COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13547

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

RICHARD DILWORTH,
Defendant-Appellee

REPLY BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT IN THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

KEVIN R. HAYDEN
District Attorney
For The Suffolk District

/s/Caitlin Fitzgerald
CAITLIN FITZGERALD
Assistant District Attorney
For The Suffolk District
BBO# 684902
One Bulfinch Place
Boston, MA 02114
(617) 619-4000
caitlin.fitzgerald@mass.gov

/s/Elisabeth Martino
ELISABETH MARTINO
Assistant District Attorney
For The Suffolk District
BBO# 673778
One Bulfinch Place
Boston, MA 02114
(617) 619-4000
elisabeth.martino@mass.gov

FEBRUARY 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ISSUES PRESENTED

1. Whether the framework set forth in *Commonwealth v. Long*, 485 Mass. 711 (2020), for assessing a defendant's claim of equal protection violations with regard to traffic stops, later extended to pedestrian stops in *Commonwealth v. Robinson-Van Rader*, 492 Mass. 1 (2023), applies to police investigations not rising to a constitutional seizure.
   s
2. If so, what threshold showing must a defendant make to demonstrate that a request for discovery is material and relevant to establishing a selective enforcement claim concerning such investigations.

ARGUMENT

I. THE REVISED EQUAL PROTECTION FRAMEWORK SET FORTH IN *LONG* AND *ROBINSON-VAN RADER* DOES NOT APPLY TO POLICE INVESTIGATIONS NOT RISING TO A CONSTITUTIONAL SEIZURE.

The question at issue in *Commonwealth v. Robinson-Van Rader*, 492 Mass. 1 (2023) was whether the revised equal protection standard adopted in *Commonwealth v. Long*, 485 Mass. 711, 724-725 (2020), which applied specifically to motor vehicle stops for traffic violations, was also applicable to a pedestrian stop that the defendant had asserted was racially motivated. *Robinson-Van Rader*, 492 Mass. at 15-18. This Court concluded that it was. *Id.* at 18. In the course of its discussion, the Court stated that the revised standard applies equally to pedestrian stops and threshold

inquiries, "as well as other selective enforcement claims challenging police investigatory practices." *Id*.

The holding in *Robinson-Van Rader*, however, was limited to its ruling that the revised equal protection standard applied to pedestrian stops, and the explanatory phrase, "other police investigatory practices," was dicta rather than binding precedent. See *Commonwealth v. Rahim*, 441 Mass. 273, 284 (2004) ("We have long held that we are not bound by 'language which was unnecessary' in an earlier decision 'and which passed upon an issue not really presented'" [citation omitted]). The distinction between dictum and holding should not be underestimated. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Id*. at 285, quoting *Penson v. Ohio*, 488 U.S. 75, 84 (1988). Judicial statements made "without the benefit of the vigorous advocacy on which the adversary process relies" therefore are not binding and are properly re-examined when the issue is placed before the Court by a party with a concrete interest in them. See *id*. at 284-286.

In *Robinson-Van Rader*, the defendant was *detained* based on reasonable suspicion. *Robinson-Van Rader*, 492 Mass. at 14-15 (emphasis added). He therefore had no

"interest in the outcome of [the] question" presented in the case at bar. *Rahim*, 441 Mass. at 285. Because this Court, in deciding *Robinson-Van Rader*, did not have the benefit of advocacy regarding whether the revised standard set forth in *Long* equally applies to police investigations not rising to a constitutional seizure, "its dictum on the subject was almost certainly incompletely investigated." *Rahim*, 441 Mass. at 285.

Here, the issue at stake is both too novel and too important to be decided without being properly placed before the Court. Massachusetts and New Jersey stand alone among all the other federal and state jurisdictions in applying suppression as a remedy for Equal Protection violations. See *State v. Segars*, 172 N.J. 481 (2002) (applying suppression to selective enforcement claims). While these two state Courts have evaluated the proper remedies for equal protection violations in prosecutions and seizures, this Court has never before evaluated the proper remedy for an equal protection violation where no seizure has occurred, such as in the instant case. The Commonwealth is unaware of any case in Massachusetts where this Court has found that suppression of evidence in a criminal case is the appropriate remedy for a constitutional violation that does not involve a seizure. As such, the Court has never examined the appropriate test to be applied where a defendant alleges an equal protection violation through

government action, not rising to a constitutional seizure, or more specifically, what the burden to obtain discovery is in such circumstances.

