SJC-13547

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS
APPELLANT

V.

RICHARD DILWORTH
APPELLEE

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

BRIEF OF AMICI CURIAE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CRIMINAL JUSTICE INSTITUTE AT HARVARD LAW SCHOOL IN SUPPORT OF APPELLEE AND AFFIRMANCE

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April 23, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21(b)(i), the amici curiae are non-profit corporations organized under the laws of the Commonwealth of Massachusetts. There are no parent corporations or publicly held corporations that own 10% or more of stock.

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PREPARATION OF AMICI CURIAE 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.

STATEMENTS OF INTEREST OF AMICI CURIAE

The **Massachusetts Association of Criminal Defense Lawyers ("MACDL")** is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy

to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions important to the administration of justice.

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 willful obstruction of defendants' access to discovery of potentially racially motivated law enforcement methods is one such issue.

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

SUMMARY OF ARGUMENT

Discovery is critical to ensuring a fair trial. *Infra* at 15-17. Obtaining it generally requires a showing that the requested information is material and relevant to the defense. Trial judges have broad discretion to determine materiality and relevance. *Infra* at 14-15. This Court should reject the Commonwealth's invitations, based on a misinterpretation of New Jersey precedents, to revise its discovery rules for defendants seeking to develop equal protection claims. *Infra* at 17-23.

As in all discovery matters, a defendant must merely establish a minimal threshold showing to obtain the discovery needed to support a potential selective enforcement defense. Building on this Court's prior decisions and the initial discovery he received, Mr. Dilworth's affidavit supplied a reasonable basis to suspect that he was targeted for social media surveillance based on his race. It also supplied a reasonable basis for concluding that the information sought—account names and cartoon images created by law enforcement to monitor him—is relevant and material to raising a reasonable inference of disparate treatment. The motion judge's order was therefore well within his considerable discretion. *Infra* at 23-29.

The Commonwealth failed to justify application of the surveillance-location or informant privileges to bar that discovery. These privileges exist to protect *real* people from harm. *Infra* at 29-32. Yet disclosing false accounts invented by law enforcement, represented by re-creatable cartoon images and usernames, raises no public safety concerns. It exposes not a single person to potential retaliation or violence, nor does it threaten to deter cooperation by any member of the public in the future. New accounts can also be created at any time, so the source of the police's surveillance is endlessly renewable. *Infra* at 32-34.

And even if either privilege applied, the defendant's trial rights and the public interest would still favor disclosure. The Commonwealth presented no evidence that the accounts from 2017-2018 are still in use, and its late-supplied, unsigned, and undated affidavit in support of reconsideration fails to show that disclosure would imperil a necessary, nondiscriminatory investigative scheme. *Infra* at 34-38.

Finally, dismissal was appropriate here and not an abuse of discretion. The Commonwealth repeatedly and blatantly disobeyed a court order. When the trial court tried to explore remedies short of dismissal, the Commonwealth effectively invited dismissal so that it could appeal and

press its objections to the merits of the trial court's discovery rulings and the merits of any potential selective enforcement claim—objections that this Court and the single justice already rebuffed or that are still premature. The motion judge thus responded appropriately to the Commonwealth's gamesmanship in dismissing the indictments against Mr. Dilworth. *Infra* at 38-43.

ARGUMENT

I. To obtain discovery about police investigation tactics on social media, a defendant need only make a minimal threshold showing of materiality and relevance to a selective enforcement claim.

Judges have broad discretion in discovery matters. This Court will only overturn a trial court judge's decision in discovery matters, including discovery about selective enforcement or selective prosecution, when the judge has abused that discretion. *Commonwealth* v. *Lowery*, 487 Mass. 851, 869-870 (2021). See *Commonwealth* v. *Washington W.*, 457 Mass. 140, 144 (2010) (holding that judge did not abuse his discretion in granting discovery of statistical data relevant to potential selective prosecution claim based on sexual orientation). A discretionary decision constitutes an abuse of discretion only when "the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the

decision falls outside the range of reasonable alternatives." *Vazquez Diaz* v. *Commonwealth*, 487 Mass. 336, 345 (2021), quoting *L.L.* v. *Commonwealth*, 470 Mass. 169, 185 n.27 (2014).

A. A defendant's right to reasonable discovery is a cornerstone of a just system.

The right to discovery is fundamentally tied to the constitutional protections of ensuring a fair trial. The history of this right traces back over centuries of criminal-procedure developments, many of which responded to the perceived injustice of criminal proceedings in England. Those proceedings historically were largely secretive affairs, with limited disclosure of evidence to the accused.[2] From those inauspicious beginnings, the right to discovery in criminal cases evolved through case law, statutory reforms, and international influences. It now stands as a cornerstone of fair and transparent criminal proceedings, ensuring the just exercise of state power by enabling defendants to effectively defend themselves against the accusations brought against them.

