Commonwealth of Massachusetts
Supreme Judicial Court

SJC-13547

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellant,
v.

RICHARD DILWORTH, JR.,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

BRIEF OF AMICI CURIAE MICHAEL BENNETT, ZAHRA STARDUST, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, AND THE INNOCENCE PROJECT IN SUPPORT OF THE APPELLEE AND AFFIRMANCE

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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. ACLUM does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Pursuant to Supreme Judicial Court Rule 1:21, the Innocence Project ("IP") represents that it is a 501(c)(3) organization domiciled in the State of New York. The IP does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

Dr. Michael G Bennett is a lawyer with expertise in technology regulation, societal impacts of emerging technologies, artificial intelligence, afro-futurism and legal education. In his research, legal practice, teaching and executive board leadership roles, Dr. Bennett has a long-lasting and focused interest in eliminating techno-social systems that enable racially disparate police and prosecutorial practices.

Dr. Zahra Stardust is a lawyer and socio-legal scholar with expertise at the intersections of criminology and media studies. Her research investigates algorithmic profiling, police surveillance and entrapment of marginalized communities, including the relationship between dating apps and law enforcement.

The **American Civil Liberties Union of Massachusetts, Inc. (ACLUM)** is a statewide nonprofit membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. ACLUM has a strong and longstanding interest in eliminating racially

[1] Pursuant to Mass. R. App. P. 17(c)(5), Amici and their counsel declare that: (a) no party or party's counsel authored the brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; (c) no person or entity—other than Amici or their counsel—contributed money that was intended to fund the preparation or submission of the brief; and (d) neither Amici nor their counsel represent or have represented any of the parties to the present appeal in another proceeding involving similar issues, or were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

disparate police and prosecutorial practices. *See, e.g.*, *Commonwealth v. Shepard*, 493 Mass. 512 (2024) (amicus); *Commonwealth v. Long*, 485 Mass. 711 (2020) (amicus); *Commonwealth v. Buckley*, 478 Mass. 861, 870 (2018) (amicus).

The **Innocence Project (IP)** is a national nonprofit organization that works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. The IP's work is grounded in anti-racism and guided by science. In addition to pursuing post-conviction claims of innocence, the IP engages in strategic litigation and policy advocacy to effect reforms that will help prevent future wrongful convictions and promote the equitable administration of justice. The IP has a strong interest in police transparency and preventing police and prosecutorial practices likely to lead to wrongful convictions, such as those that target people based on race or social affiliation, without individualized suspicion.

SUMMARY OF ARGUMENT

The motion judge correctly applied the selective enforcement test, developed in *Commonwealth v. Long*, 485 Mass. 711 (2020), to Mr. Dilworth's claim that the Boston Police Department's (BPD) practice of surveilling individuals via Snapchat violated equal protection. In *Commonwealth v. Robinson-Van Rader*, the Court held that all equal protection challenges to police investigatory techniques must be analyzed under *Long*. 492 Mass. 1, 18 (2023) ("[W]e conclude that the equal protection standard established in *Long* for traffic stops applies equally to pedestrian

stops and threshold inquiries, as well as other selective enforcement claims challenging police investigatory practices."). The Commonwealth's arguments that the Court should ignore *Van Rader* in favor of the Court's 2008 decision in *Commonwealth v. Lora*, 425 Mass. 445 (2008), must be rejected. To benefit from the *Long* test, a defendant need only show that the practice they seek to challenge is a law enforcement investigatory technique. *Van Rader*, 492 Mass. at 18.

The social media monitoring at issue here is such an investigatory technique. This Court in *Van Rader* explicitly held that the *Long* framework applies to all traffic stops, pedestrian stops, and police investigatory practices without distinction. *Van Rader*, 492 Mass. at 18. In this case, the application of *Long* is consistent with this Court's practice of applying existing constitutional frameworks to online and offline behavior. The fact that the police activity occurred online does not alter the applicable legal standard, and the Commonwealth's attempt to carve out an exception for technological investigatory techniques from the equal protection framework of this Court's holding in *Van Rader* should be rejected.

The Commonwealth's distinction between online and in-person investigatory techniques is also premised on incorrect assumptions. The Commonwealth asserts that online investigatory techniques are less intrusive than in-person stops. Appellant Br. 34–35. To the contrary, online investigatory techniques often are more intrusive than in-person stops. Because online surveillance techniques are less costly to

execute and are largely shielded from public view, they can be more pervasive and intrusive, less transparent, and subject to less public accountability. *See* Rachel Levinson-Waldman & Sahil Singhvi, *Law Enforcement Social Media Monitoring is Invasive and Opaque*, BRENNAN CENTER FOR JUSTICE (Nov. 6, 2019).

