SJC-13329

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

COMMONWEALTH,
Appellee,

v.

MICHAEL VAN RADER,
Appellant.

ON APPEAL FROM SUFFOLK SUPERIOR COURT

BRIEF *AMICI CURIAE* FOR THE CRIMINAL JUSTICE INSTITUTE AT HARVARD LAW SCHOOL AND THE NEW ENGLAND INNOCENCE PROJECT IN SUPPORT OF THE DEFENDANT-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Criminal Justice Institute represents that it is a clinical program of Harvard Law School, a 501(c)(3) organization under Federal law and the laws of the Commonwealth of Massachusetts. The New England Innocence Project represents that it is also a 501(c)(3) organization. Amici do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in amici.

PREPARATION OF AMICUS BRIEF

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

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

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

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

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

STATEMENT OF INTEREST OF AMICI

The **Criminal Justice Institute at Harvard Law School** ("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 adults and juvenile clients facing misdemeanor and felony charges in the Boston criminal courts.[1] 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 availability of a robust and accessible equal protection claim for any defendant who feels they were targeted by the police because of their race is precisely such an issue.

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. This includes ensuring that the presumption of innocence applies robustly and equally to all people and at all stages of the criminal process, from the moment of their first encounter with police through trial. It also includes ensuring that all evidence, regardless of its source or pedigree, is subjected to appropriately rigorous scrutiny and bears sufficient indicia of reliability before it

[1] The Criminal Justice Institute does not represent the official views of Harvard Law School or Harvard University.

is used against a criminal defendant. And, in recognition of the grossly disproportionate number of members of communities of color who have been wrongfully convicted, NEIP's mission includes ensuring that explicit or implicit racial biases do not operate to undermine the presumption of innocence or other rights guaranteed by the U.S. Constitution and the Declaration of Rights.

INTRODUCTION

On a March evening, two Black teenagers in black hoodies were stopped on a well-traveled path in Southwest Corridor Park based on a "generic" description that two males wearing black hoodies fled a shots-fired incident on bicycles, five minutes earlier and nearly a mile away. They were unknown to the officers. They did not have bicycles. But, based on the generic dispatch description—plus an off-duty officer's subsequent, materially different report of two people on bicycles wearing a "black jacket" and a "black vest" elsewhere, half-a-mile from the incident—three gang unit officers seized and searched them.

This appeal asks whether this police response would have occurred if J.H. and Van Rader had been two White teenagers in black hoodies walking on the path. Would the officers' inferences seem reasonable if the pedestrians were White? And if not, how can the Commonwealth escape the conclusion that race was a motivating factor in this stop?

SUMMARY OF ARGUMENT

The decision to stop and search Van Rader was not justified by reasonable suspicion. (*Infra* at 17-28.) But, even if this Court finds otherwise, it was infected by racial bias and any fruits of the seizure must be suppressed. The reasonable inference that the stop was motivated by race is supported by the robust statistical record below—a 1 in 100,000 chance that the officers' pattern of stops would result without racial profiling—and by the officers' disproportionate use of force in searching J.H. and Van Rader. (*Infra* at 28-32.)

Further, many elements of the equal protection framework this Court adopted in *Commonwealth v. Long*, 485 Mass. 711 (2020), apply equally to pedestrian stops. (*Infra* at 32.) Given the irrefutable evidence of racially disparate pedestrian stops across jurisdictions, the fact that police use discretionary street stops to ensnare Black people for common behaviors and minor offenses, and studies establishing the role of implicit bias in policing, pedestrian stops—like traffic stops—call for an adjusted reasonable inference standard. (*Infra* at 33-40.) While *Long*'s totality factors require modification in new contexts, the reasoning behind *Long*'s reduced burden applies to traffic and pedestrian stops alike. (*Infra* at 40-46.)

ARGUMENT

I. The officers lacked reasonable suspicion that Van Rader had committed a crime or was armed and dangerous.

The patchwork in the record below reveals officers acting on escalating hunches after shots were fired near a basketball court on a spring evening. Dispatch reported a generic description: two males—race unidentified—in black hoodies on bikes, turning right onto Tremont Street. A few minutes later and a half-mile away near New Heath Street, from an obstructed vantage 300 feet away, off-duty Officer O'Loughlin saw two Black males on bikes, pedaling slowly, appearing tired, and wearing a "black vest" and "black jacket." He called it in. Three gang unit officers driving from Dorchester to Roxbury picked up his hunch. They did not scope out the vicinity of the shooting, canvass the area, or closely observe who else was around. Instead, they followed O'Loughlin's report toward a well-traveled park, spun their car around, and seized two Black teenagers, on foot, wearing black hoodies, without any bikes in sight.

A. Officer suspicions rest on cognitive biases, and officer intuitions in street stops prove wrong most of the time.

Criminological research and empirical studies show that police observations and inferences are neither inherently nor especially reliable and are affected by

cognitive biases like motivated reasoning and hindsight bias.[2] This is particularly true for stops justified by reasonable suspicion, where studies show that police discover weapons or contraband in less than 5% of stops[3] and that suspicions of criminality or weapon possession frequently correspond to a person's race rather than their conduct.[4]

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[2] Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgement Right*, 8 Ohio St. J. Crim. L. 7, 28 (2010).

[3] Boston Police seized contraband or a weapon in 2.5% of field interrogations and observations (FIOs) from 2007-2010. ACLU of Mass., Black, Brown and Targeted 12 (2014), https://www.aclum.org/sites/default/files/wpcontent/uploads/2015/06/reports-black-brown-and-targeted.pdf. NYPD recovered weapons in 1.5% of frisks from 2004-2012. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y 2013); Goel et al., *Precinct or Prejudice? Understanding Racial Disparities in New York City's Stop-And-Frisk Policy*, 10 Annals of Applied Stat. 365, 366-367 (2016) (finding hit rates of 2.5% for Black people and 3.6% for Hispanic people versus 11% for White people across 300,000 stops for criminal possession of a weapon). Plaintiffs' Tenth Report To Court On Stop And Frisk Practices: Fourteenth Amendment Issues at 11, *Bailey v. City of Philadelphia*, No. 10-5952 (E.D. Pa. Apr. 20, 2020), Dkt. 104, https://www.aclupa.org/sites/default/files/field_documents/104_plaintiffs_tenth_report_on_4th_amendment_issues.pdf ["Philadelphia Report"] (guns found in 1.5% of frisks in 2019). ACLU-DC & ACLU Analytics, Racial Disparities in Stops By the D.C. Metropolitan Police Department: Review of Five Months of Data 1, 8 (2020), https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf ["DC Report"] (0.6% of stops uncovered a firearm).

