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Nos. SJC-13329, SJC-13333

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

MICHAEL VAN RADER, JR.,
Defendant-Appellant.

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

KIESON S. CUFFEE,
Defendant-Appellant.

Appeals from Judgments of the
Superior Courts for Suffolk and Hampden Counties

BRIEF FOR AMICUS CURIAE THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Under Supreme Judicial Court Rule 1:21, MACDL represents that it is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. MACDL does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in MACDL.

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STATEMENT OF INTEREST

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing 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 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 of importance to the administration of justice.

RULE 17(C)(5) DECLARATION

Amicus declares (a) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; (b) no person or entity—other than the amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief; and (c) neither amicus nor its counsel represent or have represented any of the parties to the present appeal in another proceeding involving similar issues, or were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

SUMMARY OF ARGUMENT

The constitutional guarantee of equal protection of the laws is separate from the right to be secure from unreasonable searches and seizures. *Infra* at 10. *Van Rader* and *Cuffee* both raise fundamental questions about the relationship between

these important constitutional rights. The Commonwealth attempts to collapse the inquiries into one, such that a defendant would be foreclosed from challenging police conduct on equal protection grounds if the defendant could not prove a Fourth Amendment or art. 14 violation as a predicate. This argument is incorrect: it ignores that equal protection and the bar against unreasonable searches and seizures are separate constitutional guarantees, and it would lead to the approval of police conduct as constitutionally "reasonable," even if it were racially motivated. In view of this problem, other jurisdictions that have considered the issue have held that defendants may challenge police conduct on equal protection grounds without proving an antecedent violation of the bar against unreasonable searches and seizures. *Infra* at 14.

The Commonwealth's argument that a defendant's equal protection claim may be rejected if the defendant's rights under art. 14 were not violated rests on a misreading of this Court's decision in *Commonwealth* v. *Long*. Indeed, since this Court's decision in *Long*, the Commonwealth has taken this position in several cases. To avoid confusion, this Court should clarify that challenges to police conduct on equal protection grounds are separate and distinct from challenges to the reasonableness of police conduct under art. 14. *Infra* at 22. Neglecting to do so would weaken constitutional protections and remove important checks on racially motivated law-enforcement conduct.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION IS SEPARATE FROM THE CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES

The constitutional guarantee of equal protection of the laws and the prohibition of unreasonable searches and seizures secure distinct rights. Courts routinely consider unreasonable search and seizure claims separately from equal protection claims. Despite this, the Commonwealth asserts that an equal protection challenge is "inapplicable" to a police stop that satisfies art. 14's reasonable suspicion requirement. *Van Rader* Comm. Br. 35. This reading of the scope of the equal protection guarantee is wrong and dangerous. Amicus urges the Court to reject it.

A. Courts Have Long Recognized that the Right to Equal Protection Is Separate from the Right to Be Free from Unreasonable Searches and Seizures

The structure and history of the State and Federal constitutional provisions establishing the right to equal protection of the laws and the right to be free from unreasonable searches and seizures show that the two constitutional guarantees are separate and secure different rights.

Our courts have long held that "[t]he equal protection principles of the Fourteenth Amendment … and arts. 1 and 10 … prohibit discriminatory application of impartial laws." *Commonwealth* v. *Lora*, 451 Mass. 425, 436

(2008), quoting *Commonwealth* v. *Franklin Fruit Co*., 388 Mass. 228, 229-230 (1983). The U.S. Supreme Court has recognized that the driving purpose of the Fourteenth Amendment was "the freedom of [Black people], the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2238 (2019), quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872). This Court has stressed that the equal protection guarantees of the Massachusetts Constitution were animated by similar goals. *Commonwealth* v. *Aves*, 18 Pick. 193, 210 (1836). (explaining that "[t]he whole tenor of [Massachusetts] policy" and "an unbroken series of judicial decisions" show that Black people enjoy equal protection of the laws).