Massachusetts has carried on this history through a longstanding policy of "liberal discovery." *Commonwealth* v. *Durham*, 446 Mass. 212,

[2] McMullan, *Crime, Law and Order in Early Modern England*, 27 British J. Criminology 252 (1987).

221-222 (2006). Discovery is rooted in the right to present a defense guaranteed by art. 12 of the Mass. Decl. of Rights. As this Court has long recognized, "a right to present [one's] defence" becomes "an idle gesture" when "the means of effectively exercising that right" are denied. *Commonwealth* v. *Balliro*, 349 Mass. 505, 517–518 (1965). See also *Commonwealth* v. *Stockhammer*, 409 Mass. 867 (1991) (holding that denying defendant access to complainant's privileged records violates his rights under art. 12); *Commonwealth* v. *Two Juveniles*, 397 Mass. 261, 266 (1986) ("a criminal defendant [has a] constitutional right to present evidence shown to be relevant and likely to be significant").

Regardless of whether pretrial discovery is sought from the opposing party or from a third party, the party seeking it must make a threshold showing that the evidence sought is material and relevant. Mass. R. Crim. P. 14(a)(2); Mass. R. Crim. P. 17(a)(2). See *Commonwealth* v. *Oliveira*, 438 Mass. 325, 339 n.15 (2002). That standard is no more demanding for criminal defendants seeking discovery to establish a claim of discriminatory law enforcement. *Commonwealth* v. *Cuffee*, 492 Mass. 25, 30 (2023); *Commonwealth* v. *Dilworth*, 485 Mass. 1001, 1003 (2020) [*Dilworth I*]. See *Commonwealth* v. *Long*, 485 Mass. 711, 725 (2020)

(when raising a claim of discriminatory law enforcement, "[a] defendant has a right to reasonable discovery of evidence concerning the totality of the circumstances"). In other words, even when the discovery sought pertains to a claim of discriminatory law enforcement, the touchstones are relevance and materiality.

B. This Court should not disturb its longstanding precedent that the materiality and relevance standard applies no differently to equal protection claims than it does to any other criminal defense.

"It is important to bear in mind that, at the discovery stage, a defendant is not required to establish a prima facie case of discrimination." *Cuffee*, 492 Mass. at 30, quoting *Commonwealth* v. *Bernardo B.*, 453 Mass. 158, 169 (2009) ("To adopt the higher burden . . . would place criminal defendants in the untenable position of having to produce evidence of selective enforcement in order to obtain evidence of selective enforcement."). To obtain discovery, a defendant must clear only a "minimal threshold." *Cuffee*, 492 Mass. at 26. See also *Commonwealth* v. *Betances*, 451 Mass. 457, 462 n.6 (2008) (describing the kinds of preliminary information a defendant could present in an affidavit to establish the relevance of the information sought in discovery to support a selective enforcement claim).

Relying on what it claims is the approach taken by New Jersey courts, however, the Commonwealth advocates for an onerous, merits-like standard on Defendants at the discovery stage for the investigation of potential equal protection claims. See CW Br. at 40-42; CW Reply at 10-20. The Commonwealth's approach is wrong.

To begin, the Commonwealth mischaracterizes New Jersey's approach, even as it ignores *stare decisis* and seeks to abrogate at least fifteen years of case law about equal protection discovery. The main case it relies on, *State* v. *Segars*, 799 A.2d 541 (N.J. 2002), announced a *merits* standard and burden-shifting framework for selective enforcement claims, *not* a discovery standard.[3] The other New Jersey case that the Commonwealth relies on is *also* a merits case, not a case about discovery, one that held that the State failed to rebut an inference of racial profiling

[3] In fact, this Court approvingly cited *Segars* in *Lora*—another case that, like *Segars*, also dealt with the merits, not discovery—to support its conclusion that suppression is a proper remedy for evidence obtained in violation of equal protection. *Commonwealth* v. *Lora*, 451 Mass. 425, 439 (2008), citing *Segars*, 799 A.2d at 549. That citation confirms that the burden-shifting framework *Segars* announced is a *merits* standard, entirely inapplicable to the dispute before this Court: whether Judge Krupp abused his discretion in finding that the information the defendant requested was material and relevant to a potential equal protection defense.

in conducting a pre-seizure threshold field inquiry. See *State v. Maryland*, 771 A.2d 1220, 1229 (N.J. 2001) ("Because the totality of the record suggests that the hunch itself was, in our view, at least in part based on racial stereotyping, it was insufficient to rebut the inference of selective law enforcement that tainted the police conduct.").