Particular scrutiny should be applied to these issues given this Court's recognition of the balancing of the separation of powers articulated in *Commonwealth v. Lora*, 451 Mass. 425 (2008), and which remains important today: "Of necessity, the important responsibility of eliminating racial considerations in the day-to-day enforcement of our laws lies principally with the executive branch of government ... [and,] [w]hile the judicial branch shares the responsibility of ensuring that the protections of the Constitution are afforded to all residents, it can only exercise that responsibility when proper and sufficient evidence has been presented to it." *Id*. at 446-447. This Court has acknowledged that the burden on defendants to obtain discovery for Equal Protection challenges is high, and intentionally so. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims); *Commonwealth v. Betances*, 451 Mass. 457, 461 (2008) (we decline to approve the use of the discovery rules to impose such an onerous burden on the Commonwealth, in the absence of a preliminary showing by the defendant that a reasonable basis exists to require the information sought"). As

such, this Court should be particularly cautious with requests for discovery regarding law enforcement decision-making at the investigatory phase, where no constitutional seizure has occurred. Of course, the Equal Protections of the law apply to any government action and are ultimately subject to judicial review, but the investigation and enforcement of laws are responsibilities traditionally belonging to the executive branch, which shares the responsibility of equal application of its laws. *Armstrong,* 517 U.S. at 464 (a selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive); *Lora*, at 445 (standard for proving selective prosecution "must be sufficiently rigorous that its imposition does not unnecessarily intrude on the exercise of powers constitutionally delegated to other branches of government. Balance is therefore important"); *Commonwealth v. Bernardo B.*, 453 Mass. 158, 168 (2009) (“Because a claim of selective prosecution is a collateral attack on prosecutorial decision making, a degree of rigor is demanded to balance such claims against the presumption of prosecutorial regularity.”).

The Commonwealth does not ask this Court to direct criminal defendants who raise valid Equal Protection violations to resort to civil lawsuits or file motions to dismiss their cases, as other jurisdictions have

done,[1] but instead asks this Court to establish the proper allocation of the burden each party bears when there is an allegation of equal protection violations at an investigatory phase prior to any constitutional seizure.

II. THIS COURT SHOULD ADOPT A MORE RIGOROUS DISCOVERY STANDARD FOR CLAIMS OF EQUAL PROTECTION VIOLATIONS NOT INVOLVING CONSTITUTIONAL SEIZURES, MODELED AFTER THE FRAMEWORK ESTABLISHED IN NEW JERSEY.

"Equal protection jurisprudence encompasses two broad categories of rights, which protect people against selective prosecution and selective enforcement." *Robinson-Van Rader*, 492 Mass. at 16. Prior to this Court's decision in *Long* in 2020, both selective prosecution and selective enforcement challenges were reviewed under a traditional tripartite burden. See *id.* (citing *Armstrong*, 517 U.S. at 465 ("ordinary" equal

[1] The Sixth Circuit has examined the protections of Equal Protection as it relates to consensual encounters, which do not rise to the level of a constitutional seizure. *United States v. Avery*, 137 F.3d 343 (1997). In *Avery*, the Sixth Circuit found that the right to Equal Protection under the law is relevant even before a seizure occurs. *Id*. at 352. However, the same Court declined to use the exclusionary rule as a remedy for an equal protection violation in such circumstances, stating in a subsequent opinion, "we are reluctant to graft that Amendment's traditional remedy into the equal protection context. Indeed we are aware of no court that has ever applied the exclusionary rule for a violation of the Fourteenth Amendment's Equal Protection Clause." *United States v. Nichols*, 512 F.3d 789, 794 (2008). Instead, in *Nichols*, the Sixth Circuit found that a civil suit under § 1983 was the appropriate remedy. *Id*.