Moreover, online investigatory techniques pose distinct threats to Black and brown communities. *See* Isaiah Strong, *Surveillance of Black Lives as Injury-In-Fact*, 122 COLUM. L. REV 1019, 1024–26 (2022). Covert government monitoring of online spaces poses risks of overcriminalization and allows police access to places used for protected political and expressive activity to which they previously would not have had easy access. *Id.* Online investigations may also subject communities of color to dragnet surveillance on the basis of protected characteristics, rather than individualized suspicion. *See* Levinson-Waldman & Singhvi, *supra*. Together, these features make online investigations particularly ripe for equal protection challenges.

The motion judge correctly held that the online investigatory technique used in this case is subject to the *Long* framework and protections. Accordingly, Amici respectfully urge this Court to affirm the holding below.[2]

[2] While not addressed in this brief, Amici also join the appellee's arguments that no privilege barred disclosure in this case and that dismissal was a proper remedy for the Commonwealth's failure to comply with the court's discovery order.

ARGUMENT

I. The *Long* selective enforcement test applies to online surveillance by police.

The Court has consistently sought to address the "intractable problem" of racial profiling within our state criminal legal system.[3] *Long*, 485 Mass. at 736 (Budd, J. concurring); *see also Commonwealth v. Buckley*, 478 Mass. 861, 876–77 (2018) (Budd, J., concurring) ("Years of data bear out what many have long known from experience: police stop drivers of color disproportionately more often than Caucasian drivers for insignificant violations (or provide no reason at all)"); *Commonwealth v. Warren*, 475 Mass. 530, 540 (2016) ("in weighing flight as a factor in the reasonable suspicion calculus," a judge should consider that a Black man, "when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity"); *Lora*, 451 Mass. at 444–45 (collecting cases). *Lora*, which broke

[3] The existence of racial disparity in the criminal legal system in Massachusetts is well documented by empirical data from both private and public studies. *See, e.g.*, E. Tsai Bishop, et. al, *Racial Disparities in the Massachusetts Criminal System*, Harvard Law School Criminal Justice Policy Program 1 (Sept. 2020), https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf (exploring "the factors that lead to persistent racial disparities in the Massachusetts criminal system"); Joseph Gustafson, et. al, *2021 and 2022 Massachusetts Uniform Citation Data Analysis Report*, Executive Office of Public Safety and Security (Feb. 26, 2024), https://www.mass.gov/lists/independent-massachusetts-motor-vehicle-uniform-citation-data-analysis-and-report (finding a "statistically significant . . . relationship between race/ethnicity of the stopped motorist and the outcome of the stop").

from federal case law and allowed the use of statistical evidence to prove an equal protection violation, was rooted in this history. *See id.* at 440.

Since its decision in *Lora*, the Court has conscientiously revised and updated the equal protection framework in response to challenges faced by defendants and the lower courts in the application of *Lora*. *See, e.g.*, *Long*, 485 Mass. 711; *Van Rader*, 492 Mass. 1. This case, as the motion judge recognized, involves a straightforward application of the *Long* standard, which was extended to all police investigatory practices in *Van Rader*. *Id.* at 18. The Commonwealth now urges the Court to reverse the clock back to 2008, ignoring the clear language of *Van Rader* that all police investigatory stops are subject to the *Long* test. This argument must be rejected.

A. *Long* and *Van Rader* lowered the burden of proof for equal protection claims in response to proven inadequacies of the *Lora* framework.

In *Lora*, the Court ruled that equal protection challenges to traffic stops would be analyzed under the tripartite selective prosecution framework articulated in *Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978). *Lora*, 451 Mass. at 437–38. In doing so, it noted that concerns about racial profiling "would not be alleviated by a standard that nominally allows a defendant to make claim of selective enforcement of traffic laws, but forecloses such a claim in practice." *Id.* at 445. The Court's decision was based, in part, on an assumption that "[d]ata now being collected in

Massachusetts and the work of academic and other institutions" would ease the burden on defendants in proving their claims. *Id.* at 446.

In practice, however, *Lora* did not solve the quandary of equal protection claims. Twelve years after *Lora* was decided, the Court confronted evidence that only one *Lora* motion had ever been successful. *Long*, 485 Mass. at 719. In part, this was because legislation referenced in *Lora* failed to result in the meaningful collection of data regarding traffic stops by police departments. *Id.* at 720. But, as demonstrated by the evidence Mr. Long put forth to support his motion, the absence of successful *Lora* motions did not result from or reflect the elimination of bias within policing. *See id.* at 737 (Budd, J. concurring). Rather, it reflected the need to clarify the legal standard.