In fact, this Court has *already* considered New Jersey's standards—for both obtaining discovery about and proving the merits of a selective-enforcement claim in criminal cases—when it developed its own framework under Massachusetts constitutional law. For example, just last year in *Cuffee*, this Court surveyed a defendant's discovery burden in selective enforcement actions across jurisdictions. New Jersey was one of those jurisdictions, and as this Court noted, its standard for equal protection discovery is a comparably minimal threshold, requiring just "a colorable basis" for a belief that a defendant was targeted by discriminatory law enforcement:

> In other jurisdictions, a defendant's discovery burden in a selective enforcement action has been described variously as requiring "'some evidence' of discriminat[ion]," *United States* v. *Washington*, 869 F.3d 193, 220-221 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 713 (2018); "a colorable basis" for a belief that discriminatory law enforcement occurred, *State* v. *Halsey*, 340 N.J. Super. 492, 501 (App. Div.

> 2001), quoting *State* v. *Kennedy*, 247 N.J. Super. 21, 25 (App. Div. 1991); or "something more than mere speculation," *United States* v. *Seller*s, 906 F.3d 848, 855 (9th Cir. 2018).

Cuffee, 492 Mass. at 30 n.5.

In essence, the Commonwealth asks this Court to abandon its recent decisions in *Commonwealth v. Long*, 485 Mass. 711 (2020), and *Commonwealth v. Robinson-Van Rader*, 492 Mass. 1 (2023)—which established clear distinctions between the burden-shifting framework at the merits stage of a selective enforcement claim challenging a police investigatory method and the minimal threshold required for discovery, see *Cuffee*, 492 Mass. at 26—without offering any substantial justification for doing so under principles of *stare decisis*. The Commonwealth asks this Court, for example, to allow it to defeat a discovery request simply by articulating a race-neutral reason for the challenged investigative technique, unless the defendant can show *before discovery* that the challenged investigation "was motivated *solely* by the defendant's membership in a protected class." CW Reply Br. 18-19 (emphasis added).[4] But see

[4] That these calls come mainly in the Commonwealth's reply brief is an independent reason to reject them. See *Commonwealth* v. *Stewart*, 460 Mass. 817, 831 (2011).

Long, 485 Mass. at 426 (even at the *merits* stage, "[i]f the Commonwealth does not rebut the reasonable inference that the stop was *motivated at least in part by race*, the defendant would have established that the stop violated the equal protection principles of arts. 1 and 10, and therefore was illegal") (emphasis added). *Long*, *Robinson-Van Rader*, and *Cuffee* contemplated no such roadblocks. See, e.g., *Cuffee*, 492 Mass. at 30 ("[A]t the discovery stage, a defendant is not required to establish a prima facie case of discrimination."); *Long*, 485 Mass. at 725 (requiring only "a threshold showing of relevance" at discovery stage).

Just as the discovery phase is not the proper procedural moment for requiring the defense to conclusively establish selective enforcement, it is also not the appropriate time for the Commonwealth to claim either race-neutral reasons for apparent racial disparities in its enforcement and investigatory techniques or compelling justifications for them. Under the applicable burden-shifting framework, the Commonwealth must "prove that the stop was not racially motivated" only after a defendant first raises a reasonable inference of racial profiling at the merits stage; only then must the Commonwealth "grapple with all of the reasonable inferences and all of the evidence that a defendant presented." *Long*, 485

Mass. at 726. See *Robinson-Van Rader*, 492 Mass. at 24 ("judge was required to determine whether the Commonwealth had rebutted the reasonable inference that the stop or investigation was not 'motivated at least in part by race' or another impermissible classification").

Here, all the defense is seeking is information about a government scheme that, based on discovery already turned over, has glaring racial disparities in its application, so that it can determine whether those disparities are due to intentional disparate *treatment*—the ultimate burden the defendant must meet to raise an inference of racial profiling in his case. By trying to justify its investigative techniques with a purported race-neutral reason *at the discovery phase*, the Commonwealth is asking the Court to inappropriately collapse the discovery and merits inquiries.

Accepting the Commonwealth's invitation here would seriously undermine this Court's jurisprudence, which has become a polestar for jurisdictions across the country wrestling with how to address the problem of racial profiling under both State constitutional law and the Federal Equal Protection Clause. See, e.g., *United States* v. *Weaver*, 9 F.4th 129, 160 (2d Cir. 2021) (Lohier, J., concurring in the result); *id.* at 186 (Chin, J., dissenting); *State* v. *Warren*, 955 N.W.2d 848, 871 (Iowa 2021)

(Mansfield, J., specially concurring); *Ballew* v. *City of Pasadena*, 642 F. Supp. 3d 1146, 1163-1171 (C.D. Cal. 2022); *People* v. *Sim*s, 2022 IL App (2d) 200391, ¶¶ 98-109, 207 N.E.3d 238, 264, *reh'g denied* (May 4, 2022). Rolling back this Court's equal protection jurisprudence now would signal a retreat from this Court's commitment to ensuring racial equity in our courts and in our law, which would be felt across the Nation.

