COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. **SJC-13329**

COMMONWEALTH OF MASSACHUSETTS
APPELLEE

V.

MICHAEL VAN RADER, JR.
APPELLANT

ON APPEAL FROM SUFFOLK SUPERIOR COURT

REPLY BRIEF OF THE APPELLANT

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ARGUMENT

I. Mr. Van Rader's seizure lacked reasonable suspicion.

With respect to the question of whether the Commonwealth met its burden of establishing reasonable suspicion as to justify his seizure, *Commonwealth* v. *Warren*, 475 Mass. 530, 534 (2016), Mr. Van Rader adds only the following.

a. The only directional information provided over the radio by dispatch regarding the shooters was that they took a right on Tremont Street from Prentiss Street.

The Commonwealth states that Mr. Van Rader and J.H. were present "on the shooters' path of flight away from the scene." (C.31); *see also* (C.28).[1] It bears repeating, *see* (D.50-52), that, as the motion judge found, the only information

[1] The Commonwealth's brief is referenced as (C.*page*); Mr. Van Rader's brief is referenced as (D.*page*). The addendum to Mr. Van Rader's brief is referenced as (Add.*page*). The Record Appendix is referred to as (R.page). The suppression hearing transcripts are referred to as (Tvolume/page). The following transcript volumes correspond to the following suppression hearing dates: TII (1/27/2021); TIII (3/10/2021); TIV (5/18/21).

provided by dispatch regarding where the shooters went is that they took a right on Tremont Street from Prentiss Street. (R.247,531). The contention that Mr. Van Rader and J.H. were "on the shooters' path of flight" (C.31), is *post hoc* rationalization.

b. Mr. Van Rader and J.H. did not match even the extraordinarily barebones description provided over the radio by dispatch.

The Commonwealth acknowledges that the description provided by dispatch—two guys on bikes wearing black hoodies—was "basic" (C.28), or as the motion judge put it, "generic" (R.538). It was so lacking that, as *Warren*, *Commonwealth* v. *Cheek*, 413 Mass. 492 (1992), and *Commonwealth* v. *D.M.*, 100 Mass. App. Ct. 211 (2021), illustrate, the description, "contributed nothing to the officers' ability to distinguish [Mr. Van Rader and J.H.] from any other male wearing a 'hoodie' in Roxbury." *Warren*, 475 Mass. at 534. It should be further emphasized that neither Officer O'Loughlin's radio broadcast, nor the observations made by

Officers Degrave and Eunis of Mr. Van Rader and J.H., matched even that incredibly limited description. Officer O'Loughlin's contemporaneous radio broadcast was that he saw (from an obstructed view 300 feet away) males on bikes, wearing, respectively, a "black vest" and a "black jacket," not hoodies. (TII/29-31;R.283). And when Officers Degrave and Eunis saw Mr. Van Rader and J.H. on the Southwest Corridor, they were walking, without bikes. (TII/68,71-72;TIII/35-36,40-41;R.533).

c. That Officers Degrave and Eunis did not see other people wearing hoodies in the vicinity of the shooting is of little significance where they had just arrived in the general area where the shooting took place.

The Commonwealth notes, "[i]mportantly, no other people wearing black hoodies were seen, nor in a pair together, in this area before the defendant and J.H. were stopped . . ." (C.29). However, this is not a case where Officers Degrave and Eunis spent a meaningful amount of time traveling throughout the general area in which the crime

allegedly took place, looking for potential suspects. *Contrast Warren*, 475 Mass. at 532 (officer "drove a four to five block radius around the house, searching for persons fitting the suspects' descriptions" for fifteen minutes); *Commonwealth* v. *Evelyn*, 485 Mass. 691, 694 (2020); *Cheek*, 413 Mass. at 493. *See further* (D.48-49,n.9). Nor did Officers Degrave and Eunis spend *any* amount of time at the specific location of the reported shooting, near Annunciation Road.