Likewise, both the State and Federal Constitutions protect people against "unreasonable" searches and seizures. *Commonwealth* v. *Alvarez*, 422 Mass. 198, 209 (1996). Article 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the Federal Constitution "were enacted, in large part, in 'response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.'" *Commonwealth* v. *Mora*, 485 Mass. 360, 370 (2020), quoting *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018). These

two constitutional provisions "confer[], as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized [people]." *Id*. at 371, quoting *Commonwealth* v. *Blood*, 400 Mass. 61, 69 (1987).

Because the Constitution is "flouted equally" whether evidence is obtained in violation of the Fourth or Fourteenth Amendments, subsuming the equal protection analysis within the Fourth Amendment reasonableness analysis would be "an indefensibly selective evaluation of the provisions of the Constitution." *Elkins* v. *United States*, 364 U.S. 206, 215 (1960). Moreover, the Fourth and Fourteenth Amendments are animated by separate concerns and secure separate rights. Courts routinely consider claims that a plaintiff's rights under both amendments were violated. For example, in *Ford* v. *City of Boston*, female arrestees, who had been subjected to strip searches and visual body-cavity searches while in Boston police custody, challenged the constitutionality of the searches under both the Fourth and Fourteenth Amendments. 154 F. Supp. 2d 131, 134 (D. Mass. 2001). The court considered the Fourth and Fourteenth Amendment claims separately. *Id*. at 144-148, 150-151. It found that the searches were unreasonable under the Fourth Amendment and that they violated the arrestees' Fourteenth Amendment rights because women were routinely subjected to strip searches, while men were not. *Id*. at 148-152.

Many other courts have also analyzed equal protection and unreasonable search and seizure claims separately. In *Farm Labor Org. Comm.* v. *Ohio State Highway Patrol*, Hispanic motorists who were stopped and questioned by Ohio patrolmen alleged that they had been targeted for stops because of their ethnicity, in violation of their equal protection rights. 308 F.3d 523, 528 (6th Cir. 2002). They also alleged that, following the stops, the patrolmen unreasonably confiscated their immigration documents, in violation of the Fourth Amendment. *Id*. at 528-529. The court considered the plaintiffs' Fourth Amendment claim separately from their equal protection claim, *id.* at 532-533, 543-546, and concluded that the defendants violated the plaintiffs' Fourth Amendment rights. *Id*. at 550-551. The court also remanded the case for further factual development of the plaintiffs' equal protection claim. *Id*. at 551. Similarly, in *Rivera-Corraliza* v. *Morales*, the owners of casinos and gaming machines challenged the government's warrantless seizure of gaming machines under the Fourth Amendment. 794 F.3d 208, 213 (1st Cir. 2015). They also alleged that the government violated their equal protection rights by treating them differently than similarly situated establishments. *Id.* at 213-214. The First Circuit considered the Fourth Amendment and equal protection claims separately. *Id*. at 215-224, 225-226. The court concluded that while plaintiffs had failed to make out an equal protection claim, *id*. at 225-226, the case should be remanded for further development of the Fourth Amendment claim. *Id*.

at 222-223. And in *Brown* v. *City of Oneonta*, several Black residents of Oneonta, New York, alleged that they had been targeted for investigations by town and State police based on their race. 221 F.3d 329, 333-334 (2d Cir. 2000). Although the Second Circuit held that the plaintiffs' claims had all been properly dismissed, it considered, separately from their Fourth Amendment claim, whether the police had violated their equal protection rights by targeting them based on their race. *Id*. at 336-337, 340-341.

B. Other Jurisdictions Have Held that Equal Protection Challenges to Police Conduct Do Not Turn on the Existence of a Valid Fourth Amendment Claim

Other jurisdictions that have considered the interplay between these two rights have concluded that a defendant may challenge police conduct on equal protection grounds even in the absence of any Fourth Amendment violation. For example, in *Floyd* v. *City of New York*, the U.S. District Court for the Southern District of New York considered a challenge to the New York Police Department's "stop-and-frisk" policy brought by Black and Hispanic plaintiffs who had been subjected to stops, searches, and field inquiries under the program. 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013). The plaintiffs argued that they were "stopped without a legal basis in violation of the Fourth Amendment" and that "they were targeted for stops because of their race in violation of the Fourteenth Amendment." *Id*. The court analyzed the Fourth and Fourteenth Amendment claims separately.