C. Judge Krupp's discovery decision was not an abuse of discretion and is well supported by this Court's precedents.

In *Dilworth I*, this Court declined to disturb a single justice's decision to decline interlocutory review of an ordinary, discretionary discovery order. The motion judge (Ullmann, J.), had simply acted "to make a discretionary discovery ruling that enabled Dilworth to gather information that would substantiate his [selective enforcement] claim (or not)." *Dilworth I*, 485 Mass. at 1003. As this Court held, that "ruling did not 'foreclose[ ] the Commonwealth's ability to prosecute a serious crime' or, for that matter, have any detrimental effect on the prosecution at all." *Id.*, citing *Commonwealth* v. *Fontanez*, 482 Mass. 22, 26 (2019). Building on *Dilworth I*, the central question here is highly fact bound: whether the motion judge abused his discretion in finding that the discovery materials sought are relevant and material to Mr. Dilworth's defense. That is

why motions for discovery require an affidavit establishing relevance. *Betances*, 451 Mass. at 462 & n.6. Importantly, in *Cuffee*, this Court cited *Dilworth I* as an example of "an initial showing of selective enforcement *sufficient* to order discretionary discovery," confirming that Judge Ullmann did *not* abuse his discretion in ordering the initial equal protection discovery that Mr. Dilworth requested. *Cuffee*, 492 Mass. at 31 (emphasis added), citing *Dilworth I*, 485 Mass. at 1001, 1002-1003.

Mr. Dilworth's subsequent motion and affidavit, the subject of this appeal, built on that existing showing and the order this Court left undisturbed in *Dilworth I*. Once again, Mr. Dilworth requested relevant discovery to explore whether Boston Police officers targeted him (a young Black man) for investigation on Snapchat, based at least in part on his race. Using the showing he had already made in *Dilworth I* and the significant evidence of disparate impact in BPD's Snapchat investigations that showing had turned up,[5] Mr. Dilworth requested more discovery that could more directly evince discriminatory *treatment* by law

[5] See Def. Add. 75-76 ("[O]f roughly 125 persons being monitored on Snapchat by the BPD officer who monitored Dilworth, more than 110 were Black, at least seven were Hispanic, and only one was identified as white non-Hispanic.").

enforcement. In particular, he requested the cartoon images (bitmojis) officers created for their false accounts, as well as the account names they used.

Each of those categories of information has the strong potential to yield separate, complementary evidence that may bolster a claim of discriminatory targeting. The bitmojis would show what choices the police made about which skin colors, skin tones, hair styles, and other phenotypic attributes to use, which in turn might well say something about who they meant to target for monitoring. And the account names might also be relevant, if for example they used vernacular or slang commonly associated with those who law enforcement intended to monitor. In other words, discovery of the bitmojis and the account names has the strong potential to assist in showing not just disparate impact but disparate *treatment*—the intentional choices law enforcement officers made when carrying out their investigatory method.

The judge below (Krupp, J.) reviewed the defendant's submission and determined that the requested materials were relevant and material to a potential claim of unconstitutional selective enforcement:

> "In this case, the defense … has introduced considerable anecdotal information to support the

> reasonableness of its belief, that the police targeted predominantly young men of color to monitor their Snapchat accounts for illegal activity. Discovery of the monitoring police officer's fictional Snapchat user identities is reasonably expected to offer relevant, material, and persuasive graphic evidence of the racial and ethnic demographic targeted by the Boston police for secret monitoring."

Def. Add. 70. That determination was well within his broad discretion to determine relevance and materiality. "Determinations of the relevance, probative value, and prejudice of such evidence are left to the sound discretion of the judge." *Lowery*, 487 Mass. at 867 (quotations omitted).

Judge Krupp's order was equally faithful to this Court's selective enforcement jurisprudence. At its heart, a defendant's claim of discriminatory law enforcement is a claim that his right to equal protection has been violated. *Long*, 485 Mass. at 717 ("The equal protection principles of the Fourteenth Amendment and arts. 1 and 10 . . . prohibit discriminatory application of impartial laws."). As this Court recently reaffirmed, "[s]elective enforcement refers to law enforcement practices that unjustifiably target an individual for investigation based on the individual's race or other protected class." *Robinson-Van Rader*, 492 Mass. at 16. The right to equal protection applies to all phases of the legal process, from police

conduct in the field to the prosecution of a criminal case in court. See, e.g., *id.* at 23 ("Because the equal protection clause is intended to prevent discriminatory governmental conduct, the particular 'stage' of an investigation is not relevant."); *Long*, 485 Mass. at 758 (Cypher, J., concurring) ("Much like a decision to selectively perform a traffic stop based on race, the querying of [license] plates based on race is a potential violation of the principles of equal protection.").