In response, the Court in *Long* revised the standard by which defendants could prove impermissible bias, a test that took into account the unavailability of data. *See id.* at 721–22, 724. Under the *Long* standard, a defendant need only raise a reasonable inference through statistical evidence or the totality of the circumstances that the decision to stop them was motivated by their race or another protected characteristic. *Id.* at 724. And in the years following *Long*, at least two defendants have brought successful motions to suppress at the merits stage, *see Commonwealth v. Velez*, No. 2220CR001732 (Hampden Sup. Ct. Mar. 8, 2024); *Commonwealth v. Hickey*, No. 1983CR00237 (Plymouth Sup. Ct. Dec. 4, 2023), although barriers to

access to information remained at the discovery stage, *see Commonwealth v. Cuffee*, 492 Mass. 25, 30 (2023).

Then, less than one year ago, in *Van Rader*, this Court recognized that the barriers that had prevented defendants from bringing successful equal protection claims in the context of traffic stops also existed in the context of other police practices. 492 Mass. at 18–19. In *Van Rader*, the Court thus extended the principles set forth in *Long* to pedestrian stops, "as well as other selective enforcement claims challenging police investigatory practices." *Id.* at 18. A selective enforcement claim challenging a police investigatory practice is precisely what this case involves. Accordingly, this case presents an important opportunity for the Court to confirm that the protections of its carefully considered equal protection framework apply to the fast-growing form of police surveillance, namely, online investigatory techniques.

B. As the Court has recognized, equal protection challenges to police investigatory practices are properly analyzed as selective enforcement, not selective prosecution.

The motion judge correctly applied *Long*'s selective enforcement framework to Mr. Dilworth's motion, thereby rejecting the Commonwealth's argument that the motion should be analyzed as a *Lora*-style selective prosecution claim. As the Court recognized in *Van Rader*, selective prosecution and selective enforcement claims are "two broad[,]" but distinct, "categories of rights." 492 Mass. at 16. "Selective

prosecution refers to the decision to charge a person with a crime . . . resulting in a greater number of convictions" of persons of a shared race, national origin, gender, or other protected characteristic. *Id.* (citing *Commonwealth v. Bernardo B.*, 453 Mass. 158, 167–69 (2009)). Selective enforcement, in contrast, "refers to law enforcement practices that unjustifiably target an individual for investigation based on the individual's race or other protected class." *Id.* (citing *Lora*, 451 Mass. at 436–37). In other words, selective enforcement is applied to pre-charging decisions, such as decisions to target individuals for surveillance.

To determine whether to apply the selective enforcement framework, therefore, the relevant inquiry is simply whether the practice being challenged is a law enforcement investigation technique. *Van Rader* foreclosed the need to decide whether *Long* applies on a case-by-case basis.

i. The assumptions undergirding equal protection challenges to charging decisions are invalid when applied to police investigation techniques.

The Court articulated at least two reasons for treating selective prosecution and selective enforcement claims differently. First, as several courts also have held, the decision to file criminal charges is an act of the executive branch to which the Court affords special deference. *See Van Rader*, 492 Mass. at 19. The U.S. Supreme Court also articulated that, "[a] selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive," which it will decline

absent clear evidence "to dispel the presumption that a prosecutor has not violated equal protection." *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996). In contrast, law enforcement investigation decisions do not benefit from this presumption of regularity. *Van Rader*, 492 Mass. at 19–20. Far from raising the separation of powers issues inherent in a challenge to prosecutorial decision-making, decisions by law enforcement routinely are subject to judicial inquiry. *Id.* at 20.

Second, defendants challenging their criminal conviction on selective prosecution grounds generally have available data to support their claim, such as data showing the "pool of people referred by police" and which cases a prosecutor pursues from that pool. *Id.* at 19 (quoting *Conley v. United States*, 5 F.4th 781, 789 (7th Cir. 2021)). However, a defendant claiming selective enforcement is unlikely to have such data to support their claims, *see id.*, thus making "[s]elective enforcement claims . . . notoriously hard to prove." *Commonwealth v. Stroman*, 103 Mass. App. Ct. 122, 126, *review denied*, 493 Mass. 1102 (2023) (citation omitted). As the Court noted in *Van Rader*, "[t]here is no reason to anticipate, for example, that a defendant challenging a threshold inquiry on the sidewalk in front of a public housing complex would be better able to prove . . . that similarly situated suspects of other races were *not* investigated." 492 Mass. at 18 (citation omitted). "[T]here is simply no statistical record for a defendant to point to." *Id.* (quoting *United States v. Sellers*, 906 F.3d 848, 853 (9th Cir. 2018)).

Similarly, where, as here, law enforcement engages in covert online surveillance, defendants claiming selective enforcement lack access to data to support their claims.

ii. Equal protection challenges to police investigatory techniques are subject to the lower initial burden for selective enforcement claims.

