

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12344

PLYMOUTH, SS.

COMMONWEALTH,

Appellee,

v.

ROGELIO BUCKLEY,

Appellant.

ON APPEAL FROM A JUDGMENT OF THE PLYMOUTH SUPERIOR
COURT

BRIEF OF AMICUS CURIAE

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

Jeff Goldman, BBO #660870
jeff.goldman@morganlewis.com
Vanessa M. Brown, BBO #697097
vanessa.m.brown@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110-1726
617.341.7700

Matthew R. Segal, BBO #654489
Rahsaan D. Hall, BBO #645369
Jessie J. Rossman, BBO #670685
Carlton E. Williams, BBO #600973
**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF MASSACHUSETTS,
INC.**

September 25, 2017 Attorneys for Amicus Curiae

TABLE OF CONTENTS

INTRODUCTION..... 1

ISSUE PRESENTED..... 4

INTEREST OF AMICUS CURIAE..... 4

SUMMARY OF THE ARGUMENT..... 5

ARGUMENT..... 7

 A. Pretext Traffic Stops Are Unreasonable
 Under Art..... 7

 1. The Reasonableness Of Police
 Conduct Is To Be Judged By Its
 Real-World Consequences..... 7

 2. This Court Has Never Carefully
 Examined Whether Pretext Stops Are
 Reasonable..... 9

 3. Pretext Stops Are Enormously
 Damaging To Individual Privacy And
 Public Justice..... 10

 a. Pretext Stops Are Inherently
 Insulting And Arbitrary..... 10

 b. Pretext Stops Cause Racially
 Disparate Policing..... 11

 i. Disparate Policing On
 The Road Is A
 Significant Problem..... 11

 ii. Pretext Stops Drive
 Racial Disparities..... 16

 c. Pretext Stops Reasonably Put
 Black and Latino Drivers In
 Fear For Their Lives..... 20

 4. Santana Did Not Consider These
 Issues..... 24

 5. Pretext Stops Serve No Legitimate
 Police Interest..... 25

 B. This Court Should End Pretext Stops..... 27

 C. This Court Should Clarify The Limits On
 All Traffic Stops..... 29

1.	Clarification On The Scope Of Traffic Stops Is Overdue.....	29
2.	Routine Traffic Stops Are Too Often Escalated.....	30
3.	A Clear, Simple Standard Is Warranted.....	31
4.	More Clearly Limiting The Scope Of Traffic Stops Is Consistent With Established Massachusetts Principles.....	34
5.	A Clearer Statement From This Court Is Needed.....	35
	CONCLUSION.....	36
	ADDENDUM	

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. Gant,
556 U.S. 332 (2009)*passim*

Atwater v. City of Lago Vista,
532 U.S. 318,360 (2001)7, 30

Commonwealth v. Amado,
474 Mass. 147 (2016)10

Commonwealth v. Augustine,
467 Mass. 230 (2014)4

Commonwealth v. Ceria,
13 Mass. App. Ct. 230 (1982)9

Commonwealth v. Cordero,
477 Mass. 237 (2017)34, 35

Commonwealth v. Douglas,
472 Mass. 439 (2015)10

Commonwealth v. Ferrara,
376 Mass. 502 (1978)34

Commonwealth v. Feyenord,
445 Mass. 72 (2005)6, 30

Commonwealth v. Perkins,
465 Mass. 600 (2013)28

Commonwealth v. Petrillo,
399 Mass. 487 (1987)9

Commonwealth v. Rahim,
441 Mass. 273 (2004)10

Commonwealth v. Rodriguez,
430 Mass. 577 (2000)8, 27

Commonwealth v. Rodriguez,
472 Mass. 767 (2015)
.....7, 26, 33

<u>Commonwealth v. Rousseau</u> , 465 Mass. 372 (2013)	4, 5
<u>Commonwealth v. Sanborn</u> , 477 Mass. 393 (2017)	7
<u>Commonwealth v. Santana</u> , 420 Mass. 205 (1995)	<i>passim</i>
<u>Commonwealth v. Tisserand</u> , 5 Mass. App. Ct. 383 (1977)	9
<u>Commonwealth v. Torres</u> , 424 Mass. 153 (1997)	34
<u>Commonwealth v. Warren</u> , 475 Mass 530 (2016)	5, 8
<u>New York v. Belton</u> , 453 U. S. 454 (1981)	28, 35
<u>Rodriguez v. United States</u> , 135 S. Ct. 1609 (2015)	35
<u>State v. Ladson</u> , 138 979 P.2d 833 (Wash. 1999)	27
<u>State v. Ochoa</u> , 206 P.2d 143 (N.M. 2008)	27
<u>Whren v. United States</u> , 517 U.S. 806 (1996)	2, 9

Other Authorities

“Rhode Island Traffic Stop Statistics” at 85	18, 19
209 “Massachusetts Racial and Gender Profiling Project: Preliminary Tabulations”	13, 14
ACLUM, “Black Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010” (Oct. 2014)	15

Amy Ferrell <u>et al.</u> , "Massachusetts Racial and Gender Profiling Study: Final Report," Northeastern U. Inst. on Race and Just., May 4, 2004	13, 14
Anthony C. Thompson, "Stopping the Usual Suspects: Race and the Fourth Amendment," 74 N.Y.U. L. Rev. 956, 961 (1999)	8
Darrell Fisher <u>et al.</u> , "2016 Traffic Stops in Nebraska: A Report to the Governor and the Legislature on Data Submitted by Law Enforcement," Neb. Comm'n on Law Enforcement and Crim. Just., Mar. 31, 2017	15
David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 559 (1997)	1
David Zucchino, ' <u>Reason I Stopped You is Your Brake Light is Out</u> ', L.A. Times, Apr. 9, 2015	21, 22
Dep't of Just., <u>Police Behavior during Traffic and Street Stops, 2011</u> (Sept. 2013, rev. Oct. 2016)	17, 18
Dep't of Just., "Police Use of Nonfatal Force, 2002-11" (Nov. 2015)	24
Devon W. Carbado, "Blue-on Black Violence," 104 Geo L. J 1479, 1508 (2016);	23, 25
Devon W. Carbado & Patrick Rock, "What Exposes African Americans to Police Violence?," 51 Harv. C.R.-C.L. L. Rev. 159, 168 (2016)	23
Devon W. Carbado, "From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence," 105 Cal. L. Rev. 125, 131 (2017)	3, 25
Ed Adamczyk, "Two Georgia Police Officers Fired After Violent Traffic Stop," United Press Int'l, Apr. 14, 2017.	23