This Court has already described how defendants may assert their equal protection rights in diverse selective enforcement contexts: defendants are entitled to reasonable discovery to establish such a defense. It began with traffic stops, making clear that "police may not target drivers for traffic stops, citations, and further investigation because of their race." *Long*, 485 Mass. at 718. In *Robinson-Van Rader*, 492 Mass. at 18, this Court then clarified 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*." *Id.* at 18 (emphasis added).

In this case the challenged investigatory practice is online, but the principle is no different. Police officers may not target people for

investigation, online or off, based even in part on their race or membership in any other protected class. See generally Brief of Amici Curiae Michael Bennett, Zahra Stardust, American Civil Liberties Union of Massachusetts, and the Innocence Project at 11-20. See also, e.g., *United States* v. *Avery*, 137 F.3d 343, 354 (6th Cir. 1997) ("A person cannot become the target of a police investigation solely on the basis of skin color. Such selective law enforcement is forbidden."); *Marshall* v. *Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003) (proof of the racially selective nature of the stop may be offered in the form of direct evidence of the officer's behaviors, statements, testimony, and his record of other racially selective stops and arrests).

But even though that constitutional principle is "exceedingly clear," this Court has recognized that it is also "profound[ly]" difficult to prove, turning as it does on subjective intent. *Long*, 485 Mass. at 718. Here, as the defendant showed and as Judge Krupp recognized, the requested discovery is reasonably necessary for developing his claim of having been racially profiled. The bitmojis and usernames sought are likely to supply particular insight into the potential disparate treatment of Black users like Mr. Dilworth. The police's choices about the names and visual

appearance of their false accounts may well shed light on whom they intended to target, including the intended race of those individuals, especially given the prevalence of segregation of social networks online.[6] Allowing discovery was thus well within the judge's sound discretion.

II. The requested information was not protected under this Court's precedents about confidential police investigatory information such as informants and surveillance locations.

Just as a matter of logic, when the legitimacy of an investigatory practice is what is being litigated, a privilege cannot be invoked just by claiming the practice is a "legitimate law enforcement tactic," since that would make the claim of legitimacy circular. Instead, the government always has the burden, at least initially, to establish that the privilege it seeks to invoke applies. See *Commonwealth* v. *Bonnett*, 472 Mass. 827, 846 (2015). Here, the Commonwealth asserted two privileges: the informer's privilege and the surveillance-location privilege. Judge Krupp correctly rejected both.

The purpose of the "informer's privilege" is to protect the personal safety of informants. It is designed to allow sources of law-enforcement

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[6] See, e.g., Hofstra, Corten, Van Tubergen, & Ellison, *Sources of Segregation in Social Networks: A Novel Approach Using Facebook*, 82 Am. Sociological Rev. 625 (2017).

information—people—to remain anonymous so that they are protected from harm and continue the flow of information to law enforcement. *Commonwealth* v. *Barry*, 481 Mass. 388, 410 (2019); *Bonnett*, 472 Mass. at 847. It thus rests on concerns that fear of retaliation will prevent people from furnishing information about criminal activity unless they can remain anonymous. See *Commonwealth* v. *Madigan*, 449 Mass. 702, 711 (2007). In turn, "[t]he scope of the informant privilege is limited by its underlying purpose: 'where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged.'" *Commonwealth* v. *Whitfield*, 492 Mass. 61, 68 (2023), quoting *Roviaro* v. *United States*, 353 U.S. 53, 60 (1957). The informant privilege "extends to information that would tend to reveal the identity of the informant," *Whitfield*, 492 Mass. at 68, quoting *United States* v. *Tzannos*, 460 F.3d 128, 140 (1st Cir. 2006), such as dates, times, and locations of meetings between the defendant and an informant that might allow the defendant to discern their true identity. *Whitfield*, 492 Mass. at 68, citing *Commonwealth* v. *John*, 36 Mass. App. Ct. 702, 706 (1994); *Commonwealth* v. *Douzanis*, 384 Mass. 434, 436 n.4 (1981). The informant privilege is not transferable to the type of electronic surveillance now

at issue. Here, there is no human informant—no member of the public has risked their physical safety to disclose what they know about criminal activity. Instead, law enforcement officers have created false accounts represented by cartoons to spy on community members in the hope of turning up criminal activity—and Mr. Dilworth wants to investigate whether they have selected their targets in a racially discriminatory manner. Contrast *Commonwealth* v. *Gandia*, 492 Mass. 1004, 1007 (2023) ("[T]he Commonwealth properly asserted the informant privilege, where it raised sufficient concern for the safety of the informant should his or her identity be disclosed and it asserted that revealing the identity of the informant would have a 'chilling effect' on such informants in other cases making it 'unlikely that they would continue to participate in investigations.'").

