

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH

v.

ZAHKUAN J. BAILEY-SWEETING

BRIEF AMICI CURIAE FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, THE NEW ENGLAND INNOCENCE PROJECT, THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., LAWYERS FOR CIVIL RIGHTS, CITIZENS FOR JUVENILE JUSTICE, RIGHTS BEHIND BARS, AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE DEFENDANT & REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the American Civil Liberties Union of Massachusetts, Inc. (ACLUM), Citizens for Juvenile Justice (CfJJ), the New England Innocence Project (NEIP), Lawyers for Civil Rights (LCR), and Rights Behind Bars (RBB) represent that they are 501(c)(3) organizations under Federal law and the laws of the Commonwealth of Massachusetts. The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) represents that it is a subsidiary of Harvard University, a 501(c)(3) organization. The Massachusetts Association of Criminal Defense Lawyers (MACDL) represents that it is a 501(c)(6) organization. The Committee for Public Counsel Services (CPCS) is a statutorily created agency established by G.L. c. 211D, § 1. *Amici* do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in any *amici*.

PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), amici and their counsel declare that:

- (a) no party or party's counsel authored this brief in whole or in part;
- (b) no party or party's counsel contributed money to fund preparing or submitting the brief;
- (c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

STATEMENTS OF INTEREST OF AMICI

The **Committee for Public Counsel Services** (“CPCS”) is a statutorily created statewide agency established by G.L. c. 211D, §§ 1 et seq., whose responsibility is “to plan, oversee, and coordinate the delivery” of legal services to certain indigent litigants, including defendants in criminal cases and juveniles in delinquency and youthful offender proceedings. G.L. c. 211D, §§ 1, 2, 4. This brief addresses issues related to police practices, including stops and patfrisks, that perpetuate racial injustice. Many CPCS clients—both juvenile and adult—are people of color who are disproportionately subjected to police intrusion because of these practices. As a result, this Court’s decision in this case will affect the interests of CPCS’s present and future clients. See *Patton v. United States*, 281 U.S. 276, 304 (1930) (“Whatever rule is adopted affects not only the defendant, but all others similarly situated.”).

The **Charles Hamilton Houston Institute for Race and Justice** (“CHHIRJ”) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led

to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most harmed.

The **New England Innocence Project** ("NEIP") is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for judicial and policy reforms that will reduce the risk of wrongful convictions. This includes ensuring that the presumption of innocence applies robustly and equally to all people and at all stages of the criminal legal system, from the moment of their encounter with the police through trial. It also includes ensuring that all evidence, regardless of its source or pedigree, is subjected to appropriately rigorous scrutiny and bears sufficient indicia of reliability before it is used against criminal defendants. Finally, in recognition of the grossly disproportionate number of members of communities of color who have been wrongfully convicted, NEIP's mission

includes ensuring that explicit or implicit racial bias does not operate in ways that serve to undermine the presumption of innocence.

The **American Civil Liberties Union of Massachusetts, Inc.** (“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 a longstanding interest in addressing persistent racial inequalities in the Commonwealth’s justice system, and routinely files amicus briefs on these issues. See, e.g., *Commonwealth v. Long*, 485 Mass. 711 (2020); *Commonwealth v. Buckley*, 478 Mass. 861 (2017); *Commonwealth v. Warren*, 475 Mass. 530 (2016); *Commonwealth v. Laltaprasad*, 475 Mass. 692 (2016).

Lawyers for Civil Rights (“LCR”) has an interest in this case because LCR’s mission is to foster equal opportunity and fight discrimination on behalf of people of color and immigrants. LCR has a strong interest in ensuring that residents of the Commonwealth are not subject to systemic discriminatory law enforcement. In particular, LCR is aware that Black people and other people of color are disproportionately targets of police stops and that these stops lead to humiliation and potential bodily injury for those individuals. LCR regularly litigates cases and files amicus briefs on criminal justice issues to address identity-based disparities in arrest, prosecution, charging, bail, and punishment. See, e.g., *Commonwealth v.*

Buckley, 478 Mass. 861 (2017); *Commonwealth v. Vallejo*, 480 Mass. 1001 (2018); *Commonwealth v. Adams*, 482 Mass. 415 (2019); *Commonwealth v. Long*, 485 Mass. 711 (2020).

Citizens for Juvenile Justice (“CfJJ”) is the only statewide, independent, non-profit organization working exclusively to improve the juvenile justice system in Massachusetts. CfJJ’s mission is to advocate statewide systemic reform to achieve equitable youth justice. This includes promoting smart policies that advance the healthy development of children and youth so they can grow up to live as responsible and productive adults in our communities. CfJJ believes that both children in the system and public safety are best served by a fair and effective system that recognizes the ways children are different from adults and that focuses primarily on rehabilitation rather than an overreliance on punitive approaches. Core to these ideas of fairness and equity is ensuring that young people are not negatively impacted by overzealous and biased policing, which research shows results in higher levels of anxiety and trauma in young people.