Emma Pierson et al., <u>A Large Scale Analysis of Racial Disparities in Police Stops Across the United States</u>	12
Ill. Dep't Transp., "Illinois Traffic Stop Study 2016"	12
Jack McDevitt et al., "Rhode Island Traffic Stop Statistics Data Collection Study: Final Report"	12
Jan Ransom, "Blacks Remain Focus of Boston Police Investigations, Searches," Boston Globe, Aug. 29, 2017	15, 19
Kimberle Williams Crenshaw & Andrea J. Ritchie, "Say Her Name: Resisting Police Brutality Against Black Women," July 2015	22
Lorie A. Fridell, "Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association," Racial Divide: Racial And Ethnic Bias In The Criminal Justice System, 47-48 (Michael J. Lynch, et al., eds. (2008)	24
Mo. Att'y Gen., <u>2014 Vehicle Stops Executive Summary</u> (2014)	13
Mo. Att'y Gen., <u>2015 Vehicle Stops Executive Summary</u> (2015)	13
Mo. Att'y Gen., "2016 Vehicle Stops Executive Summary" (2016)	12
Northeastern U. Inst. on Race and Just., Oct. 2014	12
Philip Marcelo, "APNewsBreak: Boston Police Make Little Progress on Race Gap,"	15
Report on Boston Police Department Street Encounters from 2007-2010, ACLU Foundation of Massachusetts (Oct. 2014)	5
Richard Pérez-Peña, "University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose," N.Y. Times, July 29, 2015	21

Sharon LaFraniere & Andrew W. Lehren, "The Disproportionate Risks of Driving While Black," N.Y. Times, Oct. 24, 201518

Sharon LaFraniere and Mitch Smith, "Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions," N.Y. Times, July 16, 2016*passim*

Stanford Open Policing Project, <https://openpolicing.stanford.edu/findings>12, 14, 19

INTRODUCTION

In the United States, everyone drives on the same pavement, yet that pavement is divided by insidious color lines. Those lines are maintained through arbitrary police action that violates Article 14 of the Massachusetts Declaration of Rights.

White people drive on roads where they can expect to travel freely unless they violate a traffic law concerning public safety. The penalty for such a violation is a ticket.

People of color do not get to drive on those roads.¹ Where they drive, a police officer can stop a driver for any reason, or none at all.² This is particularly true for Black drivers, who are as much as 270% more likely than white drivers to be subjected

¹ Many of the studies and violent incidents cited in this brief focus on disparate policing of Black people. Nevertheless, this brief occasionally uses the term "people of color" as a means of acknowledging that racially disparate policing can and does affect other groups, including but not limited to Latinos.

² "[W]ith the traffic code in hand, any officer can stop any driver any time." David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 559 (1997) (internal punctuation omitted).

to discretionary, investigatory stops.³ When a stop happens, it may involve suspicionless interrogation about crimes. What is more, these stops can have dire consequences. Instead of getting a ticket that merely ruins their day, a person of color stopped on the road may get a bullet that takes their life.

The deaths of Philando Castile, Samuel DeBose and Walter Scott bear witness to this reality.

One reason why white people and people of color drive on different roads is that courts have refused to recognize the real-world effects of their "bright-line" tests for what police conduct is reasonable during a traffic stop. In Massachusetts, Commonwealth v. Santana,⁴ has come to stand for the proposition that a stop for any traffic infraction is permissible, regardless of the officer's true reason for making it.⁵ The Court in Santana did not need to reach that holding, it provided almost no justification for its conclusion, and it almost certainly did not weigh the

³ Charles R. Epp et al., Pulled Over: How Police Stops Define Race and Citizenship, 72-73, 155 (2014) (hereinafter Epp, Pulled Over).

⁴ 420 Mass. 205 (1995).

⁵ See also Whren v. United States, 517 U.S. 806, 813-15 (1996) (reaching that conclusion under the Fourth Amendment to the U.S. Constitution).

consequences of allowing pretext stops. Yet in practice Santana has incentivized pretext stops that expose people of color, especially Black people, "not only to the violence of frequent police contact but also to the violence of police killings and physical abuse."⁶ This enhanced risk of racially disparate and violent policing is not reasonable in the real world. It should be prohibited by art. 14.

* * *

This case provides an important opportunity for two, important corrections to the post-Santana status quo. First, this Court should reject pretext traffic stops and require that fruits of pretext stops are suppressed. Second, the Court should clarify Massachusetts principles limiting the scope of routine traffic stops, which will discourage pretext stops and other arbitrary police conduct on the roads. Quite simply, this court should make clear that traffic stops are for traffic enforcement only.

⁶ Devon W. Carbado, "From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence," 105 Cal. L. Rev. 125, 131 (2017) (hereinafter Carbado, "Stopping Black People").

ISSUE PRESENTED

Should this Court adopt rules to prevent pretext traffic stops when the practice has led to racially-disparate policing with dangerous consequences for people of color?

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Massachusetts ("ACLUM"), an affiliate of the national American Civil Liberties Union, is a statewide nonprofit membership organization dedicated to the principle of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. ACLUM has long worked to promote and defend the privacy, due process and civil rights protected by the Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Rights, providing direct representation and participating as amicus curiae in numerous Fourth Amendment and Article 14 cases in this Court.⁷ ACLUM

⁷ See, e.g., Commonwealth v. Augustine, 467 Mass. 230 (2014) (direct representation arguing that the Fourth Amendment and Article 14 require a warrant to obtain cell site location information); Commonwealth v. Rousseau, 465 Mass. 372 (2013) (amicus arguing that GPS monitoring of a car constitutes a search and seizure of all the car's occupants).

has a strong and longstanding interest in eliminating racially disparate police practices.⁸

SUMMARY OF THE ARGUMENT⁹

"Pretext" traffic stops are stops purportedly legitimated by a traffic¹⁰ or vehicle¹¹ infraction but really motivated by a police officer's desire to investigate the driver for other reasons, but without reasonable suspicion or probable cause.¹² Based on a brief, unnecessary statement in Santana, the Commonwealth now regularly argues, and courts in the

⁸ See, e.g., Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010, ACLU Foundation of Massachusetts (Oct. 2014) cited in Commonwealth v. Warren, 475 Mass. 530, 539 n13 (2016)(Direct representation arguing that the Fourth Amendment and Article 14 require a warrant to obtain cell site location information); Commonwealth v. Rousseau, 465 Mass. 372 (2013) (amicus arguing that GPS monitoring of a car constitutes a search and seizure of all the car's occupants).

⁹ To the extent such sections are necessary in an amicus brief, ACLUM adopts the statement of the case and statement of facts in the Defendant's brief but believes that the views herein are also consistent with those portions of the Commonwealth's brief.

¹⁰ We use "traffic" infraction to mean any of the civil laws regulating how drivers are supposed to operate a motor vehicle. See generally G.L. c. 89.

¹¹ We use "vehicle" infraction to mean any of the civil laws and regulations governing how motor vehicles are supposed to be registered, inspected, and maintained. See generally G.L. c. 90.