protection claim brought under Fourteenth Amendment to United States Constitution requires proof of discriminatory effect, motivated by discriminatory purpose, and that similarly situated individuals were not prosecuted). In *Long*, this Court changed the landscape of its equal protection jurisprudence in the context of selective enforcement claims involving motor vehicle stops by summarily dispensing with the first of the two predicates of the traditional tripartite burden. Recognizing as a fundamental principle that "it virtually always will be the case 'that a broader class of persons' violated [traffic] law[s] than those against whom the law was enforced" and that stopping one motor vehicle but not another is always a "deliberate choice," this Court announced a revised standard for establishing an equal protection claim under articles 1 and 10 of the Massachusetts Declaration of Rights and held for the first time that a defendant need only establish one thing -- a reasonable inference that the traffic stop was motivated by the driver's race or membership in another protected class. *Long*, 485 Mass. at 722-723. Then, in *Robinson-Van Rader* in 2023, this Court expanded the holding in *Long* and stated that the revised standard "applies equally to pedestrian stops and threshold inquiries, as well as other selective enforcement claims challenging police investigatory practices." *Id*. at 18. Concluding that the tripartite burden of *Lora* is

"equally ill-suited to other claims of discriminatory law enforcement practices," this Court reasoned first, that "a defendant challenging a threshold inquiry on the sidewalk in front of a public housing complex would be [no] better able to prove a negative -- that similarly situated suspects of other races were not investigated," see *id*. at 19, and second, that while the "presumption of regularity ... applies to decisions by prosecutors and police officers to charge an individual with a crime; it does not apply to street-level police investigations." *Id*. at 20. As such, to sustain a defendant's burden for both the merits of a selective enforcement claim involving "street level investigations" and the attendant discovery, a defendant need only, as in *Long*, establish "a reasonable inference that the investigation was motivated by race or membership in another constitutionally protected class." *Id*. at 20.[2]

---

[2] Importantly, the test of *Long* and *Robinson-Van Rader* did not eliminate the requirement that a defendant raise a reasonable inference of discriminatory intent, and not merely discriminatory effect. See *Robinson-Van Rader*, 492 Mass. at 20 (defendant bears initial burden of showing police practice or investigation was motivated by race); *Long*, 485 Mass. at 723-724 (defendant bears initial burden of showing that traffic stop was motivated by race); *Commonwealth v. Stroman,* 103 Mass. App. Ct. 122, 129 (2023) ("The *Long* test looks to the 'true' or 'subjective' motivations of the officer at the time of the stop."), quoting *Long*, 485 Mass. at 726-27.

Notably, as discussed, this Court in *Robinson-Van Rader* did not articulate which other "street level police investigatory practices" are subject to the revised standard under *Long*, and the case at bar illustrates why it should not apply to undercover passive surveillance of a person's social media activity which decidedly lacks any constitutional seizure. To do so creates an unworkable standard, unfruitful discovery litigation, and frustrates the administration of justice by necessitating protracted discovery disputes that most often fail to develop into viable equal protection claims for defendants by the time they reach the merits-stage. Moreover, these underlying discovery orders, such as in the case at bar, will often implicate -- and contravene -- long-recognized privileges of surveillance and confidential informant privileges.

Here, notwithstanding that the passive surveillance by police of the defendant's Snapchat activity after the defendant voluntarily friended the undercover police Snapchat account implicates no privacy right, and no constitutional seizure, see *Commonwealth v. Carrasquillo*, 489 Mass. 107, 124 (2022) (defendant had no reasonable expectation of privacy in his Snapchat postings where he per-mitted unknown individuals to gain access to his content), the defendant below nevertheless claimed, and the trial court agreed, that he was entitled to the lower discovery and evidentiary burden of *Long*.

That decision was flawed, however, for two basic reasons: first, the police in *Long* physically stopped a defendant in a motor vehicle whereas here, the police were passively watching social media content the defendant voluntarily shared, and second, unlike in traffic stops, where it can be presumed that most individuals are committing minor motor vehicle violations and not being stopped for it, a court cannot likewise assume that most users of Snapchat are posting illegal firearms and not being investigated for it.