Rights Behind Bars (“RBB”) has an interest in this case because RBB advocates on behalf of clients in different stages of the criminal legal process. In particular RBB focuses on appellate matters to ensure that courts fully understand the impacts of procedural rulings on the lives of our clients. RBB has a strong

interest in ensuring that this Court’s past rulings are meaningfully enforced and that the progress made on racialized policing continues.

The Massachusetts Association of Criminal Defense Lawyers (“MACDL”) is an incorporated association of more than 1,000 experienced lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL seeks to improve the criminal legal system by supporting policies to ensure fairness in criminal matters and devotes much of its energy to attempting to correct problems in the criminal legal system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

INTRODUCTION

In the Commonwealth, gang designation carries devastating consequences. The designation serves as a workaround to reasonable suspicion, subjecting designated gang members to presumptive patfrisks. This cannot pass constitutional muster, and this case exemplifies why: because he had been labeled a gang member, a young Black man could not sit in the backseat of a car during a traffic stop without suffering the indignity of the police invasively touching his body. Indeed, even *proximity* to a police-“validated” gang member was enough, as the police also patfrisked the driver of the car, who was *not* on any gang list. All she did was make an allegedly unsafe lane change, but because of who she was

with, the police assumed she might be armed and dangerous. Through the distorting lens of a “gang” label, police even take cooperation as evidence of gang membership.¹ Because Black people are disproportionately subject to gang designations, they live under a cloud of baseless police suspicion.

In June, the seven justices of this Court, led by the late Chief Justice Ralph Gants, urged us all to “challenge the untruths and unfair stereotypes about African-Americans that have been used to justify or rationalize their repression.”² Gang policing is built on a foundation of untruths and unfair stereotypes.³ The police monitor what young Black and Latinx people wear, where they go, and who they know. Based on this surveillance, they assign people “points” according to criteria of law enforcement invention to “validate” gang membership. Criteria

¹ See E. Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* at 328 (2016) (“[T]he California Attorney General’s Office flagged African Americans who responded willingly and calmly to police interrogations as potential gang members.”).

² *Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar* (June 3, 2020), <https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and>.

³ See, e.g., Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 *Univ. Denver Crim. L. Rev.* 1, 4 (2015) (“No criminal conduct whatsoever is required to be identified as a gang member. The gang allegation provides a facially race-neutral means for policing the usual suspects in the usual way.”). See also *Commonwealth v. Long*, 485 Mass. 711, 750 (2020) (Budd, J., concurring) (“[T]he officer’s recognition of the vehicle or an occupant from a prior interaction or observation, conversations with other officers, or information in a gang database ... are the same factors currently used by police to racially profile people of color.”).

include clothing colors, social associations, and whether a family member has been murdered. These unreliable and overbroad criteria neither describe nor predict dangerousness. Instead, the “gang” label serves as a reliable stand-in for race: among residents of New Bedford, Black people are over *27 times* more likely to be on the gang list than white people. Gang lists thus appear to be the latest effort to forge a link between Blackness and criminality.⁴

Policing in New Bedford mirrors the racialized “search on sight” policing that plagued Roxbury nearly 30 years ago. Then, this Court decried the effective “proclamation of martial law ... for a narrow class of people, young blacks, suspected of membership in a gang or perceived by the police to be in the company of someone thought to be a member.” *Commonwealth v. Phillips*, 413 Mass. 50, 53 (1992) (citing the “formulation of a secret list of ‘known gang members’”). But that system did not end; it evolved.

STATEMENT OF THE ISSUE

Whether the police have reasonable suspicion that a young Black man sitting quietly and obediently as a passenger during a traffic stop for a civil motor vehicle infraction is nonetheless both armed and dangerous based only upon

⁴ See generally K.G. Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America I* (2010) (“Although the statistical language of black criminality often means different things to different people, it is the glue that binds race to crime today as in the past.”).

another Black male passenger’s protestations of repeated police harassment, an unsupported allegation of gang membership, and a years-old juvenile adjudication for a firearm offense.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statements of the case and facts as set forth in the brief of the defendant, Zahkuan J. Bailey-Sweeting.