¹² For a fuller definition of "pretext stop," see Wayne R. LaFave, 1 Search & Seizure § 1.4(e) (5th ed.)(2012) (hereinafter "LaFave").

Commonwealth regularly assume, that pretext traffic stops are permitted under art. 14 so long as the stopping officer can point to a traffic law that the car was violating when the stop began—and there is almost always some law available.

That rule is not reasonable, and therefore it is not compatible with art. 14. Pretext stops are arbitrary, exacerbate racial injustice, put civilians at risk, and serve no legitimate government interest. More specifically, pretext traffic stops pose real and perilous dangers for people of color, especially Black people. A stop for being “Black while driving” is a serious, humiliating, and often dangerous, reality.

The Court should, in this case, make two holdings to redress this art. 14 violation. First, it should prohibit pretext stops and adopt the tests urged by the Defendant and CPCS. Second, the Court should heed Justice Greany’s too-long ignored advice to “clearly delineate” the permissible scope of a routine traffic stop under art. 14.¹³

¹³ Commonwealth v. Feyenord, 445 Mass. 72, 89 (2005) (Greany, J., concurring).

ARGUMENT

A. Pretext Traffic Stops Are Unreasonable Under Art. 14.

1. The Reasonableness Of Police Conduct Is To Be Judged By Its Real-World Consequences.

"The ultimate touchstone" of Article 14 "is reasonableness,"¹⁴ which means this Court's art. 14 decisions must be guided—and judged—by their broad consequences rather than by the ease of their application. This is because, as wise jurists have recognized, the "reasonableness" rule makes no sense if it yields unreasonable outcomes.¹⁵ Thus, "to evaluate the permissibility of particular law enforcement practices . . . courts have balanced the intrusiveness of the police activities at issue against any legitimate governmental interests that these activities serve."¹⁶

¹⁴ Commonwealth v. Rodriguez, 472 Mass. 767, 775 (2015) (internal quotation marks omitted); see also Commonwealth v. Sanborn, 477 Mass. 393, 397 (2017) (Gants, C.J., concurring) (same).

¹⁵ See Atwater v. City of Lago Vista, 532 U.S. 318, 360 (2001) (O'Connor, J., dissenting) (recognizing that, no matter the "administrative ease" of creating bright-line rules, it "is inconsistent with the explicit guarantee of the Fourth Amendment" to allow "pointless indignit[ies] that serve[] no discernible state interest."). *Id.*

¹⁶ Rodriguez, 472 Mass. at 776.

The analysis must reflect the way people act in the real world.¹⁷ As the real world changes, the Court's understanding of this reality requires a reconsideration of reasonableness.¹⁸ This means that what we now know about the disparate impact of police conduct on people of color must be part of the picture.¹⁹ Where a decision in the Commonwealth's favor would leave Commonwealth residents vulnerable to "pointless indignities"—to searches and seizures in which the intrusiveness of the police conduct is disproportionate to the interests served by the conduct—this Court must reject the Commonwealth's position.²⁰

¹⁷ See Commonwealth v. Warren, 475 Mass 530, 539-40 (2016) (holding courts must consider racial profiling data to analyze why a Black man would flee police in Boston).

¹⁸ See id.; see also Arizona v. Gant, 556 U.S. 332, 350-51 (2009) (re-evaluating search incident-to-arrest doctrine where 28 years of experience demonstrate that prior precedent authorized "myriad unconstitutional searches").

¹⁹ See id.; see also Anthony C. Thompson, "Stopping the Usual Suspects: Race and the Fourth Amendment," 74 N.Y.U. L. Rev. 956, 961 (1999) (Fourth Amendment should be "squarely at the heart of the constitutional analysis of racially motivated searches and seizures").

²⁰ See Commonwealth v. Rodriguez, 430 Mass. 577, 584 (2000).

2. This Court Has Never Carefully Examined Whether Pretext Stops Are Reasonable.

In Massachusetts, one of the key cases that allows arbitrary and racially disparate traffic stops is Santana, which suggests that art. 14 allows a traffic stop for any reason, so long as the officer effecting the stop can find some motor-vehicle infraction.²¹

The Santana Court did not need to address pretext traffic stops, and indeed the case was also decided on other grounds. None of the cases relied upon in Santana involved either a traffic stop or a pretextual justification for police action.²² The Santana Court devoted just a few sentences even marginally relevant to pretext traffic stops. Additionally, subsequent

²¹ See also Whren, 517 U.S. at 813-15 (concluding that the Fourth Amendment does not prohibit such "pretext" stops).

²² See Commonwealth v. Petrillo, 399 Mass. 487, 489 (1987); Commonwealth v. Ceria, 13 Mass. App. Ct. 230, 235 (1982); Commonwealth v. Tisserand, 5 Mass. App. Ct. 383, 386 (1977). Petrillo involved an arrest for trespassing on school grounds; Ceria was a Terry-type stop of a man riding a moped in a park. Only Tisserand involved an automobile on a public street; but, in that case, the police approached the vehicle because it was double-parked and the defendant never argued that the stop was inappropriate, only that, after its occupants were arrested and their car towed, the car should not have been subject to an inventory search.

cases citing Santana for the proposition that art. 14 permits pretext stops are permitted have also not said why.²³

Thus, this Court would not need to upset a fully-analyzed body of law in order to prohibit pretext stops.²⁴ That is significant because, though case law has not had much to say about Santana, twenty-two years of real-world application has said quite a lot.

3. Pretext Stops Are Enormously Damaging To Individual Privacy And Public Justice.

Pretext stops are, for several reasons, an especially intrusive police action.

a. Pretext Stops Are Inherently Insulting And Arbitrary.

While motorists stopped for legitimate reasons may reasonably be upset, they do not necessarily feel that they have been targeted unfairly. But the targets of pretext stops have, by definition, been stopped for arbitrary reasons.²⁵ Thus, the motorist (and

²³ See, e.g., Commonwealth v. Amado, 474 Mass. 147, 151 & 151 n.4 (2016); Commonwealth v. Douglas, 472 Mass. 439, 444 (2015).

²⁴ Cf. Commonwealth v. Rahim, 441 Mass. 273, 284 (2004) ("[W]e are not bound by 'language which was unnecessary' in an earlier decision 'and which passed upon an issue not really presented.'").

²⁵ See supra n.2; see also LaFave §§ 1.4(e)-(f); 9.3(a).

passengers) subject to a pretext stop rightly feel that they have been singled out without good reason from other travelers on the road.

b. Pretext Stops Cause Racially Disparate Policing.

If pretext stops are permissible, a motorist's risk of being detained while driving tends to depend not, as discussed above, on the motorist's adherence to the traffic laws but on the driver's immutable characteristics. We know as much because study after study demonstrates that there is significant racial disparity in traffic stops even though there is no such disparity in the way people drive.²⁶

i. Disparate Policing On The Road Is A Significant Problem.