[4] Fagan, *No Runs, Few Hits, and Many Errors: Street Stops, Bias, and Proactive Policing*, 68 UCLA L. Rev. 1584 (2022); Gelman, Fagan & Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. Am. Stat. Ass'n 813, 822 (2007); Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev.

These officers' histories match this general pattern. Officer Degrave testified that he had seized about twelve firearms in his twelve-year career (TIII/51-52) and that he conducts 50 car stops, and five to ten pedestrian stops, monthly. (TIII/56-62). Assuming a consistent number of stops throughout his career, one gun for every 660 stops annually produces a hit rate of .15%. Limiting the scope to stops involving a frisk or search still produces an alarmingly low hit rate. Officers Eunis and Degrave frisked or searched someone in 45% of their recorded discretionary stops over an 18-month period, but only 4% uncovered a gun. (R.367). Rather than presuming these officers' inferences reasonably flow from specialized training and experience, this Court should view their suspicions critically. Indeed, their intuitions prove wrong at least 90% of the time.

B. These officers' observations, even taken cumulatively, do not establish reasonable suspicion.

While "seemingly innocent activities taken together can give rise to reasonable suspicion," *Commonwealth v. Grandison*, 433 Mass. 135, 139 (2001) (citation omitted), tallying up multiple innocuous observations cannot. *Commonwealth v. Torres*, 424 Mass. 153, 161-162 (1997) (citation omitted). The motion judge erred by misstating the record, considering each observation for its

956, 1009 (1999); Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659 (1994).

most suspicious connotation, giving unwarranted weight to innocuous factors, and layering hunches to bolster unreasonable inferences.

1. The judge erroneously found that Officer O'Loughlin's description linked the teenagers to the dispatch report.

The motion judge properly found that the dispatch description was generic, Add.74,79—so sparse it could describe many people in the neighborhood and thus distinguished no one. *Commonwealth v. Cheek*, 413 Mass. 492, 496 (1992); *Commonwealth v. Warren*, 475 Mass. 530, 534 (2016). Yet he also erroneously accepted that the two males in each tableau—on Annunciation Road, at New Heath Street, and in Southwest Corridor Park—must be the same. Add.80 (noting that, though the stopped teenagers were pedestrians, "Off. O'Loughlin's description linked them to bicycles"). This ignores the likelihood that O'Loughlin's description, which diverged from the dispatch report, described *two other people*—and that, given the barebones nature of both descriptions, Van Rader and J.H. were unrelated to either report. The motion judge also erroneously credited O'Loughlin's inaccurate testimony that the bicyclists wore "black hoodies" TII/9:9—even though a contemporaneous recording proved he radioed "black jacket" and "black vest." TII/29-31. This discrepancy reveals that O'Loughlin harmonized his account after the fact. Reasonable suspicion must be assessed against what he said in real time; seeing *bicyclists* wearing a "*black jacket*" and "*black vest*" did not make it more

likely that *pedestrians* wearing *black hoodies* at a different location were the shooters.

2. No flight path from the shooting was confirmed.

The motion judge found "Defendant and J.H. were moving in the direction of flight" from the shots-fired incident. Add.79. This is overstated. The suspects turned right onto Tremont Street. Def.Br.13. Any direction thereafter was pure supposition. *Warren*, 475 Mass. at 536 ("The location and timing of the stop were . . . not probative of individualized suspicion where the direction of the perpetrator's path of flight was mere conjecture."). The judge compounded the error by relying on *Evelyn* to find matching the "direction of travel" suspicious; in *Evelyn*, the officers misunderstood the dispatch report and drove *in the opposite direction*. *Commonwealth v. Evelyn*, 485 Mass. 691, 694 (2020).

3. Taken together, the geographic distance and temporal proximity undermine reasonable suspicion.

The *Evelyn* Court found reasonable suspicion—a "close question," *id.* at 711—based on (1) the combined force of the geographic and temporal proximity to a fatal shooting (half-a-mile away, 13 minutes after), *id.* at 704, and (2) holding an object the size of a firearm in his pocket pressed against his body, blocking the officers from seeing the object by turning away, *id.* at 708. Here, neither teenager

exhibited "evidence of a firearm" prior to the seizure, and the distance was farther (nearly a mile) with less time having passed (just five minutes).

Because the teenagers were pedestrians—*without* bikes—the combination of greater geographic distance but less passage of time relative to *Evelyn* cuts against reasonable suspicion. Making the fact pattern suspicious requires two hunches: (1) the teenagers had been riding bikes and (2) they abandoned their bikes; only then could they cover so much distance so quickly. Converting those hunches into *reasonable inferences* would require more articulable facts—e.g., finding discarded bikes before the stop, or the pedestrians seeming out of breath or breathing heavily like the people O'Loughlin saw, TI/9,11, none of which the arresting officers observed. The shooters might have continued biking to put as much distance between themselves and the scene as possible, or split up from one another. These hunches are as conceivable as the hunch that they ditched their bikes.