Rather, Officers Degrave and Eunis drove from Dorchester, two or three miles away, to the location where Officer O'Loughlin was working a detail, more than a half-mile away from the reported shooting. (TII/6,44,58;R.531). From there, Officers Degrave and Eunis proceeded to Columbus Avenue, where they saw two kids wearing hoodies, whom they did not know, walking without bikes. (TII/68,71-72;TIII/35-36,40-41;R.533,538-539). That the officers did not see other people wearing hoodies in the "area" of the shooting is of minimal relevance where they had just arrived in the

general vicinity of the shooting, and spent no time whatsoever making observations in the immediate area of Annunciation Road, where the shooting occurred.

II. The stop violated Mr. Van Rader's equal protection rights.

a. There are issues on which Mr. Van Rader and the Commonwealth appear to agree.

As Mr. Van Rader argued in his principal brief, there can be no doubt that a pedestrian stop that is based improperly on race violates equal protection principles, derived from the Fourteenth Amendment and arts. 1 and 10, warranting the suppression of evidence obtained as a result of the stop. It does not appear that the Commonwealth disagrees with this general principle. *See* (C.36) ("[t]hat is not to say that a pedestrian stop could never warrant suppression of evidence based on equal protection grounds . . ."). Nor does the Commonwealth appear to dispute that courts should conduct a burden-shifting analysis to evaluate equal protection claims in the pedestrian stop context, and that a

defendant can point to statistics to meet his initial burden. *See* (C.36) (". . . such a claim would be properly brought and evaluated under [*Commonwealth* v. *Betances*, 451 Mass. 457 (2008)] and [*Commonwealth* v. *Lora*, 451 Mass. 425 (2008)]").

The parties' agreement on these points suggests that perhaps the question, "does *Long* apply in the pedestrian stop context?" is not the right one to ask. Insofar as that question is directed at whether, (a) there is an equal protection remedy for improperly racially motivated pedestrian stops, (b) a burden-shifting analysis should apply, and (c) a defendant can point to statistics to meet his burden, it appears as though the Commonwealth would agree with Mr. Van Rader that the answer is, "yes."

b. Contrary to the Commonwealth's argument, a ruling on reasonable suspicion does not obviate the need for any consideration of whether police violated equal protection principles.

The Commonwealth takes the position that an art. 14 justification necessarily defeats an equal protection claim in the pedestrian stop context. (C.34-39) (arguing under the

heading, "[t]he motion judge correctly ruled that because the stop here was justified by reasonable suspicion, the defendant's equal protection claim must be denied"). Put another way, the Commonwealth contends that where reasonable suspicion for a stop exists, the stop survives equal protection scrutiny *per se*.

Mr. Van Rader's principal brief discusses why this argument misses the mark. The art. 14 and equal protection inquiries are doctrinally separate. *Commonwealth* v. *Long*, 485 Mass. 711, 726 (2020) (traffic stop that is valid under art. 14 may nevertheless violate equal protection principles). *See also Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (equal protection providing an independent basis to challenge enforcement of laundromat regulations, unrelated to any other constitutional right). To this point, equal protection claims can succeed even where there is *probable cause* for a criminal charge. *See e.g.*, *Commonwealth* v. *Bernardo B.*, 453 Mass. 158 (2009); *Commonwealth* v. *Franklin*, 376 Mass. 885 (1978). The

Commonwealth's position also ignores *Long*'s holding that a stop violates equal protection principles even where it is motivated only "in part" by race. *Long*, *supra*, at 726.[2]

Moreover, as a practical matter, the Commonwealth's formulation would largely render any equal protection remedy for improper raced-based pedestrian stops—at least those in which a constitutional seizure has occurred[3]—obsolete. Under their articulation, only those pedestrian stops that lack reasonable suspicion—and are, therefore,

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[2] The Commonwealth's brief contains citations to Chief Justice Budd's concurrence in *Long* that are inapplicable to the equal protection inquiry. (C.38-39) ("'the reasonable suspicion requirement is the linchpin of a valid investigatory stop under art. 14,'" quoting *Long*, *supra*, at 744 (Budd, J., concurring)). In that concurrence, Chief Justice Budd analyzed whether pretextual stops were inherently unreasonable and thus violative of *art. 14 search and seizure* principles. See *Long*, *supra*, at 738-757 (Budd, J., concurring). This language is therefore not instructive on the equal protection issues here.