At the national level, 12% of drivers are stopped per year by the police, but "[a]mong racial minorities the rate is considerably higher: 24% or more by some estimates."²⁷ According to a study of 60 million state patrol traffic stops in 20 states between 2011 and

²⁶ See Lora, 451 Mass. at 442 n.30 ("[W]e are unaware of any reliable study establishing that motor vehicle violations are more frequently committed by any particular race of driver."). See also Epp, Pulled Over at 12-13, 56-57; Frank R. Baumgartner et al., "Racial Disparities in Traffic Stop Outcomes," 9 Duke J. L. & Soc. Change 21, 25 (2017) (hereinafter Baumgartner, "Racial Disparities").

²⁷ Epp, Pulled Over, 2.

2015, there are "broad patterns" of disparity between the experiences of Black and white drivers.²⁸ Controlling for other factors, Black drivers were still stopped at 1.4 times the rate of white drivers.²⁹

Racial disparities exist in New England and throughout the country.³⁰ Massachusetts is no

²⁸ See, "Findings: The Results of our Nationwide Analysis of Traffic Stops and Searches," Stanford Open Policing Project, <https://openpolicing.stanford.edu/findings/> (hereinafter Stanford Open Policing, "Findings").

²⁹ See, Emma Pierson et al., "A Large Scale Analysis of Racial Disparities in Police Stops Across the United States," (unpublished working paper, Stanford Open Policing Project), 5 available at <https://5harad.com/papers/traffic-stops.pdf>.

³⁰ Regarding Rhode Island, see: Jack McDevitt et al., "Rhode Island Traffic Stop Statistics Data Collection Study: Final Report," Northeastern U. Inst. on Race and Just., Oct. 2014, at 35, 37, 100 available at http://www.dot.ri.gov/community/CCPRA/docs/2013-2014_Rhode_Island_Traffic_Stop_Statistics_Data_Collection_Study.pdf (hereinafter "Rhode Island Traffic Stop Statistics").

Regarding Illinois, during the same period, non-white drivers in Illinois made up just 28.48% of the estimated driving population, but 39.44% of the traffic stops. See Ill. Dep't Transp., "Illinois Traffic Stop Study 2016," <https://idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2016/2016%20ITSS%20Statewide%20and%20Agency%20Reports.pdf> (hereinafter "Illinois Traffic Stop Study 2016").

Regarding Missouri, in 2016, Black drivers in Missouri were stopped at a rate 65% greater than expected based on their proportion of the driving-age population, and a rate 75% higher than white drivers. See: Mo. Att'y Gen., "2016 Vehicle Stops Executive

different. From 2001 to 2003, 366 Massachusetts law enforcement agencies collected information regarding traffic stops. Critically—and uniquely—omitting stops that did not result in a citation or warning,³¹ the study still reflected serious racial disparities. Each of the five largest cities reported a significant gap between the percentages of citations issued to Black and Latino drivers as compared to their driving population estimates.³² For example, in Boston, Black

Summary" (2016) available at <https://www.ago.mo.gov/home/vehicle-stops-report/2016-executive-summary>. Data from 2014 and 2015 reflected similar disparities. Mo. Att'y Gen., 2014 Vehicle Stops Executive Summary (2014) available at <https://www.ago.mo.gov/home/vehicle-stops-report/2014-executive-summary>; Mo. Att'y Gen., 2015 Vehicle Stops Executive Summary (2015) available at <https://www.ago.mo.gov/home/vehicle-stops-report/2014-executive-summary>.

³¹ This omission was unique among states that have undertaken statewide data collection, and it was likely to have resulted in a substantial underestimation of racial disparities in Massachusetts. See Amy Ferrell et al., "Massachusetts Racial and Gender Profiling Study: Final Report," Northeastern U. Inst. on Race and Just., May 4, 2004, at 7, 26-27 available at <https://repository.library.northeastern.edu/files/neu:344627/fulltext.pdf> (hereinafter Ferrell, "Mass. Final Report").

³² Northeastern U. Inst. on Race and Just., Jan. 20, 2004 at 209 "Massachusetts Racial and Gender Profiling Project: Preliminary Tabulations," at 209 available at https://repository.library.northeastern.edu/downloads/neu:378461?datastream_id=content [hereinafter "Mass. Tabulations"].

drivers made up 13.7% of the driving population, but 32% of the citations, and in Springfield, they made up 13.2% of the driving population, but 22.8% of the citations.³³ Similarly, Latino drivers made up 16.2% of the driving population in Springfield, but 26.9% of the citations, and in Lowell, they made up 9.1% of the driving population, but 16.7% of the citations.³⁴ Overall, the citation data revealed racial disparities in 201 law enforcement agencies.³⁵

Massachusetts State Police data from 2011 to 2015 also revealed stark racial disparities.³⁶ Everywhere but Suffolk County, state troopers stopped Black drivers at higher rates than white drivers: for example, in Worcester County the State Police stopped Black drivers at a rate of 25% and white drivers at a rate of 10%.³⁷ These differences are particularly striking because state police stops often reflect smaller racial disparities than those of local police

³³ "Mass. Tabulations" at 209.

³⁴ "Mass. Tabulations" at 209.

³⁵ Ferrell, "Mass. Final Report" at 26.

³⁶ Stanford Open Policing, "Findings".

³⁷ Stanford Open Policing, "Findings". 8 counties stopped Latino drivers at a higher rate than white drivers, while 4 stopped Latino drivers at an equal or lower rate. Id.

departments,³⁸ suggesting that a more recent statewide study of traffic stops by Massachusetts municipal police (especially one that included stops not resulting in a citation) would reveal even worse racial disparities.

No recent statewide study has been undertaken, however,³⁹ which makes the problem of racially disparate traffic stops all the more intractable in Massachusetts.⁴⁰ Meanwhile, other data indicates that racially disparate policing in Massachusetts has held steady⁴¹ or even worsened.⁴² At the very least, there

³⁸ See, e.g., Darrell Fisher et al., "2016 Traffic Stops in Nebraska: A Report to the Governor and the Legislature on Data Submitted by Law Enforcement," Neb. Comm'n on Law Enforcement and Crim. Just., Mar. 31, 2017 at 17 available at https://ncc.nebraska.gov/sites/ncc.nebraska.gov/files/doc/Traffic_Stops_in_Nebraska_COMPLETE_FINAL_0.pdf (noting racial disparity index of 1.06 for state police and 2.24 for non-state police).

³⁹ After the legislation requiring traffic stop data collection sunset, the Massachusetts legislature has not required law enforcement agencies to gather such information despite repeated efforts to pass such legislation. See S.1409, H.3842 (186th Session); S.677, H.2853 (187th Session); S.644, H.1588, S.1115 (188th Session); S.736, S. 829, H.1575 (189th Session); S.860, S.789, H.2506, H.3122 (190th Session).