4. The finding that few other people were around is clearly erroneous.

"A finding is clearly erroneous . . . when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Commonwealth v. Bruno-O'Leary*, 94 Mass. App. Ct. 44, 49 (2018) (citation omitted). As Van Rader argues, Def.Br.48-49, the finding that few other people were out is clear error considering Officer Degrave's testimony that "a lot of people [were] in the area," TIII/20-21, which was

not inconsistent with Officer Eunis's testimony that he "didn't remember" others who "*stood out"* to him. TII/57,67-68 (emphasis added). Officer Eunis's testimony reflects a tunnel-vision focus on J.H. and Van Rader, who notably were pedestrians rather than the cyclists they were looking for. TII/57,67-68.[5] This Court should discount the finding that J.H. and Van Rader were "the only people the police observed matching the descriptions in the area," Add.79, as the officers never canvassed the area, the descriptions were too common and sparse to identify any individuals, J.H. and Van Rader did not actually "match" either description, and the officers' perception and memory may have been affected by biases.

Further, bicycle count data published by the City of Boston about the Southwest Corridor Bicycle Path belies a finding that few people were around. In 2017, the Southwest Corridor Bicycle Path boasted the third-highest number of cyclists of any route in Boston—averaging 2,185 in a 24-hour period.[6] On every published snapshot date from 2016-2021, dozens of cyclists used the bike path

[5] Saying that no others "stood out" is consistent with Van Rader's claim that he was stopped in part because of his race; Dr. Fowler found 90% of people these officers stopped were Black. R.336.

[6] https://www.boston.gov/departments/boston-bikes/2017-boston-bicycle-counts#most-cyclists-counted. Reports about the Southwest Corridor Bicycle Path—including how many cyclists traveled north and south every hour on any observed day—are available here: https://drive.google.com/drive/folders/1lZ5FyBlcBF4K_N70IFNuBOTZsOcqoaVh.

around 7 PM. Given this typical traffic, consistent with Officer Degrave's testimony, finding "not a lot of people [were] out," Add.74, was clearly erroneous.

5. The totality yields less than reasonable suspicion, but the officers' conduct required probable cause.

The judge also relied on the "existence of continuing danger based on the gravity of the crime," *Commonwealth v. Depina*, 456 Mass. 238, 247 (2009), a factor not individualized to these defendants which cannot justify a stop in the absence of other compelling factors. *Commonwealth v. Meneus*, 476 Mass. 231, 239 (2017). Lacking reasonable suspicion, the officers' seizure was premature. "While the police undoubtedly could have continued their investigation by way of continued observation or a field interrogation observation, an immediate, nonconsensual stop of this defendant was not constitutionally justified." *Commonwealth v. Kearse*, 97 Mass. App. Ct. 297, 304 (2020), citation omitted. The officers could have approached and questioned J.H. and Van Rader without communicating that they were being coerced to stay. Their responses might have provided otherwise wanting articulable facts for reasonable suspicion of their involvement in the crime.

Instead, the officers seized them and immediately asked if they had anything on them, disclosing the stop's purpose was to search for a gun. *Commonwealth v. Karen K.*, 99 Mass. App. Ct. 216, 229 n.8 (Milkey, J., dissenting in part), *review granted*, 488 Mass. 1103 (2021) ("[W]here the sole purpose of a stop unquestionably was to search someone for a gun, I fail to see how that can be justified absent

probable cause."). A seizure must be "justified at its inception." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). "Were the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion." *Commonwealth v. Barros*, 435 Mass. 171, 178 (2001) (internal quotation marks and citations omitted). At the moment of seizure, when Officer Degrave called out and compelled them to stop, see Comm.Br.13&n.4, "the [teenagers] did not even appear to be armed." *Commonwealth v. Narcisse*, 457 Mass. 1, 12 (2010).

Only after the seizure, and after asking J.H. if he "ha[d] anything on [him]," did the officers see J.H. "blade" his body,[7] which may contribute to reasonable suspicion of weapon possession but did not establish *probable cause* for a warrantless *search*. Nevertheless, the officers jumped immediately to invasive bodily contact consistent only with probable cause—lifting J.H.'s clothes to expose his skin, exceeding the boundaries of a *Terry* patfrisk. TII/80-81;TIII/52. See *Commonwealth v. Silva*, 366 Mass. 402, 407-408 (1974). Nearly contemporaneously, upon finding a gun on J.H., the officers pulled Van Rader to the ground, handcuffed him, and searched him, too. The teenagers had stopped immediately, the officers outnumbered them, and the scene was under control,

[7] *Karen K.*, 99 Mass. App. Ct. at 228 n.7 (Milkey, J., dissenting in part) ("The justice system would be better served if motion judges, attorneys, and witnesses avoided loaded terms such as "blading" and just addressed what happened."). See *United States v. Kelly*, 481 F. Supp. 3d 862, 868 (S.D. Iowa 2020).

Commonwealth v. Gomes, 453 Mass. 506, 513 (2009). This was an arrest without probable cause—a show of force disproportionate to the circumstances. See *Commonwealth v. Bottari*, 395 Mass. 777, 782 (1985).

C. The officers relied on their unconstitutional search of J.H. to search Van Rader, violating the requirement of individualized suspicion.

Police do not have an automatic right to search the companion of someone being arrested. *Commonwealth v. Ng*, 420 Mass. 236, 237-238 (1995); *Narcisse*, 457 Mass. at 10 n.6. Police must have specific, articulable reasonable suspicion that the companion may be armed and a threat to safety. *Ng*, 420 Mass. at 237. "Companion cases" permit a frisk where facts about an arrestee, *plus* the companion's own behavior, together constitute reasonable suspicion. See *id.*

Here, the search of Van Rader, on the ground, in handcuffs, exceeded a protective frisk—yet the police lacked individualized reasonable suspicion that he was armed and dangerous. He made no "furtive" movements, *Commonwealth v. Goewey*, 452 Mass. 399, 407-408 (2008); had no bulge in his pocket, *Commonwealth v. Colon*, 87 Mass. App. Ct. 398 (2015); did not "blade" his stance, *Commonwealth v. Resende*, 474 Mass. 455, 461 (2016), or adjust his waistband, *Commonwealth v. Ramirez*, 92 Mass. App. Ct. 742, 748 (2018); and had no unusual gait, *Commonwealth v. Depeiza*, 449 Mass. 367, 371 (2007). Just as the factors discussed above did not establish reasonable suspicion to support a seizure, they also did not meet the higher, separate, threshold for a frisk.