Disclosure of bitmojis or usernames poses no threat of any kind to the safety of informants or even officers, because they are not genuine identities traceable to the real humans running the false accounts.[7] Even

[7] If anything, these accounts are more like "phantom" informants than real ones. See also Fitzgerald, Informants, Cooperating Witnesses, and Undercover Investigations: A Practical Guide to Law, Policy, and Procedure163-165 (2d ed. 2015). According to a former DEA special agent,

if their status as police officers were exposed, those individuals' names and specific identities would still remain unknown to the connected accounts even if the requested material is turned over. Nor is there any risk of chilling public participation with law enforcement, since the accounts are all law enforcement creations. The bitmojis in particular are just fictional cartoon characters that could be duplicated across multiple accounts and thus lack any uniquely identifying information. Disclosing them would not risk exposing any person to risks of threats of harm. If anything, the Commonwealth's argument devalues the true vulnerability of actual, human informants.[8]

The surveillance location privilege is similarly inapplicable. The surveillance location privilege protects against the unnecessary disclosure of physical location information that would prevent the continued

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"[t]he unfortunate truth is that some police officers . . . 'invent' their informants." *Id.*

[8] Kohut, Federal lawsuit brought by mother of slain Lackawanna County police informant settles for nearly $2 million: The civil case stemmed from the 2018 killing of an informant who worked against a member of the Bloods, WNEP (Jan. 31, 2024), https://www.wnep.com/article/news/local/lackawanna-county/federal-lawsuit-lackawanna-county-confidential-informant-nina-gatto-murder/523-6a833d31-d7c7-4557-90e0-cc46eba3b6c5.

effective use of that location for surveillance purposes. *Commonwealth* v. *Hernandez*, 421 Mass. 272, 274-276 (1995); *Commonwealth* v. *Grace*, 43 Mass. App. Ct. 905, 906 (1997).

Here, the discovery order disturbs no physical location associated with surveillance. When a physical location is compromised, it may no longer be usable; the nature of the surveillance available to law enforcement could be fundamentally changed because they may need to find a new location, which may or may not be suitable. This does not apply to the bitmojis or user accounts at issue in this case. The bitmojis carry no risk of disclosing a surveillance location because they are cartoons, created by computer codes, and applicable to umpteen unique accounts. And even the user accounts themselves are replicable, so the risk of disturbing a uniquely appropriate surveillance location is inapt. As the motion judge reasoned, these social media accounts are "infinitely renewable resources." Def. Add. at 70. Police officers can simply create new ones. See *Commonwealth* v. *Rios*, 412 Mass. 208, 213 n.7 (1992) (an "argument for confidentiality seems particularly weak in this case in light of evidence about the location disclosed in open court…One need not have had a course in advanced trigonometry to identify the general location of the

surveillance site."). Here, anyone with a smartphone could replenish the investigative stock after clicking through some basic software functions.

Even if either the informant or surveillance location privilege applied, moreover, they are not absolute. A privilege must yield when it "interferes with a fair defence," *Commonwealth* v. *Johnson*, 365 Mass. 534, 544 (1974), such as when the information sought is essential, relevant, or helpful to the defense. *Barry*, 481 Mass. at 411 (characterizing the analysis as a "balancing test"). See *Commonwealth* v. *Dias*, 451 Mass. 463, 468-469 (2008) (informant's privilege); *Grace*, 43 Mass. App. Ct. at 906 (surveillance location privilege).

Both the defendant's rights and the public interest here favor disclosure of the requested discovery. To begin, the government offers no real evidence that producing this discovery will imperil gang prosecutions or lead to violence. Based on the discovery already produced after *Dilworth I*, the police do not even know who nearly one in five of the people they are monitoring are, or how they ended up monitoring them. C.A.157. Given that, the Commonwealth's assertion that this investigatory scheme is specifically targeted at those engaged in gang or firearm violence beggars belief.

Field research has also shown that law enforcement often misunderstands how young people involved in gangs use social media, and that "[c]riminal justice professionals routinely overstate the violent effects of social media challenges, which further exacerbates criminalization, racial stereotyping, and social inequality."[9] Thus, it is not surprising that this purported gang-enforcement strategy seems to exhibit preliminary evidence of a racially disparate impact and little evidence of success. Indeed, a 2007 report from the Justice Policy Institute, which conducted a meta-analysis of then-existing social science research, found little evidence of success from *most* common gang-enforcement strategies across the country, with limited replicability for the few focused deterrence strategies that have shown some success in reducing urban violence in isolated cities.[10] Just as the Boston Regional Intelligence Center has

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[9] Stuart, *Code of the Tweet: Urban Gang Violence in the Social Media Age*, 67 Soc. Problems 191 (2020).