[3] There are, of course, police encounters that do not rise to the level of a seizure and thus require no reasonable suspicion analysis. However, it cannot be the case that there is an independent equal protection remedy only where police do *not* effectuate a seizure.

already subject to suppression—could, even conceivably, violate equal protection principles. There would, accordingly, be no need for a judge to decide the equal protection question; the art. 14 determination would be dispositive.

This is precisely where the motion judge erred: he eschewed a full equal protection analysis, determining that he "need not dwell" on this aspect of the case, nor "address the question of a threshold showing," based on a separate finding that there was no unjustified art. 14 intrusion. (R.534,535). Decades of this Court's precedent command the conclusion that this cannot be so. Mr. Van Rader's equal protection claim—that is, the question of whether race played an improper role in the police decision to stop him—required a separate assessment.

This is not to say that the particular facts of a pedestrian stop are irrelevant to the equal protection inquiry; to the contrary, as discussed below, the totality of the circumstances of a stop *should* be considered in a judge's independent

assessment of whether a defendant has met his initial burden under the equal protection framework. The point is that equal protection demands a separate inquiry; art. 14 does not control.

c. It is not entirely clear why the Commonwealth contends that *Long* is "patently inapplicable" here and that the case would be "properly brought" under *Lora*.

The Commonwealth contends that *Long* is "patently inapplicable" to the instant case because that case "only applies to motor vehicle stops." (C.36). But the Commonwealth does not cite to any case that, under their own reasoning, is any more applicable. Rather, the Commonwealth instead cites to two *other* motor vehicle stop cases: *Betances* (which only concerned discovery, which is not at issue in this case) and *Lora* (which *Long* modified). (C.36). Because this Court has not directly addressed equal protection claims in the pedestrian stop context, it is sensible to turn to this Court's most recent decision in this equal

protection line of cases—*Long*—as the motion judge did here. If *Long* is not determinative, it is at least informative.

But the Commonwealth argues that an equal protection claim in these circumstances should "be properly brought and evaluated," instead, "under" *Lora* and *Betances*. (C.36). The Commonwealth states:

> "the Court in *Long* reduced the evidentiary burden previously required of defendants under *Lora* and *Betances*. In those cases, a defendant was required to establish a reasonable inference of discrimination by showing: 1) that a broader class of people than those prosecuted violated the law, 2) that the failure to prosecute was consistent or deliberate, and 3) that the failure to prosecute was based on an impermissible classification, such as race. *Lora*, 451 at 437. As *Long* explicitly states, however, this evidentiary burden is reduced in the context of motor vehicle 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." *Long*, 485 Mass. at 722, citing *Commonwealth* v. *Bernardo* B., 452 Mass. 158, 168 (2009)."

(C.37).

With respect to the manner in which Mr. Van Rader raised his equal protection claim—by statistical showing—a

distinction between *Long* and *Lora* is not particularly useful. It is true that *Long* shed the first two requirements of the *Franklin* tripartite burden—that a broader class of people than those prosecuted violated the law and that the failure to prosecute was consistent or deliberate—but it only did so in the context of permitting defendants to also raise a reasonable inference of racial profiling through *non*-statistical evidence, i.e., a totality of the circumstances. *Long*, *supra*, at 722 (first two *Franklin* requirements not needed in the context of the totality of the circumstances test).