The Court in *Long* lowered defendants' burden to prove selective enforcement "to make it easier for defendants to establish racial discrimination by allowing them to raise a reasonable inference of racial profiling" based on an officer's past conduct. *Long*, 485 Mass. at 720. For selective enforcement claims, therefore, a defendant need only present sufficient information to raise a reasonable inference through statistical evidence or the totality of the circumstances that the decision to target them was motivated by race or another constitutionally protected characteristic. *Id.* at 724–25; *Van Rader*, 492 Mass. At 17. The Commonwealth then has an opportunity to rebut this inference, *Long*, 485 Mass. at 724. But defendants need not prove that a broader class of persons than those prosecuted has violated the law or that failure to prosecute was either consistent or deliberate. *Id.* at 722. This revised test applies to all selective enforcement claims. *Van Rader*, 492 Mass. at 18 ("*Long* . . . applies equally to pedestrian stops and threshold inquiries, as well as other selective enforcement claims challenging police investigatory practices").

C. Social media surveillance is an investigatory technique.

To determine that *Long* applies here, the Court need only find that social media surveillance is an investigatory technique—which it plainly is.[4] *See id.* at 18. The Commonwealth's arguments to the contrary contravene this Court's precedent and practices. Specifically, the Commonwealth asserts that *Van Rader* "did not articulate 'which other selective enforcement claims challenging police investigatory practices' are . . . covered" by the *Long* framework. Appellant Br. 33. However, it was not necessary for the Court to enumerate a subset of selective enforcement claims because it stated unequivocally that *all* police investigatory techniques are analyzed under the selective enforcement rubric, without distinction. *Van Rader*, 492 Mass. at 18. That an investigatory technique is employed in the digital space does not change the analysis. *See id.*

The Commonwealth's argument further relies on the flawed premise that online investigations are so distinct from in-person analogs that they should not be subject to the same judicial oversight, even if they rely on racial profiling. This Court, however, has consistently recognized that existing rules and principles are well-suited to address "novel" issues posed by technological advancement. *See, e.g.*,

[4] In prior proceedings, an affidavit authored by BPD Detective Brian Ball explained the investigatory value of his social media surveillance and its utility in gathering evidence of certain criminal offenses. Appellant Br. 24–27; Appellant App. 135–143. That the police monitored Snapchat to gather evidence or information is sufficient to prove an investigation was underway.

Kauders v. Uber Technologies, Inc., 486 Mass. 557, 572 (2021) (holding that the established two-prong reasonableness test for contract formation applies to online contracts); *Commonwealth v. Purdy*, 459 Mass. 442, 450 (2011) (holding that the "confirming circumstances" rule for authenticating evidence applies to email or social media posts). Likewise, the *Long* standard is well-suited to apply to selective enforcement claims arising from both in-person and online investigatory practices.

This Court's resistance to creating technology-specific rules is apparent in its constitutional jurisprudence as well. In considering whether Snapchat investigations can infringe upon Fourth Amendment or Article 14 protections, the Court rejected calls from both parties to create tech-specific bright line rules, and instead applied the same reasonable expectation of privacy analysis used for physical searches. *See Commonwealth v. Carrasquillo*, 489 Mass. 107, 108 (2022) (citing *Commonwealth v. Porter P.*, 456 Mass. 254, 259 (2010)). Similarly, in the context of free speech cases, the Court has applied the requirements of the "true threats" doctrine, first developed in the context of offline communications, to online statements. *See Commonwealth v. Walters*, 472 Mass. 680, 690–92 (2015) (citing *O'Brien v. Borowski*, 461 Mass. 415, 423–25 (2012)). By recognizing that such limitations apply to online conduct, the Court has ensured there are not disparate results between virtual and non-virtual spaces.

In arguing the contrary, the Commonwealth improperly conflates the analysis of unreasonable searches and seizures with violations of equal protection. Appellant Br. 34. As the Court "emphasize[d]" in *Van Rader*, constitutional guarantees of equal protection are "separate and distinct" from constitutional guarantees against unreasonable searches. *See Van Rader*, 492 Mass. at 22. If the government "impose[s] unequal burdens based upon race," it has violated equal protection guarantees. *Id.* at 23. Courts do not require that the conduct at issue be unreasonable under the Fourth Amendment or Article 14 as a prerequisite for an equal protection challenge. *See id*. Thus, not only is the Commonwealth's assertion that social media investigations are non-intrusive incorrect, *see infra* Part II, it also is legally irrelevant. The *Long* selective enforcement test applies with full force to the social media investigation conducted by the BPD against Mr. Dilworth.

II. Online surveillance can impose particular harms to marginalized communities and be more intrusive than certain offline police investigation techniques.