The police did not have probable cause that J.H. had committed a crime, as they did not know J.H.'s age and did not determine whether he lawfully possessed the firearm before searching Van Rader. See *Commonwealth v. Sertyl*, 101 Mass. App. Ct. 836, 841 (2022), quoting *Commonwealth v. Alvarado*, 423 Mass. 266, 269 (1996). As soon as police found the firearm on J.H., they physically seized Van Rader, TI/82-83, even though neither J.H. nor Van Rader was known to the police, and any relationship between them was unknown. Compare *Ng*, 420 Mass. at 239 (brothers); *Commonwealth v. Sweeting-Bailey*, 488 Mass. 741, 743 (2021) (in the same car). They were briefly observed walking together in a populated area. Proximity to someone with a concealed gun does not produce reasonable suspicion, see *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), and because J.H.'s gun was concealed, police could not infer Van Rader's knowledge of it.

Officer Eunis testified that he handcuffed and frisked Van Rader because, "we were trained that, if there's one firearm, there could be another." TI/54. He did not describe that training or provide any empirical evidence to establish the reasonableness of that inference. On Officer Eunis's logic, how many people can the police frisk upon finding a firearm? Surely more individualized suspicion is required to pull someone to the ground, roll him onto his stomach and side, and scour his body. TI/82-83. Even after a shooting, finding a gun on J.H. could as likely weaken the inference that Van Rader had a gun because officers discovered the weapon.

All told, the seizure was unlawful, and the manner of the search suggested the officers' perception of threat was tinged by implicit bias.[8]

II. Applying only the *Lora* standard, Van Rader should prevail on his selective enforcement claim.

A. Lora *held that statistical evidence can establish a defendant's initial burden, allowing an inference that a broader class could have been stopped and that the failure to stop was consistent or deliberate.*

Per *Commonwealth v. Lora*, 451 Mass. 421, 440 (2008), a defendant who presents a selective enforcement claim based on statistical evidence need not establish that a specific, similarly situated person *at the time of the stop* was treated differently. Statistical methods like benchmarking account for the demographics of people an officer could encounter in the relevant location and allow comparison of an officer's pattern of stops to those demographics to determine whether the officer's history of enforcement reflects racial targeting. "'The statistics proffered must address the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated.'" *Id.*, quoting *Chavez v. Ill. State Police*, 251 F.3d 612, 638 (7th Cir. 2001). This Court has also never limited the similarly situated broader class to people who draw police attention because of

[8] Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004); Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. Exp'l Psychol. 120 (2006).

exactly the same violation, suspicious behavior, or crime. See, e.g., *Commonwealth v. Franklin*, 376 Mass. 885, 896 (1978) ("evidence of all types of violent crimes involving dangerous weapons, regardless of the nature of the weapons used" were relevant to selective prosecution claims); see also *Commonwealth v. Lafaso*, 49 Mass. App. Ct. 179, 184 (2000); *Lora*, 451 Mass. at 443-444 (finding no prima facie case because the analysis benchmarked travelers on a major interstate highway to the demographics of a small municipality, not because of the range of traffic violations in the dataset).

The *Lora* Court announced that the "minimum" statistical evidence needed to meet the defendant's tripartite burden "must establish that the racial composition of motorists stopped for motor vehicle violations varied significantly from the racial composition of the population of motorists making use of the relevant roadways." *Lora*, 451 Mass. at 442. The *Lora* Court also affirmed the need to consider statistics in context: "'[S]tatistics are not irrefutable; . . . their usefulness depends on all of the surrounding facts and circumstances.'" *Id.*, quoting *Chavez*, 251 F.3d at 638 (citation omitted). As the *Long* Court summarized, in the "absence of explicit 'smoking gun' evidence" about a particular stop, a judge could infer the stop was motivated by race based on a pattern of unequal treatment—"allow[ing] defendants a means by which to detect and challenge implicit bias." *Long*, 485 Mass. at 720.

B. The defendant presented compelling evidence of the officers' pattern of discriminatory stops, which the Commonwealth failed to rebut.

In this case, Dr. Fowler, whose expertise and methodology have been affirmed by this Court, see *Long*, 485 Mass. at 732-733, analyzed the officers' patterns of pedestrian stops—illustrating that the racial composition of pedestrians stopped by these officers in discretionary encounters varied significantly from the racial composition of the surrounding population they would encounter on patrol. The defendant limited the universe of comparison to stops that involved any level of officer discretion. Dr. Fowler then analyzed these stops for patterns of racial targeting. Among the 276 people stopped by officers Eunis and Degrave over an 18-month period, just 2% were Non-Hispanic White and 90% were Black. R.336.

To establish an appropriate benchmark, Dr. Fowler mapped the FIO locations to define the officers' patrol area, R.339-342, determined the patrol area's racial demographics based on U.S. Census block groups and inflow from surrounding communities, TIV/18;R.341-342, and accounted for time of day, age, gender, and where the officers spent the most time. She conservatively estimated a 60% Black population benchmark for the officers' patrol area. TIV/26;R.343-345,351. Using that benchmark, Dr. Fowler determined a Black person was over *five times* more likely to be targeted for an FIO than anyone else. TIV/39;R.334,355,357. In the absence of racial profiling, the likelihood of that stark disparity was 1 in 100,000. R.360-367.

The motion judge concluded "considerable statistical evidence" showed the officers' discretionary investigative stops disproportionately targeted people of color R.534;Add.75, suggesting Van Rader met his prima facie burden. However, the motion judge declined to "dwell" on it and asserted he "need not address the question of a threshold showing" because the stop was supported by reasonable suspicion. Add.75. This was error for two reasons: (1) the art. 14 claim cannot answer the equal protection question (even if the same totality factors apply in each analysis), see MACDL *amicus* brief, and (2) the motion judge relieved the Commonwealth of its step-two burden.

