COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, SS. NO. SJ-2019-0366

COMMONWEALTH OF MASSACHUSETTS

v.

RODERICK WEBBER

AMICUS BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENES LAWYERS
IN SUPPORT OF THE PETITION

The American Civil Liberties Union of Massachusetts and the Massachusetts Association of Criminal Defense Lawyers respectfully submit this brief as amicus curiae in support of the Commonwealth's petition.

The court below refused to accept the Commonwealth's *nolle prosequi* to terminate this case. That decision was directly contrary to settled law and must be corrected.

Additionally, the court's apparent refusal to accept multiple *nolle prosequi* submissions in this case and others is profoundly anti-democratic, threatens the separation of powers, and would, if allowed to stand, risk undermining public confidence in the judiciary. The Suffolk County District Attorney was elected following a campaign in which she pledged to reform excessively harsh features of our criminal justice

system, including by systematically terminating cases involving non-violent, low level offenses. Fulfilling that pledge is a quintessential and necessary exercise of prosecutorial discretion to accomplish important public safety objectives. Members of the judiciary cannot and should not displace those judgments with their own by forcing those cases to proceed.

Statement of the Interest of Amicus

The American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") is a Massachusetts non-profit organization dedicated to defending the principles of liberty and equality embodied in the constitution and laws of the Commonwealth and the United States.

The mission of the Massachusetts Association of Criminal Defense Lawyers ("MACDL") includes protecting the individual rights of citizens of the Commonwealth, maintaining the integrity and independence of criminal defense lawyers, and preserving the adversary system of justice.

Argument

I. When the Commonwealth terminates a criminal case by *nolle prosequi*, and the defendant does not object, the court has no power to force the case to proceed.

This case is one of many that arose from public demonstrations on August 30, 2019. *See* Pet. at 4-6. At one point, the Boston Police Department apparently charged a group of demonstrators, including the defendant Webber, who were

standing in the street exercising their constitutionally protected rights to assemble and speak. *See id.*; *see also* RA 6. The police admit that they targeted Webber because they saw him speaking through a megaphone. *See id.* As the police closed in, Webber allegedly tried to leave, but, like many others, he was tackled, arrested, charged with one count of disorderly conduct. *See* RA 1. Webber has no prior criminal record in Massachusetts. *See* Pet. at 3.

The Commonwealth submitted a *nolle prosequi* before Webber's arraignment, and Webber registered no objection. *See* Pet. at 3. Nevertheless, the court refused to terminate the case, arraigned Webber over the Commonwealth's objection, and set a bail amounting to *five times* the maximum fine for the subject offense. *See id.* at 7-8. This was only one of many cases where the court reportedly refused a *nolle prosequi* or dismissal of charges arising from that protest.[1]

The presiding judge was wrong to reject the Commonwealth's *nolle prosequi*. When the parties agree that a charge should be terminated before arraignment, the judge has no authority to

[1] *See, e.g.*, Travis Anderson, *Judge faces criticism for denying request to drop charges against Straight Pride Parade counterprotestors*, Boston Globe, Sept. 4, 2019, *available at* https://www.bostonglobe.com/metro/2019/09/04/judge-going-prosecute-case-hub-jurist-criticized-for-denying-request-drop-charges/mfFqX1u6ia4k3j8zRL4k3K/story.html

force the Commonwealth to proceed. *See* Mass. R. Crim. P. 16(a); *Commonwealth v. Dascalakis*, 246 Mass. 12, 18 (1923), *abrogated on other grounds*, *Commonwealth v. Bly*, 444 Mass. 640, 649-50(2005); *Attorney General v. Tufts*, 239 Mass. 458, 537-38 (1921).[2] Indeed, although the federal rules require that the prosecutor obtain "leave of court" to dismiss, *see* Fed. R. Crim. P. 48; *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977), the Massachusetts rules expressly do not. *See* Rptr.'s Notes to Mass. R. Crim P. 16(a) ("It did not seem advisable to engraft this additional requirement onto the Massachusetts rule ....").

Contrary to the trial court's apparent view, *see* Pet. at 6, nothing in the Victim Rights Act alters this conclusion. *See* G.L. c. 258B, § 3. Even if it did, the police report in this case does not allege that any natural person was victimized. *Compare* G.L. c. 258B, § 1 (defining "victim" under the Act as a "natural person"), *with* RA 5 (alleging "Victim" was

[2] This is not a case where the Defendant objected that the *nolle prosequi* amounted to a "scandalous abuse of the power." *See Tufts*, 239 Mass. at 538. Accordingly, the Court need not decide what remedies might exist if, for example, a defendant were to argue that a district attorney had improperly used a *nolle prosequi* to negate the defendant's speedy trial rights, or to prevent jeopardy from attaching where the Commonwealth found itself unready for a scheduled trial, or to favor certain racial or ethnic groups. *See, e.g.*, *Commonwealth v. Thomas*, 353 Mass. 429, 431-32 (1967) (dismissing a subsequent indictment where prosecutor terminated the original case on the day of trial for purpose of infringing the defendant's speedy trial rights).

"Commonwealth, Massachusetts"). And, more to the point, Webber could not have committed "disorderly conduct" or victimized anyone by exercising his constitutional rights to speak and assemble. *See Commonwealth v. Accime*, 476 Mass. 469, 473 (2017) (describing elements of disorderly conduct); *Commonwealth v. A Juvenile*, 368 Mass. 580, 596-99 (1975) (activities involving free expression not disorderly). Expressing a viewpoint is not a crime and has no victims. *See, e.g*, *Schacht v. United States*, 398 U.S. 58, 63 (1970)(holding that a law "which leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment").

II. The judge's repeated refusal to terminate cases threatens the separation of powers and the democratic accountability of the District Attorney's office.

Although the court's refusal to terminate this case (and others) was wrong as a matter of law, this situation did not arise in a vacuum. This District Attorney was specifically elected to terminate certain charges as part of a broad package of promised criminal justice reforms. No matter the wisdom of that platform — and amici submit that it is desperately needed — it should be beyond dispute that the policy decision whether to implement a policy of terminating certain cases falls to the Commonwealth and its counsel. Judges have no clients, and thus no perceptible interest in propping up a criminal case that the

Commonwealth (through the District Attorney) and the defendant wish to see terminated. A judge's decision to require such cases to proceed is therefore not simply lacking in legal authority, but also a threat to the separation of powers, the democratic accountability of the District Attorney's office, and the public's perception of judicial impartiality.

The prosecution of nonviolent, low level offenses has historically been wasteful, counterproductive, and a significant contributing factor to racial disparities in the criminal justice system.[3] During her recent campaign, the Suffolk County District Attorney ran on a progressive platform of declining to prosecute these offenses, except in certain unusual cases.[4] She received more than 80% of the vote in the November 2018 election[5] and subsequently issued a policy memorandum describing certain reforms.[6] Among other things, the memorandum identifies 15

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[3] *See* ACLU of Massachusetts Briefing Paper, "Facts over Fear: The benefits of declining to prosecute misdemeanor and low-level felony offenses" (March 2019), available at https://www.aclum.org/sites/default/files/20180319_dtp-final.pdf

[4] *See* https://rollins4da.com/policy/charges-to-be-declined/

[5] *See* https://www.wbur.org/news/2018/11/06/massachusetts-election-results-state-house-senate

[6] *See* The Rachael Rollins Policy Memo, App'x C (March 2019), *available at* http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf

charges (including disorderly conduct) which will ordinarily be declined or terminated pre-arraignment, unless the assigned prosecutor seeks supervisory approval to proceed based on certain specified factors.

Amici believe that prosecutorial discretion should be wielded as a tool to reduce injustice, promote equality, and focus finite prosecutorial resources on the most serious offenses. Regrettably, this sentiment is not universal. Certain elements of the political spectrum have been highly critical of this District Attorney and others like her. For example, U.S. Attorney General William Barr has publicly attacked "[t]hese anti-law enforcement DAs" as "spending their time undercutting the police, letting criminals off the hook, and refusing to enforce the law."[7] An organization calling itself the "National Police Association" publicized a bar complaint accusing the District Attorney of professional misconduct.[8]

These debates will no doubt continue, but it would be inappropriate for the judiciary to join the fray. Where the parties are in agreement that a charge should be terminated, the

[7] *See* Attorney General Barr's Remarks at the Grand Lodge Fraternal Order of Police (Aug. 12, 2019), *available at* https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th

[8] *See* https://nationalpolice.org/dev/wp-content/uploads/2018/12/DA_Rachael_Rollins_Complaint.pdf

judiciary has no power to force a prosecutor to pursue it. *See* Mass. R. Crim P. 16(a); *Tufts*, 239 Mass. at 538. And in the particular context here, the judiciary's intervention would affirmatively frustrate the will of the electorate. The voters of Suffolk County overwhelmingly voted for a District Attorney who promised to use her constitutionally assigned powers to terminate unjust cases. She alone is democratically accountable to those voters for fulfilling those promises and for whatever consequences may follow. *See Dascalakis*, 246 Mass. at 18. If a judge usurps those powers to revive a prosecution merely because the judge believes it is wise to proceed, then the people are robbed of their constitutionally guaranteed opportunity to control the administration of justice in their own community through their own elected representatives. *See Commonwealth v. Gordon*, 410 Mass. 498, 500-01 (1991) ("The district attorney is the people's elected advocate for a broad spectrum of societal interests . . . .").[9] Further, such judicial intervention is

[9] To be clear, the judiciary has its own, separate sphere of exclusive power within the context of criminal prosecutions. For example, where a judge or magistrate is asked to exercise his or her own authority to issue criminal process, he or she also has the authority to decline to do so, even if there is probable cause. *See Commonwealth v. Orbin O.*, 478 Mass. 759, 764 (2018). And, even where the District Attorney wishes to go forward on a charge, judges still possess the authority to dismiss those charges in certain cases. *See, e.g.*, *Commonwealth v. Morgan*, 476 Mass. 768, 780 (2017).

likely to create the appearance of partiality, which undermines public confidence in the fairness and independence of the judiciary. *See* Mass. Const., Part I, art. 29.[10]

Conclusion

For the reasons set forth above, amici ACLUM and MACDL respectfully submit that the petition should be allowed, the Defendant's arraignment should be vacated, and the subject criminal charge should be ordered expunged from the Defendant's criminal record.

[10] *See also* Mass. Supreme Judicial Court, Committee on Judicial Ethics, *Public Outreach in Support of the Rule of Law and Judicial Independence*, 2017 WL 770139, at *1 (Feb. 21, 2017) (explaining relevant principles). This risk of perceived partiality is particularly acute when the judiciary forces the prosecution to revive disorderly conduct charges, which in other contexts are routinely resolved in favor of the defendant. *See* "Facts over Fear," *supra*, at 20 (in 2013-14, 61.3% of disorderly conduct charges had non-adverse disposition).

Respectfully submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

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CERTIFICATE OF SERVICE

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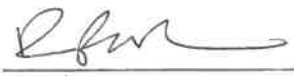

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