Amici also provide to the Court, as additional pertinent facts, statistics from a report about policing in New Bedford recently released by Citizens for Juvenile Justice (“CfJJ”), a signatory to this brief. See Citizens for Juvenile Justice, *We are the Prey: Racial Profiling and Policing of Youth in New Bedford* (Apr. 14, 2021) (“*We are the Prey*”).⁵ The report extensively documents the racial disparities that characterize policing in New Bedford: although African-Americans comprise only 7 percent of the city’s population, they accounted for 46 percent of people subjected to police field incidents from 2015 through June 2020. *Id.* at 2. Black people are thus **13 times** more likely to be subjected to a New Bedford Police field incident than white people. *Id.* at 12. As noted above, the gang list has even greater

⁵ <https://www.cfjj.org/we-are-the-prey>. Although, given its recency, this report is not formally part of the record here, this Court has previously considered precisely such extra-record information concerning racial disparities in police stops because it bears directly on the issues in a case involving a stop and patfrisk of a young Black man. See *Commonwealth v. Warren*, 475 Mass. 530, 540 (2016) (citing reports from the Boston Police and the ACLU).

disparities: Black residents of New Bedford are 27 times more likely to be on the list than their white peers. *Id.* at 2. In fact, nearly 1 in 10 Black males living in New Bedford are labeled “verified”⁶ gang members. *Id.* at 20.

Two of the officers in this case—Detectives DaCunha and Fortes—are among the most prolific in their number of field incidents, with some of the highest racial disparities in the entire department. See *id.* at 14 (of DaCunha’s 459 incidents, 66% involved Black people and 18% involved Hispanic people, a combined 84%; of Fortes’s 266 incidents, 60% involved Black people and 17% involved Hispanic people, a combined 77%).

The New Bedford Police Department responded to the report disputing how some of the data were presented,⁷ but as CfJJ explained in a point-by-point reply,⁸ these critiques do not undermine the reliability of the data or the report’s findings. The Department’s response included no analysis of its own to reduce or eliminate the significant racial disparities in its field incidents, nor did it dispute, or even discuss, the racial disparities in its gang list.

⁶ The officers at the suppression hearing used the word “validated” where the CfJJ report uses the word “verified.” *Amici* use the terms interchangeably.

⁷ New Bedford Police Dep’t, *NBPD Responds to Citizens for Juvenile Justice Report* (Apr. 2021), <https://www.newbedfordpd.com/2021/04/nbpd-responds-to-citizens-for-juvenile-justice-report>.

⁸ Citizens for Juvenile Justice, *Citizens for Juvenile Justice response to issues raised by the New Bedford Police Department* (Apr. 20, 2021), <https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/607f2dc81fb7df309070cc46/1618947528549/CfJJ+response+to+NBPD+April+2021.pdf>.

SUMMARY OF ARGUMENT

During a motor vehicle stop ostensibly for an unsafe lane change, all four occupants of the car were patfrisked after one passenger, Raekwan Paris, complained of repeated, targeted police harassment. Police cannot cast such complaints as dangerous and then leapfrog that danger from one person to another. Indeed, Black people have every right to object to the well-documented experience of racist⁹ policing recognized by this Court. See *Commonwealth v. Warren*, 475 Mass. 530, 540 (2016). Nothing about this stop suggested that Mr. Bailey-Sweeting was armed and dangerous: it was a routine traffic stop, he did nothing to raise suspicion, and there was no reason to doubt the genuineness of Mr. Paris’s complaints. See *infra* at 22-32.

To hold otherwise would divest art. 14 protection from anyone protesting police harassment or in a car with an alleged gang member—an unreviewable and unreliable label assigned on arbitrary and speculative grounds and rooted in racist stereotypes. See *infra* at 33-39. Accordingly, *amici* suggest that this Court harmonize its approach to “gang membership” as a reasonable suspicion factor in line with recent developments in its treatment of asserted “high crime areas”: the Commonwealth must prove that the “gang” label is both accurate and relevant

⁹ This brief defines racism as a “system[or] institution[] that produce[s] racially disparate outcomes, regardless of the intentions of the people who work within [it]” *Long*, 485 Mass. at 740 (Budd, J., concurring).

before it deserves any weight in the reasonable suspicion calculus. See *infra* at 39-44. This would provide much-needed guidance to lower courts and protect communities of color, whose young people are disproportionately labeled gang-involved, from dragnet policing.

ARGUMENT

I. The officers’ reliance on a “hunch” does not meet this Court’s clear standard regarding patfrisks.

A. An officer must have reasonable suspicion that an individual is both armed and dangerous to conduct a patfrisk.

In *Commonwealth v. Torres-Pagan*, 484 Mass. 34 (2020), this Court dispelled any lingering “confusion” around the standard for a patfrisk. *Id.* at 38. The police must “have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous.” *Id.* at 39. This is a conjunctive standard. See *id.* at 37 n.4 (“*both* armed *and* dangerous”) (emphasis added). “[R]easonable suspicion may not be based merely on good faith or a hunch.” *Commonwealth v. Gomes*, 453 Mass. 506, 511 (2009). “[S]urprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous.” *Torres-Pagan*, 484 Mass. at 40.