Once a defendant establishes a prima facie case of selective prosecution or selective enforcement, the Commonwealth bears a significant rebuttal burden. *Franklin*, 376 Mass. at 895; *Long*, 485 Mass. at 726 (Commonwealth must "grapple with all of the reasonable inferences and all of the evidence that a defendant presented" and "prove that the stop was not racially motivated"). The Commonwealth did not meet its burden. As in *Lora*, the Commonwealth could have interrogated the benchmark, put on its own expert to attack the universe of stops the defendant's expert compared to this stop, explained how this stop did not conform to the demonstrated pattern, or advanced a compelling governmental interest that race was considered but was not an *improper* consideration. Where a defendant's prima facie case is based on statistics contextualized by the totality of the

circumstances, as here,[9] the Commonwealth must grapple with *all* the inferences from the data *and* from the surrounding circumstances and prove that race did not improperly motivate the stop. Here, the Commonwealth only argued the stop was supported by reasonable suspicion, attempting to inoculate it from an equal protection challenge. Because the defendant's prima facie case went unrebutted, as in *Long*, the defendant must prevail.

III. Elements of the *Long* framework unequivocally apply to other selective enforcement claims.

A. The Constitution proscribes any police action improperly motivated, in whole or in part, by race.

This Court's holding in *Long* barring improper racial motivation in any police action, even in part, 485 Mass. at 726, 729 n.15, conforms to precedents across state and federal courts. See, e.g., *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1167 (10th Cir. 2003) ("The discriminatory purpose need not be the only purpose, but it must be a motivating factor in the decision."); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-267 (1977). As long as the discriminatory purpose was "a motivating factor" in the police decision, it is proscribed by the equal protection clause and arts. 1 and 10 of the Declaration of Rights.

[9] The nature of the seizure and disproportionate force used to search J.H. and Van Rader suggest implicit bias and racial profiling at play.

B. Given the ubiquity of racially disparate pedestrian stops across jurisdictions, the exploitable nature of reasonable suspicion factors, and social science showing that police require less suspicion to stop people of color, pedestrian stops call for the same reduced prima facie burden as traffic stops.

The lawfulness of discriminatory treatment does not depend on whether police action happens in a car or on foot, and neither should the applicability of this Court's *Long* framework. The *Long* Court collected studies illustrating widespread disparities in traffic stops, *Long*, 485 Mass. at 717-718, and adjusted the reasonable inference standard for traffic stops because "it virtually always will be the case 'that a broader class of persons' violated the law than those against whom the law was enforced" and "in stopping one vehicle but not another, an officer necessarily has made a deliberate choice." *Id.* at 722. The same reasoning applies to pedestrian stops, where police use vague descriptions and common human behaviors to disproportionately stop, search, and arrest people of color.

First, consider the mountains of evidence of widespread, systemic racial disparities in pedestrian stops—in Massachusetts and around the country. Black people comprise about one-quarter of Boston residents, but roughly 60-70% of FIOs every year for the last fifteen years.[10] *Warren*, 475 Mass. at 539-540 & n.15

[10] Anderson, *Boston police release new data on FIO stops*, Bos. Globe (Jan. 8, 2016), https://www.bostonglobe.com/metro/2016/01/08/boston-police-release-new-data-fio-stops/6iPbS7E0QEYjLJIut5KnxL/story.html; Ransom, *Blacks remain focus of Boston police investigations, searches*, Bos. Globe (Aug. 28, 2017), https://www.bostonglobe.com/metro/2017/08/28/blacks-remain-focus-

("[B]lack men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations."); *Evelyn*, 485 Mass. at 700 ("African-Americans continue to be targeted disproportionately in [FIO] encounters."). This overrepresentation holds even controlling for neighborhood crime rates and gang affiliations.[11] Other Massachusetts jurisdictions exhibit similar patterns. In New Bedford, for example, Black people comprise 7% of the population but 46% of stops—*13 times* the rate at which White residents are stopped by police.[12]

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boston-police-investigations-searches/PDbFr2QZexCEi3zJTO9mOJ/story.html; Press Release, Boston Police Department Releases Latest Field Interrogation Observation Data, Boston Police Dep't (Mar. 13, 2020), https://bpdnews.com/news/2020/3/13/boston-police-department-releases-latest-field-interrogation-observation-data?rq=fio; Press Release, Boston Police Department Releases Latest Field Interrogation Observation Data, Boston Police Dep't (May 8, 2020), https://bpdnews.com/news/2020/5/8/boston-police-department-releases-latest-field-interrogation-observation-data; Miller, *FIOed: some in Boston face weekly police stops*, Bay State Banner (July 29, 2020), https://www.baystatebanner.com/2020/07/29/fioed-some-in-boston-face-weekly-police-stops; Press Release, Boston Police Department Releases Latest Field Interrogation Observation Data, Boston Police Dep't (Apr. 16, 2021), https://bpdnews.com/news/2021/4/13/boston-police-department-releases-latest-field-interrogation-observation-data.

[11] Fagan et al., Final Report: An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports 8, 12, 24-26 (2015), https://s3.amazonaws.com/s3.documentcloud.org/documents/2158964/full-boston-police-analysis-on-race-and-ethnicity.pdf; Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 Fordham. Urb. L.J. 539 (2016); ACLU of Mass., *supra* note 3, at 7.

[12] Citizens for Juvenile Justice, We are the Prey: Racial Profiling and Policing of Youth in New Bedford 12 (2021), https://static1.squarespace.com/static/

Years of data from New York,[13] Chicago,[14] Los Angeles,[15] Philadelphia,[16] Washington, D.C.,[17] Minneapolis,[18] San Francisco and Oakland,[19] and elsewhere establish that Black people are disproportionately stopped in street encounters and are *also* more likely to be frisked or searched. For example, in Los Angeles, Black people were stopped almost 260% more often than White people and were 127%

58ea378e414fb5fae5ba06c7/t/6075ac25a9d458246f44edef/1618324547486/We+Are+The+Prey+FINAL.pdf.