The Commonwealth incorrectly asserts that online racial profiling is less invasive than racial profiling that occurs in person. Appellant Br. 34 (arguing that online racial profiling "does not constitute an intrusion in the way that a pedestrian stop or threshold inquiry does"). This is false. Not only does large-scale online surveillance of communities of color reinforce the same harms as offline equivalents, it also introduces new harms. In fact, technology enables surveillance that "*never*

would be available through the use of traditional law enforcement tools of investigation." *See Commonwealth v. Perry*, 489 Mass. 436, 449 (2022) (emphasis in original). Downplaying the negative impacts of online surveillance ignores the harms that Black and brown communities continue to experience as a result of systems that perpetuate racial inequality, including clandestine surveillance.

A. Online racial profiling reinforces and magnifies the harms of in-person racial profiling.

Modern social media investigations are part of a long history of law enforcement surreptitiously surveilling communities of color to impose criminal sanctions. Surveillance has been used to criminalize and harm Black communities throughout history, including through federal counterintelligence programs in the Civil Rights era, stop and frisk practices at every level, and social media surveillance in the modern era. *See* Strong, *supra*, at 1035–39. These practices contributed to the over-criminalization of communities of color, harmed communities' and individuals' trust in civic institutions, and often bore little to no relation to stated public safety objectives. *See, e.g.*, Jonathan Ben-Menachem & Kevin T. Morris, *Ticketing and Turnout: The Participatory Consequences of Low-Level Police Contact*, 117 AM. POL. SCI. REV. 822, 830 (2022)[5] (finding that Black voters stopped

[5] https://www.cambridge.org/core/journals/american-political-science-review/article/ticketing-and-turnout-the-participatory-consequences-of-lowlevel-police-contact/184A410DFF3DC72F4B9667C8CA3E0730

by police shortly before an election were less likely to vote, and that the short-term negative effects on turnout were greater for Black voters than non-Black voters); U.S. Department of Justice, *An Examination of Racial Disparities in Bicycle Stops and Citations Made by the Tampa Police Department* 20, 33–35 (2016)[6] (finding that police stops for bicycle law violations exhibited "stark racial disparities" while failing to reduce rates of crashes).

Today, law enforcement agencies continue to target Black and brown communities for surveillance, and have taken these biased investigatory techniques online. *See, e.g.*, Federal Bureau of Investigation Counterterrorism Division, *Intelligence Assessment: Black Identity Extremists Likely Motivated to Target Law Enforcement Officers*, FBI RECORDS: THE VAULT (Aug. 3, 2017).[7] Law enforcement agencies, including the BPD, have frequently monitored social media to identify and surveil individuals affiliated with the Black Lives Matter ("BLM") movement. *See* Nasser Eldroos & Kade Crockford, *Social Media Monitoring in Boston*, ACLU MASSACHUSETTS (2018)[8] (finding that the BPD used social media tracking tools to surveil online speech associated with the Black Lives Matter movement in 2014);

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[6] https://www.cambridge.org/core/journals/american-political-science-review/article/ticketing-and-turnout-the-participatory-consequences-of-lowlevel-police-contact/184A410DFF3DC72F4B9667C8CA3E0730

[7] https://vault.fbi.gov/black-identity-extremist-bie-intelligence-assessment-august-3-2017/black-identity-extremist-bie-intelligence-assessment-august-3-2017-part-01-of-01.pdf

[8] https://privacysos.org/social-media-monitoring-boston-free-speech-crosshairs/

see also Blanchard v. City of Memphis, 2018 WL 11416671, *10 (W.D. Tenn. Oct. 26, 2018) (finding that the Memphis Police Department had conducted targeted social media searches for the term "Black Lives Matter" and scraped information on associated journalists); Chris Brooks, *After Barr Ordered FBI to 'Identify Criminal Organizers,' Activists Were Intimidated at Home and at Work*, THE INTERCEPT (June 12, 2020)[9] (noting that FBI agents questioned BLM protestors about social media posts).

These types of online investigatory techniques have led to Black people being criminally prosecuted, sometimes without adequate evidence. For example, in 2012, a Black teenager in New York City was arrested and charged with attempted murder and described as a gang member—based on posts he had "liked" on Facebook. Ben Popper, *How the NYPD is Using Social Media to Put Harlem Teens Behind Bars*, THE VERGE (Dec. 10, 2014).[10] Two years later, the case was dismissed without explanation. *Id.* In 2017, a Black teenager in Philadelphia was arrested and kept in jail after police monitored his social media posts and connections, only for the case to be dismissed a year later for lack of evidence. Max Rivlin-Nadler, *How Philadelphia's Social Media-Driven Gang Policing Is Stealing Years From Young*

[9] https://theintercept.com/2020/06/12/fbi-jttf-protests-activists-cookeville-tennessee/

