that peremptory challenge was based on race, judge determines whether proffered reason for challenge is pretextual).

[16] Additional factors that could inform the "would have" test include: whether police ran the license plate or the record of the registered owner of the car prior to observing the purported traffic violation, as in *Long*, see 485 Mass. at 712; 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; and whether police patfrisk the driver or passengers of the car without apparent justification.

D. Stare decisis principles do not require the Court to retain the authorization rule.

"The principle of stare decisis 'is not absolute. No court is infallible, and this court is not barred from departing from previous pronouncements if the benefits of so doing outweigh the values underlying stare decisis.'" *Commonwealth v. Hernandez*, 481 Mass. 582, 592-593 (2019), quoting *Stonehill College v. Massachusetts Comm'n Against Discrimination*, 441 Mass. 549, 562 (2004). Stare decisis is perhaps at its weakest in a context like this one, where the question is whether to abrogate a "judicially created rule" and "to perpetuate the rule would be to perpetuate inequity." See *id.*, quoting *Lewis v. Lewis*, 370 Mass. 619, 628 (1976).

When this Court endorsed the authorization rule in *Commonwealth v. Santana*, 420 Mass. 205 (1995), neither Mr. Santana nor his codefendant had argued that pretext stops violate art. 14's prohibition on general warrants (or made any art. 14 claim at all) nor raised the problem of racial bias in traffic stops, and it does not appear that the Court considered either of those issues. See *Long*, 485 Mass. at 748 (Budd, J., concurring) ("It appears that the court previously has not examined the constitutionality of pretextual stops from an art. 14 perspective."). And when this Court reaffirmed the authorization rule in *Long*, it did so without apparent reckoning with the general warrant problem and at least in part on the basis that equal protection principles were "the best legal analysis to use to redress the fundamental problem of racial bias in traffic stops." 485 Mass. at 726. But the equal protection remedy has proven inadequate to the task of responding to the problem of racial profiling and does nothing to address other kinds of arbitrary stops enabled by the authorization rule. "When the rationales which gave meaning and coherence to a judicially created rule are no longer vital, and the rule itself is not

consonant with the needs of contemporary society, a court not only has the authority but also the duty to reexamine its precedents." *Lewis*, 370 Mass. at 628.[17]

II. The arrest and search of Mr. Arias, and the search of his car, cannot be justified by G.L. c. 90, § 25, because there was no probable cause that he failed to stop for police and because the pretextual nature of his arrest on that basis violates art. 14.

A. There was no probable cause to charge Mr. Arias with failure to stop, and a holding to the contrary would invite more pretextual stops and arrests.

After police activated their lights and sirens, Mr. Arias traveled less than one tenth of a mile before he was blocked by police. Def.Br.15; Def.Add.56. The Registry of Motor Vehicles specifically instructs drivers being stopped by police *not* to stop in a travel lane but to move the car "completely to the side of the road." Massachusetts Driver's Manual (July 2023) 103.[18] The judge specifically found that there was no evidence that there was space on the side of the road where Mr. Arias could have stopped earlier. Tr.4: 149. Yet he also concluded that there was probable cause that Mr. Arias committed the presently arrestable offense of failure to stop for police, G.L. c. 90, § 25. Def. Add.60.

This cannot be right; a driver who does not stop *immediately* because there is not *immediately* an available place to pull over has not "refused" or "neglected"

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[17] In addition to being inconsistent with art. 14, pretextual stops are not a productive use of police resources given their exceedingly low rate of discovering contraband, yielding little effects on serious crime. See, e.g., Heydari, Rethinking Federal Inducement of Pretext Stops, 2024 Wis. L. Rev. 181, 192 (2024) (collecting studies showing low hit rates for turning up evidence from traffic stops in general, with particularly low hit rates from pretextual stops).

[18] https://www.mass.gov/doc/english-drivers-manual/download.

to stop—he has been unable to stop. Interpreting the statute so strictly against drivers would be particularly unfair given appellate decisions that, in contrast, loosen the statutory requirements for police behavior. Section 25 says that a person commits the offense of failure to stop when refusing or neglecting to do so after being signaled to "by a police officer who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment." But the requirement of a badge display has been effectively read out of the statute. See, e.g., *Commonwealth v. Gray*, 423 Mass. 293, 296 (1996); *Commonwealth v. Ross*, 73 Mass. App. Ct. 181, 184 (2008). An approach to Section 25 that relaxes its requirements for police while holding drivers to a standard so strict that they cannot stay within the bounds of the law—because stopping in the travel lane is impermissible and pulling over is impossible—would turn the rule of lenity on its head.[19]