[13] *Floyd*, 959 F. Supp. 2d at 558; Feuer, *Black New Yorkers Are Twice as Likely to Be Stopped by the Police, Data Shows*, N.Y. Times (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/nyregion/nypd-arrests-race.html.

[14] ACLU of Il., Stop and Frisk In Chicago 3 (2015), https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf (Black people comprised 72% of stops, but 32% of Chicago's population).

[15] Ayres & Borowsky, A Study of Racially Disparate Outcomes in the Los Angeles Police Department 5-6 (2008), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf.

[16] Philadelphia Report, *supra* note 3, at 4.

[17] DC Report, *supra* note 3, at 6.

[18] Minn. Dep't of Human Rights, Investigation into the City of Minneapolis and the Minneapolis Police Department (2022), https://mn.gov/mdhr/assets/Investigation%20into%20the%20City%20of%20Minneapolis%20and%20the%20Minneapolis%20Police%20Department_tcm1061-526417.pdf ["Minneapolis Report"].

[19] Gardiner & Neilson, *'Are the police capable of changing?': Data on racial profiling in California shows the problem is only getting worse*, San Fran. Chronicle (July 14, 2022), https://www.sfchronicle.com/projects/2022/california-racial-profiling-police-stops. Lofstrom et al., Public Pol'y Inst. of Cal., Racial Disparities in Law Enforcement Stops (2021), https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops.

more likely to be frisked.[20] In Philadelphia, nearly a decade into a consent decree, Black pedestrians accounted for 80% of all frisks; in New York from 2014-2017, 84% of frisks targeted Black and Latino people; and in Washington, D.C., over 90% of those frisked or searched were Black.[21] As detailed in Part I.A., the *vast majority* of frisks do not turn up contraband, vanishingly few turn up guns, and "hit rates" are lower for people of color. This Court's concern with the harms attendant to discriminatory traffic stops has equal applicability to pedestrian stops, which also cause pain, fear, and humiliation; negative health and educational outcomes;[22] and have led to Black people being killed. See *Utah v. Strieff*, 579 U.S. 232, 252-254 (2016) (Sotomayor, J., dissenting), cited in *Long*, 485 Mass. at 718.

Next, consider the evidence of disparate enforcement of minor pedestrian violations against Black people,[23] and the susceptibility of reasonable suspicion

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[20] Ayres & Borowsky, *supra* note 15, at 5-6, 9-10.

[21] Philadelphia Report, *supra* note 3, at 16; NYCLU, Stop-and-Frisk in the de Blasio Era 17 (2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf. DC Report, *supra* note 3, at 6.

[22] Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PNAS 8261 (2019); Geller, *Youth–Police Contact: Burdens and Inequities in an Adverse Childhood Experience, 2014–2017*, 111 Am. J. Pub. Health 1300 (2021); Legewie & Fagan, *Aggressive Policing and the Educational Performance of Minority Youth*, 84 Am. Sociological Rev. 220 (2019).

[23] Ehrenfreund, *The risks of walking while black in Ferguson*, Wash. Post (Mar. 4, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/04/95-percent-

factors and low-level criminal offenses to discriminatory enforcement. Nearly anyone can be stopped by police—especially in communities of color—based on minor violations or common human behaviors spun into a web of suspicion. See *Kelly*, 481 F. Supp. 3d at 876 ("[T]he Court rejects the Government's position that Kelly was 'jaywalking' under state and local law, a ubiquitous rationale used to detain and search African Americans"). This is especially true for Black people: officers "use[] neighborhood conditions and prior knowledge of problem areas to justify detaining otherwise law-abiding Black citizens" and "tend to misinterpret Blacks' nonverbal communications as suspicious, a basis for conducting discretionary stops of Blacks."[24] Black people are disproportionately likely to be arrested for low-level offenses involving significant officer discretion, like disorderly conduct, disturbing the peace, obstruction, trespass, and resisting arrest.[25]

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of-people-arrested-for-jaywalking-in-ferguson-were-black; Sanders, Rabinowitz & Conarck, *Walking While Black: Jacksonville's enforcement of pedestrian violations raises concerns that it's another example of racial profiling.*, ProPublica & Fla. Times-Union (Nov. 16, 2017), https://features.propublica.org/walking-while-black/jacksonville-pedestrian-violations-racial-profiling; Bergal, *Racial Justice, Pedestrian Safety Fuel Jaywalking Debate*, Pew Trusts (July 14, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/14/racial-justice-pedestrian-safety-fuel-jaywalking-debate.

[24] Gaston & Brunson, *Reasonable Suspicion in the Eye of the Beholder: Routine Policing in Racially Different Disadvantaged Neighborhoods*, 56 Urb. Aff. Rev. 188, 213 (2020).

[25] See, e.g., ACLU of Mass., Facts Over Fear 18 (2019), https://www.aclum.org/sites/default/files/20180319_dtp-final.pdf (finding Black people charged with disorderly conduct, trespass, and resisting arrest at three times the rate for White

As Black youth in Chicago have proclaimed, "nothing" they do avoids police suspicion.[26] Yet courts continue to find mundane behaviors *and their opposites* equally probative of suspicion. *United States v. Weaver*, 9 F.4th 129, 167 (2d Cir. 2021) (Pooler, J., dissenting) ("The absurdity is all the more obvious when you consider that officers have cited both looking and not looking at them as a basis for a stop or a search.") (citations omitted). It is a fact of modern policing that pedestrian stops, like vehicle stops, allow for unbridled police discretion and a common point of contact for residents and the police[27]—but the police only deploy these tactics in certain neighborhoods and against certain people. *Washington v. Lambert*, 98 F.3d 1181, 1187 (9th Cir. 1996) ("[T]he burden of aggressive and intrusive police action falls disproportionately on African–American, and sometimes Latino, males.").