[10] J. Greene & K. Pranis, Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies, Justice Policy Institute (2007), https://justicepolicy.org/wp-content/uploads/2022/02/07-07_rep_gangwars_gc-ps-ac-jj.pdf. See also, e.g., J. Trujillo & A. Vitale, Gang Takedowns in the de Blasio Era: The Dangers of 'Precision Policing', Brooklyn College Policing and Social Justice Project (2019), https://static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+P

failed to establish that surveillance methods like the gang database have ever directly contributed to preventing violence,[11] the Commonwealth here has failed to demonstrate that this surveillance scheme (1) has thwarted violence or (2) is indispensable as a legitimate (nondiscriminatory) police investigatory method.

Detective Ball's unsigned, undated affidavit supporting reconsideration, filed five months after Judge Krupp's discovery order, also changes nothing. C.A.200; see also Def. Add. 79. Even overlooking the procedural problems Judge Krupp noted, see Def. Add. 72, which amply supported denying reconsideration, the Ball affidavit made no claim that any of the harm it detailed stemmed from, or would occur after, the court-ordered disclosures at issue here. As Judge Ullmann explained in his dismissal order, "the affidavit and non-compliance notices do not include a single example of particular circumstances suggesting that disclosure of the

olicing+Report+-+FINAL%29.pdf; Wong, Gravel, Bouchard, Morselli, & Descormiers, Effectiveness of street gang control strategies: A systematic review and meta-analysis of evaluation studies, Ottawa, ON: Research and National Coordination Organized Crime Division (2012).

[11] Mullings, *Council denies BRIC surveillance grant*, The Baystate Banner (July 8, 2021), https://www.baystatebanner.com/2021/07/08/council-denies-bric-surveillance-grant.

icons, bitmojis and user names used by BPD between August 1, 2017 and July 31, 2018 would imperil the safety of confidential informants and/or undercover officers or impede ongoing investigations." Def. Add. 79. Nor did the Ball affidavit claim that any of the accounts at issue—now from six or seven years ago—were even still in use. As such, the affidavit does not alter the balancing or reasoning regarding the applicability of the Commonwealth's claimed privileges.

Racial profiling in social-media surveillance is a serious societal concern. The Brennan Center notes that "[u]sers of color benefit especially from social media's wide-ranging applications.... [O]nline platforms can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[12] This "modern public square," *Packingham* v. *North Carolina*, 582 U.S. 98, 107 (2017), must be protected just as much as the traditional public square has been. Ensuring that police cannot selectively target Black users helps assure that the

[12] Levinson-Waldman, *Principles for Social Medica Use by Law Enforcement*, Brennan Center for Justice (Feb. 7, 2024), https://www.brennancenter.org/our-work/research-reports/principles-social-media-use-law-enforcement.

public square remains equally accessible to all.[13] Already researchers have found that as "social media monitoring is increasingly used for law enforcement purposes, racial biases in surveillance may contribute to existing racial disparities in law enforcement practices."[14]

The consequence of erroneously interposing the privileges the Commonwealth invokes here would be to cloak racially targeted surveillance—concealing it from review or rebuke. The government should not be able to so easily avoid having to disclose specifics about its investigative methods' impacts on the communities it claims to serve.

III. Dismissing the indictments against the defendant as a sanction for the Commonwealth's flagrant obstruction of a lawful discovery order was not an abuse of discretion.

"Where a party fails to comply with a discovery order, a judge may impose sanctions under Mass. R. Crim. P. 14(c)(1), as appearing in 442 Mass. 1518 (2004)." *Commonwealth* v. *Washington W.*, 462 Mass. 204,

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[13] Levinson-Waldman, *supra* note 12 ("[T]hreats include incursions into constitutionally protected speech and association, disproportionate focus on and repercussions for marginalized communities, and overcollection of irrelevant information.").

[14] Borradaile, Burkhardt, & LeClerc, *Whose tweets are surveilled for the police: an audit of a social-media monitoring tool via log files*, Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency at 570 (2020), https://dl.acm.org/doi/pdf/10.1145/3351095.3372841.

213 (2012), citing *Commonwealth* v. *Frith*, 458 Mass. 434, 442 (2010). When reviewing a trial court decision imposing sanctions for discovery violations, this Court "accept[s] the judge's subsidiary findings of fact absent clear error and review[s] her sanctions order for abuse of discretion or other error of law." *Id.*, citing *Commonwealth* v. *Carney*, 458 Mass. 418, 425 (2010); *Commonwealth* v. *Lam Hue To*, 391 Mass. 301, 307 (1984). Dismissal is appropriate "where there is egregious prosecutorial or police misconduct and prejudice to the defendant's right to a fair trial, and where the dismissal is necessary to cure the prejudice." *Id.* at 215–216, citing *Commonwealth* v. *Mason*, 453 Mass. 873, 877–878 (2009).