As Mr. Arias argues, Def.Br.31, far from being a crime, slowing down to find a safe place to pull over is reasonable behavior. And this Court should say so. Amici are aware of an increasing number of cases in which police and prosecutors point to a supposed "slow roll" before a stop as either a factor in the reasonable suspicion calculus, invoked to justify further intrusions after the traffic stop, or, as here, a basis to charge failure to stop. See, e.g., *Commonwealth v. Davis*, 105 Mass. App. Ct. 1120, *2 (March 31, 2025) (unpublished) (Appeals Court panel concluded that slowly driving a single city block before stopping contributed to reasonable suspicion that driver was hiding a weapon in the car); *Commonwealth v. Malabre*,

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[19] There is particular irony in the police waiting *an entire day* to initiate the traffic stop for a civil motor vehicle infraction but alleging that Mr. Arias "neglected" or "refused" to stop for police because of a delay of *mere seconds* in finding a safe place to pull over.

91 Mass. App. Ct. 1126, *1 (June 7, 2017) (unpublished) (describing—without passing on its propriety—arrest of non-defendant driver for failure to stop after "slow roll" that covered only two blocks); see also *Commonwealth v. Timothy*, 89 Mass. App. Ct. 1102, *1 (Jan. 21, 2016) (unpublished) (noting that "the facts supporting a failure to stop need not be egregious" and defendant taking 100 feet to pull over met the statute).

But slowing down and moving safely out of the travel lane is exactly what the RMV instructs drivers to do. And drivers may need to slow down before stopping to determine if they are, in fact, the target of the police stop. See *Commonwealth v. Campbell*, 69 Mass. App. Ct. 212, 215 (2007) ("[T]he initial appearance of a cruiser with lights and sirens already activated does not necessarily send a message to stop to one particular car within a general traffic pattern"). If police can escalate that normal, prudent behavior into both a factor supporting reasonable suspicion to search drivers and cars and even the arrestable offense of failure to stop, pretextual stops and arrests will inevitably rise.

B. This Court should hold that pretextual arrests violate art. 14.

Even if the Court finds that there was probable cause to arrest Mr. Arias for failure to stop, it should hold that because the given reason for the arrest was pretextual—or, more accurately, a *post hoc* justification for the accompanying search of Mr. Arias as incident to arrest and of the car as an inventory search, see Add.60,62—the arrest violated art. 14. An authorization rule for arrests is problematic for the same reasons that it is for stops, *supra* 13-28, exacerbated by the greater intrusion that an arrest represents. This Court has often interpreted art. 14 as more protective of individual rights than the Fourth Amendment. See, e.g., *Gonsalves*, 429 Mass. at 668. Doing so here would be consistent with at least

a handful of other jurisdictions that have rejected a lockstep approach with the Supreme Court on the issue of pretextual arrests. See, e.g., *State v. Sullivan*, 348 Ark. 647, 655-656 (2002); *State v. Ladson*, 138 Wash. 2d 343, 353-354 (1999); *Commonwealth v. Bennett*, 2003 PA Super. 212, ¶ 27 (2003).

Pretextual arrests will nearly always be made, as here, for the purpose of justifying a search incident to arrest or an inventory search (or both). But inventory searches are impermissible if "the police's true purpose for searching the vehicle is investigative." *Commonwealth v. Oliveira*, 474 Mass. 10, 14 (2016). And G.L. c. 276, § 1, which governs searches incident to arrest, provides, in relevant part, that such searches may *only* be made "for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape."[20] (Obviously, no search will turn up physical evidence of a failure to stop for police.) This Court should not permit a pretextual arrest to legitimate a pretextual search, when a pretextual search after a legitimate arrest is impermissible. See *Lek*, 99 Mass. App. Ct. at 200 (inventory search following pretextual traffic stop was improper because the Commonwealth failed to show that it was done for a different and "legitimate, noninvestigative purpose"). At the very least, when the police admit they have ulterior motives for a criminal investigation and immediately turn a traffic stop into an exit order and arrest without any safety justification, such that everyone agrees the underlying stop was pretextual, this court should look more searchingly at any enforcement actions that follow.

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[20] It is thus "more restrictive than the Fourth Amendment," *Commonwealth v. Blevines,* 438 Mass. 604, 607 (2003).

Conclusion

For the foregoing reasons, amici urge this Court to reverse the order denying Mr. Arias's motion to suppress and to hold that pretextual stops and arrests violate art. 14.

Respectfully submitted,

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November 12, 2025

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 7,486 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 Brooke Hartley of the Suffolk County District Attorney's Office, Brooke.Hartley@mass.gov, and to Attorney John Warren, counsel for Mr. Arias, johnpwarren@warrenlaw.com.

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November 12, 2025