Long did not change the manner in which a defendant would go about making a statistical claim in order to shift the burden to the Commonwealth to prove that the police action was not motivated by race in any way. As in *Lora*, the idea is to point to the officers' historical record of stops, compare that record to a benchmark—i.e., the "broader class" of individuals the officers would have encountered while on patrol over that timeframe—and determine whether a racial disparity exists.

See Long, *supra*, at 724-726; *Lora*, *supra*, at 436-442. Put another way, the statistical case Mr. Van Rader made here is cut from the same cloth as both *Long* and *Lora*. And further, as the motion judge explained, despite failing to fully consider the equal protection claim, the evidence of disparity provided by Mr. Van Rader's expert was "considerable." (R.534) ("[d]efendant introduced a report by Dr. Fowler and considerable statistical evidence that Officers Franklin, Eunis and Degrave have historically conducted discretionary investigative stops in a way that disproportionately impacted people of color more than white people. I need not dwell on this aspect of the case, or make detailed findings in this regard, in light of my other findings and rulings in the case.").

d. <u>*Long*'s explicit acceptance of non-statistical evidence, rearticulation of "reasonable inference," and explanation of the Commonwealth's rebuttal burden, are applicable to Mr. Van Rader's equal protection claim—and to pedestrian stops generally</u>.

i. Embracing a totality of the circumstances test.

This Court has made clear that in raising an equal

protection claim, either in the traffic stop context or otherwise, a defendant is not limited to presenting solely statistical evidence. *Long*, *supra*, at 721-722 (nothing in *Lora* limited a defendant to statistical evidence and "in 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"). In other words, under settled law predating *Long*, a defendant may rely on non-statistical evidence to support an equal-protection-based selective enforcement argument.

As Mr. Van Rader argued in his principal brief (D.62), and below in the trial court (R.513-517), viewing the overwhelming statistical evidence in the context of circumstances of the stop supported a reasonable inference that race played a role in the stop. *See further* (D.61-64). Had the motion judge fully considered the statistical evidence—including the bleak reality that **90%** of the people involved in

the officers' discretionary FIOs were Black, while only **2%** were white non-Hispanic (R.336)—together with the fact that the stop was conducted on a well-traveled bike path at 7:30 pm on a spring evening based on two generic descriptions (the first by dispatch of suspects leaving the scene, and a differing description by a detail officer of two people who might have been those suspects or might have been two other people entirely), neither of which Mr. Van Rader and J.H. matched, the evidence against Mr. Van Rader should have been suppressed.[4] This Court need only rely on settled law—including that non-statistical evidence may also support a reasonable inference of selective enforcement, *Long*, *supra*, at 721-722—to reverse the denial of the motion to suppress.

It any event, it is worth noting that both Mr. Van Rader

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[4] The context illustrates that Officers Degrave and Eunis exercised discretion in selecting these two Black teenagers to stop in response to "generic" description(s) which they did not perfectly match. The statistical analysis raised the inference that, like their pattern of stops, this deliberate decision reflected biases, unconscious or otherwise.

and the Commonwealth argue that the circumstances of this particular stop are relevant to the equal protection claim. *See* (D.61-64); (C.39) ("[t]he very facts that supported the stop rebutted any such inference [of an improper racial motivation]"). It is possible that the particular circumstances of a stop bear more heavily on an equal protection claim in the pedestrian stop than in the traffic stop context. Indeed, pedestrian stops unfold in a wide variety of circumstances, and tend to fall along a continuum of police discretion—making such stops susceptible to bias at varying degrees. *See generally Commonwealth* v. *Gonsalves*, 429 Mass. 658, 664 (1999) (wide discretion is an invitation for discriminatory enforcement). There are pedestrian stops in which an officer has limited discretion, stops that are purely discretionary, and stops that fall everywhere in between. Where a particular stop falls on that discretion continuum—which can only be determined by considering the totality of the circumstances surrounding that particular stop—is relevant

to the equal protection analysis because it illustrates how race may have played a role, even in part, in the officer's decision to convert a particular pedestrian into a suspect.

As such, it would be wise for this Court to adopt a *Long*-type totality of the circumstances test, setting forth relevant factors to guide the parties, and the courts, in evaluating future equal protection claims in the pedestrian stop context. *See e.g.*, *Long*, *supra*, at 724-725 (establishing non-exhaustive list of six factors relevant to defendant's claim that the circumstances of a traffic stop raised a reasonable inference that it was racially motivated). Just how courts should evaluate a defendant's claim that a pedestrian stop was racially motivated, particularly if a defendant were to rely solely on *non*-statistical evidence, would be aided by the development of a factor-based test laid out by this Court.[5]

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[5] Permitting a defendant to point to the totality of the circumstances of a stop also avoids the pitfalls of a framework that requires a statistical analysis. *See e.g.*, *Long*, *supra*, at 721-722 (discussing the "persistent difficulties attendant to

ii. Applying the "reasonable inference" standard, as defined in Long.

The "reasonable inference" standard—defining a defendant's initial burden in the equal protection context—was set forth, in the traffic stop context, in *Lora*, *supra* at 437-438, having been derived from *Franklin*, 376 Mass. at 895 (rejecting the motion judge's determination that the defendant's burden was "far heavier than making a prima facie case"). *Long* did not change the nomenclature; it just rearticulated what is meant by "reasonable inference":

> "we conclude that our past interpretations of a reasonable inference do not control in the context of traffic stops. While a defendant must show more than the fact that he or she was a member of a constitutionally protected class and was stopped for a traffic infraction, the burden must not be so heavy that it makes any remedy illusory. The requirement that a defendant establish a reasonable inference that a traffic stop was motivated by racial bias means simply that the

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using statistical data"). Presenting statistical claims in these contexts is a burdensome process, made more difficult by the fact that police departments do not uniformly track, categorize, and share data on each and every stop—of motor vehicles or pedestrians—that they make. See *Long*, *supra*, at 734 (urging widespread, officer-specific data collection).

> defendant must produce evidence upon which a reasonable person could rely to infer that the officer discriminated on the basis of the defendant's race or membership in another protected class. Conclusive evidence is not needed."

Long, *supra*, at 723. In support of this formulation, *Long* cited *Lora* for the proposition that, "biased policing 'would not be alleviated by a standard that nominally allows a defendant to make a claim of selective enforcement of traffic laws, but forecloses such a claim in practice.'" *Id*., citing *Lora*, *supra*, at 445.

The same should be said for pedestrian stops. As discussed in his principal brief, this Court has repeatedly acknowledged that there exists a troubling pattern of racially discriminatory pedestrian stops. See (D.60), citing *Evelyn*, 485 Mass. at 708, *Warren*, 475 Mass. at 539-540, and *Commonwealth* v. *Phillips*, 413 Mass. 50, 53 (1992). Racial profiling, of course, is not a problem limited to people inside motor vehicles. Thus, in the pedestrian context, as in *Long*, *supra*, at 723, this Court should not establish a burden that

"is so heavy that it makes any remedy illusory" or require a defendant to present "conclusive evidence."

Regardless of how this Court defines "reasonable inference" in the instant case, Mr. Van Rader met his burden based on the statistical evidence he presented, considering the circumstances of the stop.[6] Of course, not all pedestrian stops are effectuated nearly a mile away from a reported crime on the basis of a barebones description, nor do all pedestrian stops involve officers who, based on a comprehensive statistical analysis, historically conduct FIOs of Black individuals at a rate four times greater than non-Black individuals. (R.334). Indeed, it may be true that it proves more difficult for a defendant to establish a "reasonable