Here, in response to a lawful order, and after the denial of reconsideration sought more than five months after the original June 2021 discovery order, as well as a failed attempt at interlocutory review, the Commonwealth and the Boston Police Department—in an apparently coordinated refusal—each filed a so-called "Notice of Non-Compliance." In fashioning an appropriate sanction for this willful discovery violation, Judge Ullmann wrote a well-reasoned, thorough decision. He repeatedly invited the Commonwealth to propose alternatives short of dismissal or other ways to provide the discovery, see Def. Add. 79-80, all of which the

Commonwealth declined. It thus appears from the record that the Commonwealth chose this path because it wanted to litigate the *merits* of the *potential* selective enforcement claim here about online surveillance by having an appellate court consider whether its surveillance scheme was justified *before* Mr. Dilworth could even obtain the discovery needed to present his selective enforcement claim.

As in *Washington W.*, "the Commonwealth failed to provide the … discovery relevant to a defense of selective [enforcement] that the judge had ordered, and that … failure [was] 'deliberate, willful and repetitive.'" *Washington W.*, 462 Mass. at 213. Indeed, even after the Commonwealth's petition for interlocutory review was denied and *Cuffee* and *Robinson-Van Rader* reaffirmed both the breadth of potential selective enforcement claims and the right to seek discovery to develop them—citing *Dilworth I*—the Commonwealth has continued to advance arguments this Court already rejected, a continuing pattern of willfully obstructive behavior. At every turn, it has tried to turn a case about a discovery ruling into a debate about the merits of its surveillance techniques, apparently in the hopes that this Court will decide that question and convert

its discovery standard to a merits one in the process. The willfulness of the Commonwealth's disregard of this order could not be more plain.

Dismissal here was not only an appropriate exercise of discretion: it was prefigured by this Court's precedent. This case is on all fours with *Washington W.*, 462 Mass. at 216, which upheld dismissal based on "egregious prosecutorial misconduct in repeatedly and wilfully failing to comply with the discovery order" that "denied the opportunity to develop a factual basis in support of" the juvenile's selective prosecution claim. As in *Washington W.*, Judge Ullmann concluded here that the defendant's inability to fully develop his potential selective enforcement defense, because of the Commonwealth's and the Boston Police Department's flat refusal to comply with a final discovery order, impeded his right to a fair trial. The only solution the Commonwealth proposed was that Judge Ullmann allow the case to proceed *without the discovery* and let the defendant challenge the Commonwealth's noncompliance down the road if convicted—in other words, an *unfair* trial with appellate correction available as a consolation prize, and a process that might result in *years* of avoidable incarceration for Mr. Dilworth. Faced with such a perversion of the remedial purpose underlying Rule 14's sanctions provisions, Judge

Ullman correctly perceived dismissal as the only option. See *Washington W.*, 462 Mass. at 217 ("The opportunity eventually to present this claim would not cure the loss of the earlier opportunity to present it.").

* * *

This case has broad implications for the administration of justice and institutional fairness. When a defendant fails to comply with a court order, such as an order of conditions of pretrial release, they may be (and often are) arrested and detained for months. Any individual who refuses to comply with a court order may be held in contempt and either jailed or subjected to significant financial penalties. The sanctions that *individuals* face for violating court orders are severe, even life-altering.

Yet in this case, the Commonwealth argues it should suffer *no* consequences for its flat refusal to comply with judicial directives that it has already tried (and failed) to challenge. This Court should not endorse such a cynical and inequitable view of the judicial process and whom it binds. The Commonwealth was ordered to turn over information exclusively within its control, to enable Mr. Dilworth to determine whether he was targeted for online surveillance even partly based on the color of his

skin. The Commonwealth's failure to provide that information has prejudiced Mr. Dilworth's right to a fair trial. It warrants dismissal.

CONCLUSION

For all these reasons, this Court should affirm the discovery order and the dismissal of the indictments.

Respectfully submitted,

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Dated: April 23, 2024

MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filling of briefs, including Mass. R. App. P. 16, 17, and 20. It is typewritten in 14-point, Century Schoolbook font, and complies with the length limit of 20(a)(2)(c) because it was produced with a proportionately spaced font and does not contain more than 7,500 non-excluded words. This document contains 6,289 non-excluded words as counted by the word processing system used to prepare it.

CERTIFICATE OF SERVICE

On April 23, 2024, I served a copy of this brief on all parties through the e-file system and by electronic mail.

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