Id. at 565-569, 570-572. The court held that the stop-and-frisk program was unconstitutional on equal protection grounds even though it also concluded that some of the challenged stops had been supported by reasonable suspicion. *Id*. at 667 (concluding that NYPD's position that stops supported by reasonable suspicion could not be racial profiling was "fundamentally inconsistent with the law of equal protection" and "a particularly disconcerting manifestation of indifference"). The court found that the NYPD maintained a policy that "encourage[d] officers to focus their reasonable-suspicion-based stops on 'the right people, the right time, the right location,'" which led to targeting of people for stops based on their race. *Id*. at 603. In concluding that the "stop-and-frisk" policy violated plaintiffs' equal protection rights, the court explained that "[t]he Equal Protection Clause's prohibition on selective enforcement means that suspicious [B]lacks and Hispanics may not be treated differently by the police than equally suspicious whites." *Id*. at 667.

Similarly, the New Jersey Supreme Court has rejected the position the Commonwealth is advancing here. In *State* v. *Segars*, the court reversed the denial of the defendant's motion to suppress where the defendants were unlawfully targeted by police because of their race, even where there was no Fourth Amendment violation. 172 N.J. 481, 498-499 (2002). In *Segars*, the defendant presented evidence that the decision to query his license plate in a computer

database had been motivated by his race. *Id*. Likewise, in *State* v. *Maryland*, the court reversed the denial of the defendants' motions to suppress where they were found to be in possession of marijuana after a consensual field inquiry by a police officer because the defendants presented evidence to show that police targeted them for the field inquiry based on their race. 167 N.J. 471, 484-485 (2001) ("Although a field inquiry may be conducted in the absence of grounds for suspicion without violating the Fourth Amendment … that does not mean the police may rely on impermissible criteria to question individuals"). Even if a stop is supported by reasonable suspicion, courts in New Jersey may still suppress evidence on equal protection grounds if the stop or search is motivated by the subject's race. *State* v. *Soto*, 324 N.J. Super. 66, 83 (N.J. Super. Ct. L. Div. 1996).

C. Legal Scholars Agree that When Police Action is Challenged on Both Equal Protection Grounds and Fourth Amendment Grounds, the Arguments Should be Analyzed Separately

Scholars likewise agree that when a party raises both equal protection and Fourth Amendment claims, the claims should be addressed separately. Subsuming the equal protection analysis within the unreasonable search and seizure analysis would lead to "[the] implication that racial discrimination is validated by the principle that in 'ordinary' cases, the existence of probable cause [or reasonable suspicion] establishes reasonableness" (footnotes omitted). Chin & Vernon, Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of

Whren v. United States, 83 Geo. Wash. L. Rev. 882, 917 (2015). Such a framework also ignores that an otherwise "reasonable" search or seizure "should be regarded as fruit of the poisonous tree" if it is "based on a prior violation of the … Equal Protection Clause[]." *Id*. at 918. Professor Akhil Amar has argued that while "racially disparate impact alone" would not violate equal protection, the equal protection clause and the Fourth Amendment are nevertheless "often tightly intertwined," so that "equal protection principles" should "call for concern when [B]lacks bear the brunt of a government search or seizure policy." Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 808-809 (1994). See Holland, Racial Profiling and a Punitive Exclusionary Rule, 20 Temp. Pol. & Civ. Rts. L. Rev. 29, 57-68 (2010) (arguing for suppression remedy for equal protection violations, in order to deter racial profiling by police).