⁴⁰ Cf. Lora, 451 Mass. at 445 (noting the "practical weight" of data collection can be "admittedly daunting").

is no reason to suppose that the disparities identified in the data from 2001 to 2003 have been remedied.

**ii. Pretext Stops
Drive Racial Disparities.**

There are at least four indicators that racial disparities in traffic stops are due, in significant part, to the law's allowance of pretext stops.

First, Black and Latino drivers are disproportionately cited for insignificant violations or provided no reason for their stop. A 2011 Department of Justice study found that Black drivers

⁴¹ For example, from 2007 to 2015, police encounters in Boston targeted Black people more than 60% of the time. See ACLUM, "Black Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010" (Oct. 2014) at 1 available at <https://aclum.org/wp-content/uploads/2015/06/reports-Black-brown-and-targeted.pdf> (2007 - 2010 data); Philip Marcelo, "APNewsBreak: Boston Police Make Little Progress on Race Gap," U.S. News and World Report, Apr. 26, 2017. After controlling for arrest history and alleged gang affiliation, an academic study of the 2007 to 2010 data found that it reflected "racially disparate treatment" by the Boston Police Department. Anthony A. Braga et al., "An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports," ACLUM and Boston Police Dep't, June 15, 2015, at ii.

⁴² Jan Ransom, "Blacks Remain Focus of Boston Police Investigations, Searches," Boston Globe, Aug. 29, 2017 (hereinafter Ransom, "Blacks Remain Focus of Boston Police") (noting that, in 2016, 70% of police encounters in Boston targeted Black people).

were nearly twice as likely as white drivers to receive no justification for being stopped (4.7% to 2.6%).⁴³ An additional 33% of Black drivers were told that they were stopped for a vehicle defect or record check, as compared to just 21.7% of white drivers.⁴⁴ Latino drivers were also more likely than white drivers to be stopped without explanation (3.3%) or for a vehicle defect or record check (26.2%).⁴⁵ Individual jurisdictions reveal similar disparities, and there is nothing to suggest that Massachusetts is not subject to this trend.⁴⁶

Second, a comparatively high percentage of Black drivers are stopped and then released without any enforcement action. According to the Department of

⁴³ Dep't of Just., "Police Behavior during Traffic and Street Stops, 2011" (Sept. 2013, rev. Oct. 2016), at 4 available at <https://www.bjs.gov/content/pub/pdf/pbtss11.pdf> (hereinafter "DOJ," "Police Behavior").

⁴⁴ DOJ, "Police Behavior" at 4.

⁴⁵ DOJ, "Police Behavior" at 4.

⁴⁶ See, e.g., "Illinois Traffic Stop Study 2016" (non-white Illinois drivers in 2016 were stopped for equipment violations 23.7% of the time, as compared to just 17.85% of white drivers); Epp, Pulled Over at 60-61 (in Kansas City, 18% of Black drivers were given no justification for their traffic stop, as compared to 8% of white drivers; 52% of Black drivers were stopped for low-level violations, as compared to only 34% of white drivers).

Justice, Black drivers were twice as likely as white drivers to be stopped and allowed to proceed without any enforcement action.⁴⁷ Studies in other states (there are none for Massachusetts, specifically) show similar results.⁴⁸ This phenomenon suggests that, for Black drivers moreso than white drivers, the stated reason for the stop was not important to the officer, and the officer's true aim was to investigate a hunch that did not pan out.⁴⁹

Third, Black and Latino drivers are more likely than white drivers to have their cars searched during a traffic stop. The Department of Justice found that 6.3% of stopped Black drivers and 6.6% of stopped Latino drivers were searched by police, as compared to just 2.3% of stopped white drivers.⁵⁰ The 2011-2015 State Police data indicate that, in most counties

⁴⁷ DOJ, "Police Behavior" at 7.

⁴⁸ See Sharon LaFraniere & Andrew W. Lehren, "The Disproportionate Risks of Driving While Black," N.Y. Times, Oct. 24, 2015, (hereinafter LaFraniere, "Driving While Black") (Black drivers are more likely to be let go without police action than white drivers in Greensboro, North Carolina); "Rhode Island Traffic Stop Statistics" at 54 (non-white drivers more likely to receive no citation than white drivers in 80% of the reporting Rhode Island jurisdictions).

⁴⁹ LaFraniere, "Driving While Black"; DOJ, "Police Behavior" at 7.

⁵⁰ DOJ, "Police Behavior" at 9.

where data was reported, non-white drivers were searched at a higher rate than white drivers.⁵¹ Likewise, a study of a dozen Northern and Southern states found that Black drivers were about 2.5 times as likely, and Latino drivers were more than 3 times as likely, as whites to be searched.⁵² Massachusetts data mirrors this disparity. Just last month, the Boston Globe reported that 80% of the Boston Police Department's 2016 vehicle searches during an FIO involved Black drivers.⁵³ These numbers are particularly striking given the repeated finding that searches of Black and Latino drivers are less likely to yield contraband than searches of white drivers.⁵⁴ This suggests that the police are simply using these stops as a tool to probe for evidence of an unknown crime.

⁵¹ Stanford Open Policing, "Findings".

⁵² Baumgartner, "Racial Disparities" at 41.

⁵³ Ransom, "Blacks Remain Focus of Boston Police".

⁵⁴ See, e.g., "Rhode Island Traffic Stop Statistics" at 85 (50.5% of the discretionary searches of white drivers led to contraband vs. 40.5% for non-white drivers); LaFraniere, "Driving While Black" (finding contraband on white drivers 27 percent of the times versus 21 percent on Black drivers).

Fourth, because it is nearly impossible to drive in America without violating some traffic law,⁵⁵ police decisions about which drivers to stop will necessarily be influenced by subjective hunches about which drivers deserve police scrutiny. These decisions, in turn, are inevitably influenced by the "stereotype of Black criminality [which] has a powerful hold on police and public perceptions."⁵⁶

c. Pretext Stops Reasonably Put Black and Latino Drivers In Fear For Their Lives.

Recent experience shows why Black and Latino drivers are especially worried about pretext stops. Cell phone cameras have revealed the violence that can occur against people of color in ways that this Court could not have seen when it decided Santana.

For example, just last year, a video posted to Facebook showed Minnesota police officers killing Philando Castile, who had been the subject of a pretext stop (purportedly based on a cracked taillight).⁵⁷ Mr. Castile had been stopped at least 49 times in 13 years for minor infractions, including

⁵⁵ See supra n.25.

⁵⁶ Epp, Pulled Over at 46 (citing studies).