Nevertheless, the defendant here requested, and was granted, a plethora of discovery based on his counsel's representation that an informal survey of Suffolk County attorneys representing people arrested after posting firearm videos of themselves on Snapchat all were Black and Hispanic and none were white (CA 15). But the defendant's broad discovery requests were incongruous with what he aimed to establish -- that police were unfairly seeking out and targeting black and Hispanic males for firearms arrests based on their Snapchat activity (CA 52). To the contrary, as the record below makes clear, when police engage in passive undercover Snapchat surveillance, BPD police officers create a fake Snapchat account with a generic photo or bitmoji having no relation to a particular person and then "friend request" certain individuals the officers know to be involved in gang and firearm related violence (CA. 141

at ¶ 20). No messages are ever sent or answered by the officer (CA. 141 at ¶ 20). Once a friend request is sent and received, "[i]n many cases the law enforcement account will receive invitations from the friends of the target once the connection between the two accounts is made" (CA. 141 at ¶ 20). From there, the officers organically build a network of other followers who both affirmatively friend-request officers as well as accept their friend requests (CA. 141 at ¶ 20). Officers then passively monitor postings that these individuals share with their friends, which often include illegal firearm activity resulting in further investigation and possibly stops and arrests (CA. 141 at ¶ 20). Thus, only some of those people who are passively monitored ultimately choose to engage in criminal activity by sharing videos of themselves in possession of illegal firearms, and only those people are eventually investigated and possibly arrested by police. To claim, as the defendant here did, that he was entitled to discovery as to the perceived race, gender, and age of each individual passively monitored over a one-year period, was neither relevant nor material to his claim that he was unfairly targeted as part of a discriminatorily motivated investigation. In fact, his discovery request sought information about people not only friended by the officers, but also people who affirmatively friended the officers, and included people who engaged in criminal

activity as well as those who did not. See *Conley v. United States*, 5 F.4th 781, 797 (2021) (defendant failed to establish that police investigative practice was racially selective where police selected only some targets, but other defendants were either recruited by or voluntarily agreed to participate with those targets). Moreover, the Commonwealth furnished an affidavit by Detective Brian Ball to show that the first people police sought to "friend" in their Snapchat undercover surveillance "investigations" were accounts of people involved in gang-related and firearm violence in Boston, vitiating any reasonable inference that the friend-requests were impermissibly motivated based on membership in a protected class. Simply put, the discovery sought was neither relevant nor material to the claim the defendant aimed to establish, and the judge erred in ordering the Commonwealth to produce it.

Further, the trial judge's order that the Commonwealth provide "color copies of the user icons or bitmojis, and the usernames for the fake Snapchat accounts" (CA. x), meant piercing the properly-asserted confidential informant privilege, see *Commonwealth v. Whitfield*, 492 Mass. 61, 68-69 (2023); *Commonwealth v. D.M.*, 480 Mass. 1004, 1005 (2018), and surveillance privilege, see *Commonwealth v. Grace*, 43 Mass. App. Ct. 905, 906 (1997), and served no practical support for an equal protection claim. C.f. *Carrasquillo*, 489 Mass. at

127 ("Indeed, to hold otherwise would require police officers to 'identify themselves as [such] when they investigate criminal activity,' thus rendering 'virtually all undercover work' unconstitutional.") (citations omitted); *Commonwealth v. Garcia*, 421 Mass. 686, 692 (1996) ("undercover police work is a legitimate investigative technique").

The instant case thus illustrates the difficulties in balancing requests for discovery that may be material and relevant to a selective enforcement claim at the investigatory phase, while also taking into consideration important government interests such as protecting undercover sources. New Jersey's standard for assessing an equal protection claim based on pre-seizure conduct, while similar to Massachusetts, is more exacting. See *State v. Maryland*, 167 N.J. 471 (1999). Under the New Jersey paradigm,

> [a] defendant advancing such a claim has the ultimate burden of proving by a preponderance of the evidence that the police acted with discriminatory purpose, i.e., that they selected him because of his race.
>
> In addition to that ultimate burden, [the] defendant bears the preliminary obligation of establishing a prima facie case of discrimination. A prima facie case is one in which the evidence, including any favorable inference to be drawn therefrom, could sustain a judgment. Once a defendant through relevant evidence and inferences establishes a prima facie case of racial targeting, the burden of

> production shifts to the State to articulate a race neutral basis for its action.
>
> That burden of production has been described as so light as to be 'little more than a formality. It is met whether or not the evidence produced is found to be persuasive. In other words, the determination of whether the party defending against an Equal Protection challenge has met its burden of production 'can involve no credibility assessment. What is required is that the evidence produced shows a race-neutral motivation and thus raises a genuine issue of fact framed with sufficient clarity so that the other party has a full and fair opportunity to demonstrate pretext. . . .
>
> Once the State has met its burden of production by articulating a race-neutral explanation for its actions, the presumption of discrimination simply drops out of the picture. The defendant retains the ultimate burden of proving discriminatory enforcement [by a preponderance of the evidence].