[10] https://www.theverge.com/2014/12/10/7341077/nypd-harlem-crews-social-media-rikers-prison

People, THE APPEAL (Jan 19, 2018).[11] Police have also surveilled Black and brown youth online to add their names to gang databases used for prosecutorial purposes based on their friend lists and photos. Rose Hackman, *Is the Online Surveillance of Black Teenagers the New Stop-and-Frisk?*, THE GUARDIAN (Apr. 23, 2015).[12] Of individuals included in one BPD gang database, sixty-six percent were Black, twenty-four percent were Latinx, and only two percent were white. Philip Marcelo, *Gang Database Made Up Mostly of Young Black, Latino Men*, AP NEWS (July 30, 2019).[13]

As with in-person stops and other offline investigative techniques, online surveillance is used to target Black and brown communities in a manner that increases criminalization and law enforcement encounters. The Commonwealth's attempt to strip social media surveillance of constitutional safeguards threatens to exacerbate these harms.

B. Clandestine, racially-targeted online surveillance is invasive and harmful in new ways.

Unlike in-person surveillance, online surveillance allows law enforcement more anonymity and increased access to Black community spaces that would be

[11] https://theappeal.org/how-philadelphias-social-media-driven-gang-policing-is-stealing-years-from-young-people-fa6a8dacead9/
[12] https://www.theguardian.com/us-news/2015/apr/23/online-surveillance-black-teenagers-new-stop-and-frisk
[13] https://apnews.com/article/dd5643e358c3456dbe14c16ade03711d

unavailable to them in-person, thus opening Black communities up to new and distinct harms. Where, as here, law enforcement officials are alleged to have created Black-presenting avatars in order to "friend" Black people on social media, the racial targeting is evident.[14] Appellant Br. 22–23. Such behavior can only signify that law enforcement is intentionally acting to gain the trust of, then surveil, Black people.

The racial harms of covert online surveillance are magnified because the online spaces targeted by police for these investigatory techniques are socially and politically invaluable to historically marginalized communities in the modern age. Social media has been central to political organizing and community building for Black people and historically marginalized groups. Alexandria Lockett, *What is Black Twitter? A Rhetorical Criticism of Race, Dis/information, and Social Media*, *in* RACE, RHETORIC, AND RESEARCH METHODS, 172–73 (Iris D. Ruiz et al. eds., The WAC Clearinghouse; University Press of Colorado, 2021). The ability to organize online "benefit[s] marginalized populations—by both leveling the playing field and allowing people from these groups to pursue social change." *Social Media Continue to be Important Political Outlets for Black Americans*, Pew Research Center (Dec.

[14] The record does not indicate the race of the BPD officer behind the Snapchat account in question, or indeed whether it was a single officer at all. Discovery would shed light on the extent to which BPD officers were appropriating Black identities to gain access to Black online spaces.

11, 2020).[15] This may be one reason Black social media users are more likely than their white counterparts to say that social media sites are important for political activities, to highlight important issues, and to give voice to underrepresented groups. *Id.* (finding 60% of Black users relied on social media to find people who share their political views, as opposed to 39% of white users).

Online anonymity allows police to infiltrate these online spaces by falsely posing as fellow community members. Thus, online investigations are not only harmful because they introduce police contact into spaces important to members of Black communities, but also because police officials can exploit Black digital personas to do so.[16] Sadly, the allegations in this case that BPD officers donned digital Blackface to gain access Black social media users' accounts are not unique. In 2016 and 2017, a white detective in Memphis posed as a person of color, liking Black Lives Matter pages and friending local Black leaders and professionals, so the police could monitor everything from book recommendations to vegan cookouts.

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[15] https://www.pewresearch.org/short-reads/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/

[16] While the current cases raise a reasonable inference of racial profiling, infiltration of online spaces can be used to target communities on the basis of other protected characteristics as well. *See, e.g.*, Afsaneh Rigot, *Digital Crime Scenes: The Role of Digital Evidence in the Persecution of LGBTQ People in Egypt, Lebanon, and Tunisia*, ARTICLE 19, 1–2 (Mar. 7, 2022), https://www.article19.org/wp-content/uploads/2022/03/Digital-Crime-Scenes-Report-3.pdf (finding that in Egypt, Lebanon, and Tunisia, police have increasingly posed as members of the LGBTQ community on dating apps in order to surveil and arrest LGBTQ individuals).

Antonia Noori Farzan, *Memphis Police Used Fake Facebook Account to Monitor Black Lives Matter, Trial Reveals*, THE WASHINGTON POST (Aug. 23, 2018).[17] Police also used social media to obtain information about in-person activist meetups—a particularly concerning revelation given that undercover police attended real-world events such as truck festivals and church meetings hosted by Black community members. George Joseph, *Meet 'Bob Smith,' the Fake Facebook Profile Memphis Police Allegedly Used to Spy on Black Activists*, THE APPEAL (Aug. 2, 2018).[18]

In this way, online investigations may expose people from Black communities to additional harm, contrary to the Commonwealth's assertions. Appellant Br. 34. By utilizing Internet anonymity to take on Black digital identities, police are able to gain access to critical online spaces that Black community members use to organize and connect. Police can then exploit this access and trust to monitor and police the very community members they impersonate.

III. Raising the bar for discovery of racially-targeted online surveillance would shield discriminatory investigative practices from court review.

Like stop-and-frisk and pretext stops, social media investigations can be used to selectively monitor individuals based on race rather than individual suspicion. And, like offline dragnets, social media surveillance often sweeps far too widely.

[17] https://www.washingtonpost.com/news/morning-mix/wp/2018/08/23/memphis-police-used-fake-facebook-account-to-monitor-black-lives-matter-trial-reveals/
[18] https://theappeal.org/memphis-police-surveillance-black-lives-matter-facebook-profile-exclusive/

See, e.g., Levinson-Waldman & Singhvi, *supra* (discussing NYPD's use of social media surveillance in "gang takedowns" where the majority of individuals charged were not alleged to be gang members). Unlike real-world stops, however, online investigations shield racially discriminatory policing behind a technology barrier.

Online investigations are a popular tool among law enforcement agencies. KiDeuk Kim et al., Urban Institute, *2016 Law Enforcement Use of Social Media Survey*, at 3 (Feb. 2017).[19] This is because online operations are less costly, more readily available, and less subject to public scrutiny than offline equivalents. Accordingly, the need for judicial oversight and due process protections in the online world is great. Failing to enforce discovery where, as here, a defendant has established a reasonable inference of racial profiling, would foreclose the primary way for litigants to bring discriminatory online police investigatory practices to light.

A. Online investigations are pervasive yet opaque, underscoring the need for discovery in online selective enforcement cases.

For over a decade, local, state, and federal law enforcement agencies have routinely used social media to track and investigate unknowing targets. *See supra*, Eledroos & Crockford, *supra; see also* Rachel Levinson-Waldman et al., *Social Media Surveillance by the U.S. Government*, BRENNAN CENTER FOR JUSTICE (Jan. 7,

[19] https://www.urban.org/sites/default/files/publication/88661/2016-law-enforcement-use-of-social-media-survey_5.pdf.

2022)[20] (detailing growing use of undercover social media surveillance by federal law enforcement agencies). By 2016, seventy percent of surveyed police departments reported using social media for "intelligence gathering for investigations." *See* Kim et al., *supra.*

However, fewer than half of metropolitan police departments have made their social media surveillance and investigation policies publicly available. Rachel Levinson-Waldman & José Guillermo Gutiérrez, *Study Reveals Inadequacy of Police Departments' Social Media Surveillance Policies,* BRENNAN CENTER FOR JUSTICE (Feb. 7, 2024).[21] This includes the BPD: despite its persistent use of online investigative techniques, *see* Eledroos & Crockford, *supra*, the BPD has not published any readily accessible policies on its online investigation practices. The BPD's conduct at issue here is part of a broader trend of law enforcement deploying secret online investigation processes that are shielded from public view.

Given the opacity of online investigatory techniques, information about potentially discriminatory practices must be unearthed through discovery. Courts have long recognized the importance of discovery in selective enforcement cases. *See, e.g., United States v. Davis*, 793 F.3d 712, 723 (7th Cir. 2015) (en banc)

[20] https://www.brennancenter.org/our-work/research-reports/social-media-surveillance-us-government
[21] https://www.brennancenter.org/our-work/analysis-opinion/study-reveals-inadequacy-police-departments-social-media-surveillance

(lowering the discovery standard for selective enforcement claims after reviewing evidence that the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives targeted Black individuals in fake stash house stings). State and local legislatures have enacted data collection and disclosure requirements after recognizing the difficulty of uncovering discriminatory law enforcement practices. *See, e.g.*, How Many Stops Act, Int. 0538-2022 (NY City Council) (enacted Jan. 20, 2024) (requiring police to track and report rates of civilian encounters by race and ethnicity); CONN. GEN. STAT. § 54-1m(a)–(b) (2022) (mandating tracking of race and ethnicity data for traffic stops); N.C. GEN. STAT. § 143B-903 (2022) (same). These efforts demonstrate the importance of collecting and reporting information about *how* police are targeting individuals for investigations, whether they occur on or offline.