⁵⁷ Sharon LaFraniere and Mitch Smith, "Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions," N.Y. Times, July 16, 2016.

turning into a parking lot without signaling and failing to repair a broken seatbelt.⁵⁸ It is inconceivable that these stops, each of which put Mr. Castile face-to-face with an armed officer, could have happened without case law authorizing pretext stops. The last pretext stop killed him. 40 seconds after the stop began, the officer shot Mr. Castile seven times while his girlfriend and her 4-year-old daughter sat in the car.⁵⁹

A pretext stop killed Samuel DeBose in July 2015, after he was pulled over for a missing license plate.⁶⁰ Video shows Mr. DeBose pointing to the plate in the glove box minutes before he was shot.⁶¹

A pretext stop killed Walter Scott, who was purportedly pulled over for having a broken brake light.⁶² A bystander's cell phone camera recorded how

⁵⁸ Id.

⁵⁹ Jay Croft, "Philando Castile Shooting: Dashcam Video Shows Rapid Event," CNN, June 21, 2017.

⁶⁰ Richard Pérez-Peña, "University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose," N.Y. Times, July 29, 2015 (explaining DuBose's traffic violation was driving without a front license plate).

⁶¹ Id.

⁶² David Zucchino, "'Reason I Stopped You is Your Brake Light is Out,'" L.A. Times, Apr. 9, 2015 (hereinafter Zucchino, "Reason I Stopped You").

the stop ended: the officer shot Mr. Scott in the back multiple times.⁶³

A pretext stop also led to the death of Sandra Bland, who was pulled over, and later arrested, for failing to signal a lane change.⁶⁴ Three days later, Ms. Bland was found dead in her jail cell.⁶⁵

Thankfully, here in Massachusetts, there have not been high-profile stops resulting in death, but there have been stops resulting in violence. In 2007, for example, a Worcester police officer stopped Clytheah Mwangi for speeding. When the passenger, a Black woman named Wakeelah Cocroft, complained about how the officer was treating Ms. Mwangi, the officer wrestled Ms. Cocroft to the ground, slammed her face against the concrete, and kneeled on her back until a second officer finally arrived.⁶⁶

⁶³ Zucchini, "Reason I Stopped You".

⁶⁴ Kimberle Williams Crenshaw & Andrea J. Ritchie, "Say Her Name: Resisting Police Brutality Against Black Women," July 2015, at 11, available at <http://www.aapf.org/sayhernamereport>.

⁶⁵ Id.

⁶⁶ ACLUM brief in Cocroft v. Smith, available at <https://aclum.org/cases-briefs/cocroft-v-smith/> (last visited Sept. 23, 2017). Similar attacks occur throughout the country. In 2009, Denver officers severely beat 19-year-old Alex Landau during a traffic stop for an illegal left turn. Nic Turiciano, "Review clears 3 Denver police officers in 2009 beating of

That people of color—particularly Black people—are acutely threatened during traffic stops is borne out not only by the examples above, but also by data.

- People of color are more frequently subjected to pretext stops.⁶⁷
- When police officers conduct a pretext stop, they are more likely to prolong the stop to probe the driver⁶⁸ and, in turn, to “increase the level of conflict between officers and drivers.”⁶⁹
- Pretext traffic stops are especially dangerous for Black drivers because they “occur[] against the background of stereotype of African-Americans as violent and dangerous.”⁷⁰ For example, in studies

Alex Landau,” Denver Post, Apr. 5, 2013. In 2014, Jamal Jones was stopped for a seatbelt violation in Indiana while driving his girlfriend’s kids. “Lawsuit: Ind. Police Used Excessive Force in Traffic Stop,” CBS News, Oct. 7, 2014. The officers shattered the window, dragged Mr. Jones out of the car and tasered him. *Id.* In 2017, Georgia officers repeatedly kicked and beat Demetrius Hollins who lay on the ground in handcuffs after being pulled over for failure to signal and lack of license plates. Ed Adamczyk, “Two Georgia Police Officers Fired After Violent Traffic Stop,” United Press Int’l, Apr. 14, 2017.

⁶⁷ See supra.

⁶⁸ Epp, Pulled Over at 93-94.

⁶⁹ Epp, Pulled Over at 93.

⁷⁰ Devon W. Carbado, “Blue-on Black Violence,” 104 Geo L. J 1479, 1508 (2016); see also Devon W. Carbado & Patrick Rock, “What Exposes African Americans to Police Violence?,” 51 Harv. C.R.-C.L. L. Rev. 159, 168 (2016) (“[R]obust empirical evidence in the field of social psychology” reveals “that white Americans associate African American men with violence and dangerousness.”). While the term is used in the direct

asking participants to quickly select "shoot" or "don't shoot" depending on whether they are shown someone who is armed or unarmed, people erroneously "shoot" unarmed Blacks more often than unarmed whites.⁷¹

- Indeed, a national Department of Justice study found that officers are roughly three times more likely to use or threaten force during a stop of a Black driver than during a stop of a white driver (2.5% versus .8%, from 2002 to 2011). Officers were more than two times as likely to do the same during a stop of a Latino driver (1.8% v .8%).⁷²

4. Santana Did Not Consider These Issues.

The Santana Court made no mention of any of these issues. The decision in Santana gives no hint of having considered the real-world effects of pretext stops in driving racially-disparate policing. It is

quote here, it is important to note that not all Black Americans are African Americans.

⁷¹ See Lorie A. Fridell, "Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association," *Racial Divide: Racial And Ethnic Bias In The Criminal Justice System*, 47-48 (Michael J. Lynch, et al., eds. (2008); Dep't of Just., "Police Use of Nonfatal Force, 2002-11" (Nov. 2015), at 4 available at <https://www.bjs.gov/content/pub/pdf/punf0211.pdf>. (hereinafter: DOJ: Nonfatal Force"); LaFraniere, "Driving While Black".

⁷² DOJ, "Nonfatal Force," at 4. A New York Times review of thousands of traffic stops in Greensboro similarly found that police officers "were more likely to use force if the driver was black, even when they did not encounter physical resistance." LaFraniere, "Driving While Black".

now clear the judicial authorization of pretext stops (and similar forms of arbitrary police conduct) creates "vulnerability to extraordinary police violence."⁷³ Santana's holding, as it has come to be applied, "facilitates frequent police surveillance of and contact with" people of color, and further divides communities of color from those who are sworn to protect them.⁷⁴ Case law that increases the risks of broken bodies, in the name of broken tail lights, must be reconsidered.

5. Pretext Stops Serve No Legitimate Police Interest.

Despite being more intrusive than non-pretext stops, pretext stops are also less-justified by "legitimate governmental interests." In fact, they are not justified by any "legitimate" interest at all. This Court has recognized only one legitimate governmental interest for permitting enforcement of the traffic laws through vehicle stops: "permitting stops based on reasonable suspicion or probable cause that these laws may have been violated gives police the ability to immediately address potential safety

⁷³ Carbado, "Stopping Black People" at 128.