Segars, 172 N.J. at 494-496 (internal quotation marks and citation omitted) (emphasis added).

Similar to New Jersey, this Court should add a step to the discovery process as outlined in *Betances,* which would require that the defendant first make a preliminary prima facie showing of discrimination through specific evidence or reliable information in affidavit form that the challenged law enforcement action being challenged was motivated solely by the defendant's membership in a protected class. See *Betances,* 451 Mass. at 461. If the defendant makes out such a prima facie claim, the burden of production shifts

to the Commonwealth, still at the discovery phase, to articulate its race neutral reason for the challenged investigative action, framed with sufficient clarity such that the defendant has a full and fair opportunity to nevertheless demonstrate pretext, and then to further request material and relevant discovery through a *Betances* motion. *Id.* The added phase would allow the Commonwealth to produce a race-neutral reason for the government conduct without burning useful investigative techniques, such as the Snapchat accounts at issue here, and at the same time, would allow defendants to pursue additional discovery with notice and understanding of the Commonwealth's purported race neutral reason for its challenged conduct.

For example, here, had the defendant met his initial burden through his affidavit to make out a prima facie case of discrimination regarding the Snapchat investigation, the burden would have shifted to the Commonwealth to provide a race neutral reason for their conduct, which could have been accomplished through Detective Ball's affidavit explaining that targets are chosen due to their involvement in gang and firearm violence, and that others were monitored as part of an organic group including those the officers friended and those who affirmatively friended the officers (CA). The defendant could then have tested the BPD's explanation against the twenty defendants he was able to identify

through his informal survey and, if the BPD's explanation was not supported by the information known to defense counsel, the defendant could have filed an affidavit and motion for further discovery under *Betances*. Such a procedure would permit the Commonwealth to protect investigations by articulating a race neutral reason for the challenged investigative action at the discovery phase, and then ensure that only those equal protection claims supported by "proper and sufficient evidence" are litigated. *Lora,* at 446-447.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court reverse the Court's order of dismissal on the indictments and the Court's discovery order.

Respectfully submitted
FOR THE COMMONWEALTH,

KEVIN HAYDEN
District Attorney
For The Suffolk District

/s/Caitlin Fitzgerald
CAITLIN FITZGERALD
Assistant District Attorney
For The Suffolk District
BBO# 684902
One Bulfinch Place
Boston, MA 02114
(617) 619-4000
caitlin.fitzgerald@mass.gov

/s/Elisabeth Martino
ELISABETH MARTINO
Assistant District Attorney
For The Suffolk District
BBO# 673778
One Bulfinch Place
Boston, MA 02114
(617) 619-4000
elisabeth.martino@mass.gov

FEBRUARY 2024

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Art. 1 of the Massachusetts Declaration of Rights
All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness. *[Annulled by Amendments, Art. 106]*

Art. 10 of the Massachusetts Declaration of Rights
Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k). This brief complies with the length limit of Mass. R. App. P. 20: it is written in 12-point Courier New at 10 characters per inch and spans 17 pages of text.

/s/Caitlin Fitzgerald
CAITLIN FITZGERALD
Assistant District Attorney

/s/Elisabeth Martino
ELISABETH MARTINO
Assistant District Attorney

COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service of the brief for the Commonwealth on the defendant via the Tyler e-filing system to:

Josh Raisler Cohn, Esq.,
JRaislerCohn@publiccounsel.net.

Respectfully submitted
FOR THE COMMONWEALTH,
KEVIN HAYDEN
District Attorney
For The Suffolk District

/s/Caitlin Fitzgerald
CAITLIN FITZGERALD
Assistant District Attorney
For The Suffolk District
BBO# 684902
One Bulfinch Place
Boston, MA 02114
(617) 619-4000
caitlin.fitzgerald@mass.gov

/s/Elisabeth Martino
ELISABETH MARTINO
Assistant District Attorney
For The Suffolk District
BBO# 673778
One Bulfinch Place
Boston, MA 02114
(617) 619-4000
elisabeth.martino@mass.gov

FEBRUARY 2024

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13547

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

RICHARD DILWORTH,
Defendant-Appellee

REPLY BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT IN THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY