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[6] Notably, the statistical case here was presented by the same statistician as in *Long*, conducting an even more sophisticated analysis than in *Long*, wherein this Court ruled that the defendant had met his initial burden under the standard as articulated in either *Long* or *Lora*. *Long*, *supra*, at 715 ("even under the overly heavy evidentiary burden that resulted from our decision in *Lora*, we conclude that he presented more than adequate data to support his claim").

inference" that the stop was racially motivated in the pedestrian context than in the traffic stop context (which, even under *Long*, is very difficult in its own right). But a remedy should not be made even more elusive—to the point of impracticability—by the way in which this Court articulates the phrase "reasonable inference."

iii. The Commonwealth, in rebuttal, must grapple with all of the inferences, and all of the evidence, presented by a defendant.

Under the equal protection framework established in *Franklin*, and expounded in *Lora* and *Long*, once a defendant has established a reasonable inference of selective enforcement, the burden shifts to the Commonwealth to rebut that inference. *See Long*, *supra*, at 726. As discussed above, Mr. Van Rader's equal protection claimed deserved a proper analysis by the motion judge—a full consideration of his statistical showing, contextualized by circumstances surrounding the stop of Mr. Van Rader, to rule on whether he met his initial *prima facie* burden. To the extent that the

Commonwealth attempted to rebut an inference of discrimination, it did not suffice for the Commonwealth to address *some* of the inferences, or *some* of the evidence raised by the defendant. Rather, as *Long* explained, the Commonwealth must "prove that the stop was not racially motivated" by "grappl[ing] with *all* of the reasonable inferences and *all* of the evidence that a defendant presented." *Id.* (emphasis added). For the reasons Mr. Van Rader has discussed (D.64-69), including the failure to adequately rebut Mr. Van Rader's strong statistical showing and the inferences that flow therefrom, the Commonwealth did not do that here.

Because Mr. Van Rader met his burden of establishing a reasonable inference that the stop was motivated, even in part, by race, the denial of the suppression motion should be reversed on equal protection grounds. *See*, e.g., *Long*, *supra*, at 733-744 (Commonwealth was required to rebut the defendant's equal protection claim at the suppression hearing, and having failed to do so, the remedy is reversal).

CONCLUSION

On June 3, 2020, this Court issued a letter stating, in part:

> "And as members of the legal community, we need to reexamine why, too often, our criminal justice system fails to treat African-Americans the same as white Americans, and recommit ourselves to the systemic change needed to make equality under the law an enduring reality for all. This must be a time not just of reflection but of action."[7]

As alluded to in the preceding paragraph, the doctrinal answer to this Court's call for action is, of course, equal protection. It is the equal protection doctrine that, in theory, tethers the criminal justice system to the notion of equality. And it is the development of that doctrine—by striking down laws that fail to deliver on its promise and developing practicable frameworks that lawyers can utilize to stress-test the system—that tethers the criminal justice system to

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[7] Letter from the Seven Justices to Members of the Judiciary and Bar (June 3, 2020), https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supremejudicial-court-to-members-of-the-judiciary-and.

equality, in actuality.

On equal protection grounds, this Court should reverse the denial of the motion to suppress because, considering the statistical evidence presented, bolstered by the context of the stop, Mr. Van Rader raised a reasonable inference that race improperly played a role in his seizure which the Commonwealth failed to rebut. In the alternative, this Court should reverse the denial of his motion to suppress because the officers lacked reasonable suspicion, under art. 14, to stop him.

Respectfully submitted,

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ADDENDUM

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UNITED STATES CONSTITUTION

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS DECLARATION OF RIGHTS

ARTICLE 1

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

ARTICLE 10

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their

constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

ARTICLE 14

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(13); Mass. R. A. P. 16(e); Mass. R. A. P. 18; Mass. R. A. P. 20; and Mass. R. A. P. 21, and does not exceed 4,500 words. The brief is printed in Century Schoolbook font consisting of 4,049 non-excluded words as tallied by the word count function of Microsoft Word.

October 5, 2022
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CERTIFICATE OF SERVICE

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