⁷⁴ Carbado, "Blue-on-Black Violence" at 1508.

hazards on the road." ⁷⁵ Indeed, in Rodriguez, this Court refused to countenance traffic stops for reasons unrelated to enforcement of traffic safety laws.⁷⁶

Pretext stops are plainly unreasonable because they have nothing to do with "potential safety hazards on the road." By definition, they do not seek to enforce the motor vehicle laws. As the prosecutor conceded in this case, the police officers did not stop Mr. Buckley because of his driving infraction. (Supp. 176). True, as in this case, pretext stops will occasionally turn up evidence of another crime. But so would a general warrant; that does not make the police action "legitimate." Quite the contrary, in a pretext stop, "probable cause"—the purported legal justification for the stop—exists only as to "an offense for which an arrest or search would not ordinarily be made."⁷⁷ That is "precisely the kind of arbitrary authority that gave rise to the Fourth Amendment and art. 14."⁷⁸

⁷⁵ Rodriguez, 472 Mass. at 776.

⁷⁶ Id.

⁷⁷ LaFave §1.4(e).

⁷⁸ Id.

B. This Court Should End Pretext Stops.

A pretext traffic stop is "a significant intrusion into an individual's privacy," that exacerbates racial injustice and puts civilians at risk, all without serving any "legitimate governmental interest." Under this Court's standards, and consistent with the conclusions of several other courts, that is more than enough to hold that pretext stops violate art. 14.⁷⁹

Other courts have employed workable standards to identify pretext stops and exclude resulting evidence without unduly impinging police conduct.⁸⁰ ACLUM

⁷⁹ See Rodriguez, 430 Mass. at 584 ("There is no ready test for reasonableness under art. 14 except by balancing the need to search or seize against the invasion that the search or seizure entails."); see also State v. Ladson, 138 979 P.2d 833, 837-38 (Wash. 1999) (holding pretext stops unreasonable because they are intended "not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving"); State v. Ochoa, 206 P.2d 143, 155 (N.M. 2008) (barring pretext traffic stops because "The purpose of our objective reasonable suspicion / probable cause exception to the warrant requirement is to prevent officers from arbitrarily acting on whims or unsupported hunches, because that is constitutionally unreasonable")

⁸⁰ See, e.g., Ladson, 138 Wash. 2d at 343 (the court should consider the "subjective intent of the officer as well as the objective reasonableness of the officer's behavior"); Ochoa, 146 N.M. at 40 (2009) (trial courts are well-suited to identify pretext stops based on testimony and common sense).

supports and adopts the arguments in Mr. Buckley's and CPCS's briefs in support of employing similar tests in Massachusetts.

We note that The U.S. Supreme Court's decision in Arizona v. Gant⁸¹ provides a useful example, in a similar context, of reconsideration of constitutional traffic stop issues based on lived experience. In Gant, the Court overruled its previous decision in New York v. Belton,⁸² which had come to stand for a "bright-line test" authorizing police to search an automobile after arresting one of its occupants. In Gant, the Court concluded that the Belton Court had intended the decision to be read so broadly and had not appropriately grappled with the real-world consequences of its holding. As Justice Stevens wrote for the Court in Gant, "blind adherence to Belton's faulty assumption would authorize myriad unconstitutional searches. The doctrine of stare decisis does not require us to approve routine

⁸¹ 556 U.S. 332, 335 (2009); see also Commonwealth v. Perkins, 465 Mass. 600, 605 (2013) (rejecting a search of an automobile where the driver was arrested for operating a motor vehicle without a license because officers could not have expected to find evidence of the crime of arrest).

⁸² 453 U. S. 454 (1981).

constitutional violations.” In place of Belton’s bright-line test, Gant requires a fact-specific analysis of whether a search of an automobile, incident to the arrest of one of its occupants, was reasonable under the circumstances.

**C. This Court Should Clarify
The Limits On All Traffic Stops.**

Requiring suppression of evidence found through a pretext traffic stop is not enough. To remove the incentive for officers to undertake pretext stops, and particularly because spotting pretext stops will not always be easy, this Court should also limit the scope of what police officers can do when a traffic stop—any traffic stop—begins. Amicus explains below why such a curtailment is warranted and what, in broad brushstrokes, it might entail. But the basic concept is this: this Court should clarify that traffic stops are for, and only for, traffic enforcement.

**1. Clarification On The Scope
Of Traffic Stops Is Overdue.**

A dozen years ago, a Justice of this Court recognized that the permissible bounds of a routine traffic stop should be “clearly delineate[d] . . . in order fully to protect the art. 14 rights of all our citizens and to avoid even the appearance of having

countenanced official discrimination and harassment."⁸³
But no case in the succeeding years has provided that
clarity.

**2. Routine Traffic Stops Are Too Often
Escalated.**

In theory, stops should be short and pose a minor
inconvenience to motorists while a police officer
checks a driver's license and registration and, in
some instances, issues a citation.⁸⁴ In practice,
however, pretext stops tend to "get ugly."

As a part of the "routine," a
criminal history and outstanding
warrants records check is run on
the driver and passengers; they
are closely questioned about their
identities, the reason for their
travels, their intended
destinations, and the like, and
may be quizzed as to whether they
have drugs on their persons or in
the vehicle. The driver may be
induced to submit to a full search
of the vehicle, or a drug-sniffing
dog may appear on the scene and
"do his thing."⁸⁵

These tactics allow police officers to use traffic
stops as an excuse to investigate the driver,
constituting "encouragement to police to undertake

⁸³ Feyenord, 445 Mass. at 89 (Greany, J.,
concurring).

⁸⁴ See Atwater, 532 U.S. at 363-64. (O'Connor, J.,
dissenting).

⁸⁵ LaFave § 9.3.

pretext traffic stops so that they may engage in interrogation about drugs in a custodial setting[.]”⁸⁶ It appears that is exactly what happened here. It should not have.

3. A Clear, Simple Standard Is Warranted.

Any stop for a traffic or vehicle infraction should begin with a clear statement by the stopping officer about the reason for the stop: e.g., “I have stopped you because your car has a broken tail light, and the law requires you to fix it.”

An officer’s conduct during a traffic stop should be strictly limited to the steps necessary to address the stated infraction. E.g., the officer stopping a car for a broken tail light should verify that the tail light is indeed broken, ask the driver if he or she is the owner of the vehicle, and, if so, either advise the driver to fix the tail light or, if it is deemed necessary, take down the driver’s name and vehicle registration information and write a ticket for the tail light infraction.