D. This Court's Decision in *Commonwealth* v. *Long* Does Not Limit Equal Protection Claims

The Commonwealth asserts that *Commonwealth* v. *Long*, 485 Mass. 711 (2020), establishes that reasonable suspicion of criminal activity justifying a stop necessarily precludes an equal protection claim that the stop was also based on improper consideration of race. See *Van Rader* Comm. Br. 38. But this interpretation of *Long*'s holding is wrong.

Long addressed equal protection claims raised in the context of motor vehicle stops. *Long*, 485 Mass. at 713. The Court recognized that "the plethora of

potential traffic violations is such that most drivers are unable to avoid committing minor traffic violations on a routine basis," so that police officers will typically have a basis for a traffic stop. *Id*. at 718. The stop at issue in *Long* satisfied art. 14 because the police officer who executed the traffic stop had reasonable suspicion that the defendant violated the traffic laws. *Id*. at 714. Nonetheless, the Court concluded that the defendant's motion to suppress should have been allowed on equal protection grounds because the defendant presented sufficient evidence to raise an inference that the traffic stop had been racially motivated. *Id*. at 734 ("[T]he Commonwealth clearly failed to rebut the reasonable inference of impermissible discrimination raised by the defendant, and the denial of the motion to suppress must be reversed"). Accordingly, the Court conducted the equal protection analysis separately from the reasonableness analysis under art. 14. That is precisely the opposite of the Commonwealth's interpretation of the holding in *Long*.[1] *Van Rader* Comm. Br. 39.

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[1] Since *Long* was decided, at least one Massachusetts court has applied its holding to allow a defendant's motion to suppress on equal protection grounds. Commonwealth *vs*. Vargas, Mass. Super. Ct., No. 1481CR01135, Memorandum of Decision and Order on Defendant's Motion to Suppress Evidence at 1 (Middlesex County Aug. 16, 2019). In *Vargas*, the court analyzed the defendant's equal protection claim separately from the claim that the stop was unsupported by reasonable suspicion. The court allowed the motion to suppress, concluding that the defendant's unrebutted evidence raised an inference that the stop had been motivated by the defendant's race. *Id*. at 10.

Long itself is only the latest in a line of cases addressing defendants' claims of selective enforcement or selective prosecution. *Long* streamlined the framework for analyzing selective enforcement claims in the traffic stop context that had been enunciated in *Commonwealth* v. *Lora*. *Long*, 485 Mass. at 718-719, citing *Lora*, 451 Mass. 425, 437 (2008). The traffic stop at issue in *Lora*, like the one in *Long*, was valid under art. 14. *Lora*, 451 Mass. at 427 & n.6. Nonetheless, the Court separately analyzed the defendant's claim that the stop should be suppressed because it was motivated by his race. *Id*. at 443-444.

Lora built on the burden-shifting framework for selective prosecution claims described in *Commonwealth* v. *Franklin*. *Lora*, 451 Mass. at 437-438, citing 376 Mass. 885, 894 (1978). In *Franklin*, the defendants—who were both Black—argued that their warrantless arrest and attendant searches of their apartments were unreasonable under art. 14, and that the decision to prosecute them had been racially motivated. *Franklin*, 376 Mass. at 887-888. The Court concluded that the defendants' motions to suppress on art. 14 grounds had been properly denied, but it remanded the case for a hearing on the merits of their selective prosecution claim. *Id*. at 895, 902-903. These cases show that the Commonwealth's position is incorrect. Massachusetts courts have consistently analyzed equal protection claims separately from claims arising under art. 14.

Moreover, the Commonwealth's flawed understanding of equal protection and art. 14 claims, if adopted, may have unintended consequences for other types of civil rights cases. Plaintiffs in civil rights cases often assert separate claims for violating their Fourth and Fourteenth Amendment Rights. See, e.g, *Wilmot* v. *Tracey*, 938 F. Supp. 2d 116, 136 (D. Mass. 2013) (in action under 42 U.S.C. § 1983, considering separately plaintiff's claims of constitutional violations under Fourth and Fourteenth Amendments); *Ortiz* v. *Morris*, 97 Mass. App. Ct. 358, 361 (2020) (in Massachusetts Civil Rights Act action, considering separately plaintiff's claim that police violated her equal protection rights from claim that her warrantless arrest was unreasonable under art. 14).