Discovery is the primary avenue by which litigants can uncover information about potentially discriminatory online surveillance practices. *See Progeny v. City of Wichita, Kansas*, No. 21-1100-EFM-ADM, 2022 WL 2340866, at *5 (D. Kan. June 29, 2022) (noting that "plaintiffs' ability to succeed…would be undermined" without access to documents demonstrating *how* the police conducted its social media monitoring). Because current state and local data collection requirements only pertain to offline investigations, discovery remains the only way to unearth relevant data about online investigations. Failing to enforce discovery obligations in cases

like this effectively forecloses any avenue for citizens to bring racial discrimination investigatory practices to light, solely because they occur online.

B. Social media surveillance enables low-cost, high-volume searches, allowing police departments to investigate communities with no individualized suspicion.

Surreptitious social media investigations like the one at issue here are particularly concerning because online investigations are often cheaper and easier to execute than real-world operations. *Cf. United States v. Jones*, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring) (noting that because GPS monitoring is "cheap in comparison to conventional surveillance techniques and by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices"); *Perry*, 489 Mass. at 449 ("[T]echnological surveillance that proceeds surreptitiously empowers investigators to engage in long-term, secret surveillance that would not otherwise be possible.").

In analyzing online investigatory practices, this court has examined whether offline methods of gathering the same information would have been "prohibitively expensive or otherwise impracticable." *Perry*, 489 Mass. at 449. In-person investigations and confidential informant operations are naturally constrained by human resources. By contrast, passive and frictionless online investigations constitute a form of dangerous dragnet surveillance, not limited by any "practical considerations of limited police resources and community hostility." *Illinois v.*

Lidster, 540 U.S. 419, 426 (2004). The creation and use of Snapchat accounts is an "infinitely renewable resource."[22] Appellee Br. 30. A single police officer can create, conduct, and oversee dozens of undercover social media investigations at once, for any period of time, at virtually no incremental cost. Engaging in a comparable portfolio of offline investigations would be prohibitively expensive, if not logistically impossible. Because online surveillance is not constrained by resourcing limits, police departments need not use it only when it is an effective form of investigation for a given case; with no cost barrier, there is little incentive *not* to initiate an online investigation, whether directed at one or dozens of individuals.

When conducted at scale, online investigations subject scores of innocent individuals to suspicion based on race and affiliation rather than individualized suspicion, and thus put them at risk of erroneous or wrongful persecution. For example, Minnesota's Department of Human Rights found that Minneapolis Police Department officers used undercover social media accounts to surveil Black individuals, organizations, and elected officials that bore "no nexus to a criminal investigation or to a public safety objective." *See* Minnesota Department of Human Rights, *Investigation into the City of Minneapolis and the Minneapolis Police*

[22] Moreover, disclosure of fake social media accounts does not create risk to informants or officers. Accordingly, the motion judge rightly rejected the Commonwealth's attempt to equate the disclosure of fake Snapchat accounts and Bitmojis to confidential informant information.

Department, at 35–36 (Apr. 27, 2022). These practices reveal a pattern of law enforcement agencies targeting individuals for dragnet surveillance based on race and affiliation rather than individualized suspicion. Technology has enhanced these sweeping investigatory practices, enabling intrusions that are potentially even more harmful and expansive to the communities at which they are targeted. *See* Strong, *supra*, at 1038–40.

This Court should not allow police departments to shield potentially discriminatory and unlawful conduct behind a technological screen. Instead, it should maintain its leadership in protecting the civil rights and civil liberties of Massachusetts defendants above the federal floor, *see Lora*, 451 Mass. at 690, and ensure that courts maintain their role in allowing discovery of and halting racially discriminatory police surveillance.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the discovery order and the dismissal of the indictments below.

Dated: April 16, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(c)(9) of the Massachusetts Rules of Civil Procedure, I, Mason A. Kortz, hereby certify that the foregoing **Brief of Amici Curiae Michael Bennett, Zahra Stardust, American Civil Liberties Union of Massachusetts, and The Innocence Project in Support of Appellee and Affirmance** complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to:

Mass. R. A. P. 16(e) (references to the record);
Mass. R. A. P. 17(c) (cover, length, and content);
Mass. R. A. P. 20 (form and length of brief); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 points and contains 5,475 total non-excluded words as counted using the word count feature of Microsoft Word 365.

Dated: April 16, 2024

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-13547

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellant,
v.

RICHARD DILWORTH, JR.,
Defendant-Appellee.

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(e), I, Mason A. Kortz, hereby certify, under the penalties of perjury, that on this date of April 16, 2024, I have made service of a copy of the foregoing **Brief of Amici Curiae Michael Bennett, Zahra Stardust, American Civil Liberties Union of Massachusetts, and The Innocence Project in Support of Appellee and Affirmance** in the above captioned case upon all attorneys of record by electronic service through eFileMA.

Dated: April 16, 2024

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