Any additional inquiry should be outside the proper scope of a traffic stop. The officer should not be permitted to conduct any additional

⁸⁶ Id. at § 9.3(d).

investigation of the driver (for example, by checking for warrants or criminal history). The officer should not be able to ask questions of any passengers or to ask the driver about unrelated issues. (This also means, consistent with what CPCS argues, that the officer should not ask for consent to search the vehicle.)

An officer undertaking a traffic stop should be able to ask herself: is what I am about to do necessary to remedy the traffic safety issue I observed? And a motion judge at a suppression hearing should ask: was the officer's conduct necessary to address the traffic safety issue giving rise to the stop?

The standard for escalating a traffic stop (for doing more than necessary to address the traffic safety issue giving rise to the stop) should be made equally clear. If (and only if), in performing the actions necessary for the motor-vehicle infraction giving rise to the stop, the officer develops reasonable suspicion of another pressing traffic safety issue, then further investigation into that traffic violation would be appropriate. For instance, further investigation would be appropriate if the

driver stopped for a broken tail light has bloodshot eyes, slurred speech, and breath reeking of liquor.⁸⁷

Otherwise a traffic stop should not be used as a launching pad for investigative actions or searches.⁸⁸ Investigation of (and questions about) non-traffic safety-related issues at traffic stops should take place only if the officer observes a crime or if some other clear "exception to the warrant requirement applies."⁸⁹

Application of those principles here would lead clearly to reversal of the motion judge's decision. The Defendant was stopped for going slightly over the speed limit during a "slight snowstorm." The only appropriate police response was to issue a warning or a speeding ticket. It was inappropriate in the

⁸⁷ See Rodriguez, 472 Mass. at 777 ("the governmental interest in . . . promoting compliance with our automobile laws is clear and compelling. No similar governmental interest supports allowing police to [use traffic stops to investigate issues unrelated to] maintaining highway safety.").

⁸⁸ This is to say, unless traffic safety concerns are involved, mere reasonable suspicion of unrelated issues should not be enough to escalate a traffic stop. In other words, officers should not be allowed to initiate traffic stops in the hope that reasonable suspicion regarding unrelated issues will arise in the "custodial setting" that a traffic stop creates. See generally LaFave at § 9.3(d). Otherwise, the incentive for pretext stops will remain.

⁸⁹ Gant, 556 U.S. at 351.

circumstances for a plainclothes detective to approach the driver to ask her about drugs.⁹⁰

4. More Clearly Limiting The Scope Of Traffic Stops Is Consistent With Established Massachusetts Principles.

The standard suggested above would not represent a major departure from how traffic stops already are supposed to proceed under Massachusetts law.

This Court has already held that an officer's conduct during a stop must be limited to the steps "necessary to effectuate the purpose of the stop."⁹¹ These steps include (1) verifying the driver's license and registration and (2) writing (or declining to write) a citation.⁹²

⁹⁰ It was inappropriate for the detective to be there at all. The officer effecting the stop appears to have testified that it was uneventful, that he was not concerned for his safety, and that he did not have reasonable suspicion that the driver had committed any crime.

⁹¹ See Commonwealth v. Cordero, 477 Mass. 237, 242 (2017).

⁹² See Commonwealth v. Torres, 424 Mass. 153, 158 (1997) ("It is well settled that a police inquiry in a routine traffic stop must [normally] end on the production of a valid license and registration."); Commonwealth v. Ferrara, 376 Mass. 502, 505 (1978) ("Once the defendant had produced a valid license and registration, there was no basis for further interrogation and no need for further protective precautions.").

Likewise, this Court has made clear that a traffic stop should generally last only a few minutes, and certainly no longer than "reasonably necessary to effectuate the purpose of the stop."⁹³ With modern technology, including "onboard computer[s]" in police cars,⁹⁴ an officer can quickly perform the limited permissible steps of a traffic stop.

5. A Clearer Statement From This Court Is Needed.

The difficulty with these cases is that they appear to be stated too abstractly, or enforced too haphazardly, to meaningfully prevent officers from turning a pretext stop into a broader investigation.

In other words, the situation is similar to the pre-Gant status quo for searches incident-to-arrest. Somehow, the U.S. Supreme Court thought it had made the law clear, but, due to the mistake in Belton, and the lack of clarity on other cases, police officers and lower courts were allowing "myriad unconstitutional searches," resulting in "[c]ountless

⁹³ Cordero, 477 Mass. at 241(citing Amado, 474 Mass. 147, 151); see also Rodriguez v. United States, 135 S. Ct. 1609, 1614-16 (2015) ("seven or eight-minute" prolongation of traffic stop, in order to allow investigation of criminal activity, is unreasonable absent reasonable suspicion).

⁹⁴ Cordero, 477 Mass. at 238.

individuals guilty of nothing more serious than a traffic violation" having "their constitutional right[s] . . . violated[.]"⁹⁵

For the same reasons the U.S. Supreme Court changed its stance in Gant, this Court should both remedy the error in Santana and announce, here, a clear rule that traffic stops are for traffic safety only.

CONCLUSION

For the foregoing reasons, this Court should (1) reject pretext traffic stops, and (2) clarify that traffic stops are for traffic safety.

⁹⁵ 556 U.S. at 349.

Respectfully submitted,

**AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS**

By Its Attorneys,



Jeff Goldman, BBO #660870
jeff.goldman@morganlewis.com
Vanessa M. Brown, BBO #697097
vanessa.m.brown@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110-1726
617.341.7700

Matthew R. Segal, BBO #654489
Rahsaan D. Hall, BBO #645369
Jessie J. Rossman, BBO #670685
Carlton E. Williams, BBO #600973
**AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS, INC.**
211 Congress Street
Boston, MA 02110
617-482-3170
msegal@aclum.org

Dated: September 25, 2017

RULE 16(k) CERTIFICATION

I, Vanessa M. Brown, counsel for Amicus Curiae, hereby certify that this brief complies with the Rules of Court pertaining to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.



Vanessa M. Brown, BBO #697097

Addendum

Constitution of United States of America 1789 - Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Massachusetts Constitution of 1780, PT. 1, ART. 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.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12344

COMMONWEALTH

Appellee

v.

ROGELIO BUCKLEY

Appellant

CERTIFICATE OF SERVICE

I, Vanessa M. Brown, hereby certify that on
September 25, 2017, I served the attached Brief of
Amicus Curiae American Civil Liberties Union of
Massachusetts mailing paper copies, postage prepaid,
to:

Mary E. Lee
Office of the District
Attorney/Bristol County
888 Purchase Street
New Bedford, MA 02740

Matthew Malm
Wood & Nathanson, LLP
50 Congress Street
Suite 600
Boston, MA 02109
mmalm@woodnathanson.com

Vanessa M. Brown, BBO# 697097
vanessa.m.brown@morganlewis.com
Morgan, Lewis & Bockius LLP
One Federal Street
Boston, MA 02110-1726
+1.617.341.7700