The Commonwealth's argument would require plaintiffs challenging police conduct on equal protection grounds to also prove an antecedent violation of their rights under art. 14, thus adding another hurdle on the "steep uphill climb" plaintiffs already face to obtaining effective relief. *Mancuso* v. *Massachusetts Interscholastic Athletic Ass'n*, 453 Mass. 116, 129 (2009), quoting *Pagan* v. *Calderon*, 448 F.3d 16, 34 (1st Cir. 2006). Making it harder for people to obtain redress for violations of their constitutional right to equal protection of the law would weaken the strength of those rights and allow racially motivated law enforcement to go unchecked. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001, 2011 (1998) ("[C]oncern with eliminating

suppression as a remedy for racially selective prosecution or law enforcement stems from the role suppression plays in fully vindicating individuals' rights against police misconduct"); Rubinstein, Selective Prosecution, Selective Enforcement, and Remedial Vagueness, 2022 Wisc. L. Rev. 825, 874-875 ("[S]ince the majority … of selective prosecution and selective enforcement claims … are made in criminal proceedings, it is no wonder that the controlling requirements for proving selective enforcement are so demanding").

II. THE COURT SHOULD CLARIFY THE LAW APPLICABLE TO EQUAL PROTECTION CLAIMS THAT ALSO IMPLICATE ART. 14

The Court should clarify that the equal protection and search and seizure analyses under art. 14 are separate legal inquiries. In recent cases, as here, the Commonwealth has argued otherwise. For example, that is the Commonwealth's position in *Van Rader* and *Cuffee*. *Van Rader* Comm. Br. 35 (contending that the motion judge here was correct in concluding that "the equal protection framework [is] inapplicable to this case" because the police had reasonable suspicion for the stop at issue); *Cuffee* Comm. Br. 19 (arguing that *Long* "does not apply to pedestrian stops supported by reasonable suspicion"). The Commonwealth took a similar position in *Commonwealth* v. *Dilworth*, 485 Mass. 1001 (2020), where the Commonwealth argued that a person cannot assert an equal protection claim based on certain police conduct where that conduct does not violate the person's rights under the Fourth Amendment or art. 14. See Brief for the Commonwealth at 18-

19, *Commonwealth* v. *Dilworth*, 485 Mass. 1001 (2020) (No. SJC-12764). As explained above, this reasoning jeopardizes defendants' equal protection rights and opens the door to unconstitutional selective enforcement. This Court should therefore take this opportunity to reject the Commonwealth's interpretation and clarify the law addressing the interplay between equal protection claims and the reasonableness analysis under the Fourth Amendment and art. 14.

CONCLUSION

Subsuming the equal protection analysis within the reasonableness analysis under the Fourth Amendment and art. 14 is wrong. If tolerated here, it would create confusion in the law, weaken constitutional protections, and remove important checks on racially discriminatory conduct by law enforcement. Thus, this Court should clarify that equal protection claims raised by defendants based on selective prosecution or selective enforcement of the laws must be addressed separately from claims of unreasonable search or seizure under the Fourth Amendment and art. 14.

Respectfully submitted,

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December 16, 2022

MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure Rules 16(a)(13) (addendum), 16(e) (references to the record), Rule 20, and Rule 21, that pertain to the filing of briefs.

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. App. P. 20(a)(2)(D), the brief contains 3,386 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word, version 1808, build 10730.20205 in 14 point Times New Roman font. The undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I, Kevin S. Prussia, hereby certify, under the penalties of perjury that on December 16, 2022, I caused a true and accurate copy of the foregoing to be filed via the Massachusetts Odyssey File & Serve site and served two copies upon the following counsel by electronic and overnight mail:

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