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people in Suffolk County); Minneapolis Report, *supra* note 17, at 31 ("MPD officers improperly and excessively cite Black individuals for [disorderly conduct and obstruction]"); Holmes, *Resisting Arrest and Racism: The Crime of Disrespect*, 85 UMKC L. Rev. 625 (2016); Cacho & Melamed, *How Police Abuse the Charge of Resisting Arrest*, Bos. Rev. (June 29, 2020), https://www.bostonreview.net/articles/lisa-cacho-jodi-melamed-resisting-arrest.

[26] Futterman, Hunt & Kalven, *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 125 U. Chi. Legal Forum 125, 146 (2016).

[27] Conroy, *"Show Me Your Papers": Race and Street Encounters*, 19 Nat'l Black L.J. 149, 166 (2005) ("The absence of bright line rules concerning the gray areas of reasonable suspicion allow[s] for abuse of police authority.").

Finally, consider social science research on implicit bias in policing:[28] police (1) require less suspicion to stop and search people of color—even though they are less likely to discover contraband;[29] (2) are more likely to associate Black people with threats and threatening objects—biases that are enhanced for police working in specialized units;[30] (3) use more force against Black people even though White people resist more;[31] (4) use harsher language in encounters with people of color,[32] and (5) are more likely to attribute ambiguous behaviors of people of color to criminality and "identical behaviors of whites to external factors."[33] Implicit biases

[28] Quattlebaum, *Let's Get Real: Behavioral Racism, Implicit Bias, and the Reasonable Police Officer*, 14 Stan. J. C.R. & C.L. 1, 13 (2018).

[29] Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 Ind. L.J. 1143, 1145 (2012).

[30] Correll et al., *Across the thin blue line: police officers and racial bias in the decision to shoot*, 92 J. Personality & Soc. Psychol. 1006 (2007); Correll et al., *The police officer's dilemma: using ethnicity to disambiguate potentially threatening individuals*, 83 J. Personality & Soc. Psychol. 1314 (2002); Sim, Correll & Sadler, *Understanding police and expert performance: when training attenuates (vs. exacerbates) stereotypic bias in the decision to shoot*, 39 Personality & Soc. Psychol. Bull. 291 (2013).

[31] Arthur, *New Data Shows Police Use More Force Against Black Citizens Even Though Whites Resist More*, Slate (May 30, 2019), https://slate.com/news-and-politics/2019/05/chicago-police-department-consent-decree-black-lives-matter-resistance.html.

[32] Voigt et al., *Language from police body camera footage shows racial disparities in officer respect*, 115 PNAS 6521 (2017).

[33] Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 Ariz. St. L. Rev. 267, 268, 272-273 (2012). Godsil & Song Richardson, *Racial Anxiety*, 102 Iowa L. Rev. 2235, 2248 (2017).

in policing are likeliest to take hold in discretionary decisions.[34] "[W]hen police have broad general power to search but are, like all of us, subject to implicit bias, the problem of arbitrary enforcement of search and seizure becomes a systemic problem—not a one-time knockoff." *State v. Warren*, 955 N.W.2d 848, 875 (Iowa 2021) (Appel, J., dissenting).

Given this substantial evidence that pedestrian stops are plagued by disparate enforcement and, by their discretionary nature, invite implicit racial bias, defendants in pedestrian stop cases should be afforded *Long*'s reduced prima facie burden.

C. Because the first two requirements of the defendant's tripartite burden "would be difficult or impossible to prove with circumstantial evidence" in pedestrian stops just like traffic stops, this Court should import Long*'s adjusted standard.*

In *Long*, this Court excused two elements of the defendant's tripartite prima facie burden because (1) they would "virtually always" be satisfied in traffic stops, *Long*, 485 Mass. at 722, (2) they would be "difficult or impossible to prove with circumstantial evidence," *id.*, and (3) data for a statistical claim might be unavailable, *id.* at 734. These reasons apply equally to pedestrian stops. As in traffic stops, only a small percentage of behavior that *could* draw officer attention results in pedestrian stops. Similarly, in stopping one person but not another, an officer

[34] Spencer et al., *Implicit Bias and Policing*, 10 Soc. & Personality Psych. Compass 50, 59 (2016).

"necessarily has made a deliberate choice." *Id.* at 722. Like traffic stops, pedestrian stops "often [constitute] the first and only interaction" between the police officer and the pedestrian and provide "a minimal amount of direct evidence of the officer's motivations for the particular stop." *Id.* at 718. Where evidence from a stop rarely establishes that a broader class of persons violated the law but was not deliberately or consistently targeted, *id.* at 723-724, this Court should import *Long*'s framework into this equally appropriate context to ensure the remedy for an equal protection violation is not "illusory."

Further, despite this Court's repeated encouragements, *id.* at 734; *id.* at 752 n.17 (Budd, J., concurring), the Legislature has not required the collection of law enforcement stop data statewide. A bill introduced last session, S.1549 "An Act Relative to Traffic and Pedestrian Stop Data,"[35] did not pass committee and was sent to study in March.[36] The bill would have required data collection about every vehicle or pedestrian stop, frisk, or search. Similar bills have failed for at least seven years.[37]

While all police departments must submit uniform citation data to the Department of Transportation, no similar mandate exists for pedestrian stops.

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[35] https://malegislature.gov/Bills/192/S1549.html.

[36] https://malegislature.gov/Bills/192/SD1892.

[37] Segal & Rose, *Race, Technology, and Policing*, Bos. Bar Ass'n, Vol. 59, No. 3, July 8, 2015, https://bostonbar.org/journal/race-technology-and-policing (describing then-pending bills on stop data collection).

Without a legislative requirement, most localities in the Commonwealth do not track pedestrian stop data. Thus, in many jurisdictions, statistical claims are likely unavailable to challenge pedestrian stops. *Id.* at 720 (lamenting "inadequate or inaccessible data"). Black residents should not have to wait for better data collection to receive equal protection under the law. An alternative totality of the circumstances option must exist—one that does not create "difficult or impossible" hurdles, *id.* at 722.

D. A totality test enables judges to consider the context of the stop and account for heightened public safety concerns that reduce the likelihood that an officer acted from an improper racial motivation.

"[I]n the broader jurisprudence on selective enforcement, both nationally and in Massachusetts, the evidence necessary to raise a reasonable inference of discrimination need not be statistical." *Long*, 485 Mass. at 721. In *Lora*, this Court held a defendant *could* raise a reasonable inference that a police action was racially motivated through statistics, *Lora*, 451 Mass. at 440, considered in context. *Id.* at 442 ("their usefulness depends on all of the surrounding facts and circumstances"). But neither *Lora* nor *Long* required statistical evidence to "replace previous means of establishing a violation of equal protection," *Long*, 485 Mass. at 721.

The *Long* Court tailored its totality of the circumstances test to traffic stops because (1) that was the context of Edward Long's stop and (2) the factors were borrowed from pretextual traffic stop case law. *Id.* at 746 & n.9 (Budd, J.,

concurring). Accordingly, some of the factors require adjustment in new contexts, but many still yield helpful guideposts for trial judges to evaluate bias in pedestrian stops. This Court might consider the following adapted non-exhaustive list[38] for pedestrian stops:

(1) patterns in enforcement actions by the particular officer;

A defendant might point to an officer's patterns of enforcement before and after the stop at issue. It could be probative, for example, if a significant percentage of stops made by the officer in the preceding days, weeks, or months involved pedestrians of the same race being stopped for minor offenses, stopped without ultimately issuing a citation or making an arrest, disproportionately searched, or repeatedly charged with the same minor offense(s), such as disorderly conduct, disturbing the peace, trespass, or a standalone charge of resisting arrest, while those of other races were not. Such evidence need not be statistically valid to support a reasonable inference of racial profiling.

(2) the sequence of events prior to the stop, including whether the stop was a random stop motivated by officer observation of a defendant's conduct; the stop was conducted in response to a reported crime, a dispatch description, or a shotspotter alert; the stop was conducted in connection with an investigation

[38] For other ideas, see Keene, *Raising Arguments About the Potential Influence of Implicit Racial Bias in Police Stops*, Crim. Just., Summer 2017, Vol. 32, No. 2, at 35, 36; Thompson, *supra* note 4, at 1007.

or a specific, reliable tip about a named individual;[39] or the stop occurred after the officer personally witnessed a serious offense committed in front of them;

Establishing a "discretion continuum" makes clear that certain police actions allow for more discretion and therefore create more opportunity for an officer's decisions to be guided by bias, explicit or implicit. Other actions involve much less discretion, limiting opportunities for officer selectivity. Outlining this continuum—from purely discretionary stops based on a person's behavior in the absence of a reported crime to stops supported by probable cause to a felony offense committed in the officer's view—directs judges to consider how much discretion was involved in the decision to stop and the opportunity for bias to affect the officer's calculus. Further, how long officers observed a person before the stop, when the officer noted the person's race, and whether the circumstances allowed the officer to note race at all could be relevant.

(3) the manner of the stop, including the officer's use of force if any, the officer's statements and tone in the encounter, and the officer's professed subjective motivations for making the stop;

A judge might examine whether the officer's conduct during the stop was consistent with, and limited to, that necessary to effectuate the stop's initial purpose, whether the officer quickly escalated the encounter, how the officer characterized the

[39] "'[R]acial or other profiling' shall not include the use of such characteristics, in combination with other factors, to apprehend a specific suspect based on a description that is individualized, timely and reliable." G.L. c. 90, § 63(h).

defendant's demeanor,[40] whether the officer used racial slurs or language indicative of prejudice, whether the defendant expressed feeling targeted based on their race during the encounter,[41] and whether the officer used more force than necessary to achieve the stop's purpose.

(4) the safety interests in making the stop;

Where the stop implicates significant public safety concerns, those concerns would weigh against—but not entirely preclude—drawing an inference of discrimination. Such surrounding circumstances might include, for example, a reported kidnapping, reliable information about an armed shooter, etc.

(5) the police department's policies and procedures regarding pedestrian stops, and

If an officer's actions in making the stop deviated from the policies and procedures of their department, the deviation might support an inference that the stop involved racial profiling.

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[40] Fagan & Geller, *Profiling and Consent: Stops, Searches, and Seizures After* Soto, 27 Va. J. Soc. Pol'y & L. 16, 32-33 (2020) ("the subjective interpretation of demeanor as 'suspicious' or masking illegality or signaling culpability may itself be subject to racialized interpretations"); Farrell, *Use of force during stop and frisks: Examining the role of suspect demeanor and race*, 82 J. Crim. Just. 102001 (2022).

[41] See, e.g., *Warren*, 955 N.W.2d at 871 (Mansfield, J., concurring specially) ("An officer's suspicion of illicit activity is enough for a stop, but a defendant's suspicion of racial discrimination is not enough to invalidate a stop"); Najdowski et al., *Stereotype threat and racial differences in citizens' experiences of police encounters*, 39 L. & Hum. Behavior 463 (2015).

(6) the officer's history of prejudiced statements; prior investigations into, complaints of, or findings of biased conduct; membership in a bigoted organization; or documented connection to discriminatory movements or gatherings.

These factors are not exhaustive; any relevant facts may be raised for consideration.

CONCLUSION

When officers have minimal information and high adrenaline, implicit racial bias may fill the gaps in a borderline reasonable suspicion assessment. Given the pronounced empirical evidence suggesting racial profiling here, contextualized by the manner of the stop and search, the defendant should prevail on his equal protection claim. Further, this Court should affirm that pedestrian stops, like traffic stops, require a reduced burden and allow for a totality analysis.

Respectfully submitted,

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December 22, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to those specified in Rule 16(k), 17, and 20. It complies with the type-volume limitation of Rule 20(2)(C) because it contains 7,498 non-excluded words. It complies with the type-style requirements of Rule 20 because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

Pursuant to Massachusetts Appellate Rule of Procedure 13(2), I certify that on December 22, 2022, I have made service of this brief upon the attorneys of record for each party via the Electronic Filing System.

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