Because Black people are subject to vastly disproportionate police scrutiny, officers cannot interpret as “dangerous” behaviors that “might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled.” *Warren*, 475 Mass. at 540. See also *Commonwealth v. Evelyn*, 485 Mass. 691, 708

(2020). Thus, the police must “discount” flight and “other types of nervous or evasive behavior” in determining whether to stop, let alone search, a Black person. *Evelyn*, 485 Mass. at 709.

B. The evidence in this case did not come close to satisfying that standard.

Mr. Bailey-Sweeting did nothing to suggest that he might pose any danger: he made no so-called “furtive movements,” and he was not combative or uncooperative. According to one officer, he was just “sitting quietly in the car.” Tr.3/28.¹⁰ He was patfrisked based not on his own actions but those of the front-seat passenger, Raekwan Paris, whose reasonable reaction to police targeting was pathologized and criminalized.

Removing the distorting lens of hindsight and of alleged gang affiliation, see *infra* at 32, there was no reason to view Mr. Paris’s behavior as anything other than a protest by a young Black man fed up with repeated stops by officers who had been stopping him since childhood. Perhaps Mr. Paris abandoned what the Commonwealth calls his “savvy level of politeness,” CW’s Br. at 30, 45, and reasonably reacted differently than on prior occasions because the repeated stops—the repeated *indignities*—took on a cumulative effect. Mr. Bailey-Sweeting, on the other hand, did exactly what the law has said should protect him: sit quietly and comply. But his compliance did not protect him. As explained below, nothing

¹⁰ The three transcript volumes of the motion to suppress hearing are cited herein in chronological order as Tr.1, Tr.2, and Tr.3.

that happened here justified the belief that the police were in danger, let alone that Mr. Bailey-Sweeting—sitting obediently in the car—“ha[d] a weapon and appear[ed] inclined to use it.” *Commonwealth v. Narcisse*, 457 Mass. 1, 9 (2010). Neither the nature of the traffic stop, nor suspicion about another person, nor a reliance on unfounded speculation can satisfy the *Torres-Pagan* standard.

(i) *A civil traffic infraction does not support an inference of danger.*

The patfrisk of Mr. Bailey-Sweeting occurred during a traffic stop for an unsafe lane change. See Tr.I/6-7. There was no report of criminal activity or shots fired; the police had no legitimate reason to suspect anyone in this car of a crime. See Tr.I/26. The traffic stop, carried out by three gang unit detectives in an unmarked cruiser, appears pretextual.¹¹

To the extent pretextual stops continue to be permitted in this Commonwealth,¹² they cannot allow for patfrisks of everyone who happens to be

¹¹ See *Long*, 485 Mass. at 724 n.8 (“Traffic stops initiated by officers whose primary assignment does not involve the enforcement of traffic laws might warrant particular scrutiny.”); *Commonwealth v. Lek*, 99 Mass. App. Ct. 199, 200 (2021) (“[T]he judge found that Sandoval was ‘looking for motor vehicle violations in order to pursue gang suppression in the area.’”). See also New Bedford Police Dep’t, *High-Energy Patrol Initiative* (Jan. 26, 2006), <https://data.aclum.org/wp-content/uploads/2018/08/NBP-Directive-re-High-Energy-Patrol-Initiative-1-15-13-response.pdf> (repealed in Jan. 2021 after community outcry) (encouraging officers to use “threshold inquiries, field interviews, motor vehicle stops, warrant checks, and street encounters” to “generate information that leads up the ladder to a circumstance in which reasonable suspicion is developed”).

¹² But see *Long*, 485 Mass. at 736 (Budd, J., concurring) (explaining why pretextual stops are unconstitutional).

present. Data disprove the oft-repeated notion about the dangers inherent to routine traffic stops.¹³ See Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 Mich. L. Rev. 635, 639 (2019) (concluding, based upon “the largest and most comprehensive study to date on violence against the police during routine traffic stops,” that by a conservative estimate police officers are seriously injured in 1 of every 361,111 stops). Only 3 percent of the vanishingly rare instances of violence during traffic stops in the Woods study were random or unprovoked, and a mere “handful of *those* cases involved guns or knives.” See *id.* at 641 (emphasis added). The law around stops and patfrisks should not ignore empirical reality.¹⁴

It is objectively unreasonable for the police to expect danger in every traffic stop. This danger narrative creates a mindset of fear that affects how police officers perceive the risks of their jobs and thus how they act. See *id.* at 638. An unjustified hair trigger during routine stops can lead to excessive force, with deadly consequences. See *Commonwealth v. Buckley*, 478 Mass. 861, 877 (2018)

¹³ See *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring) (“There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.”). Justice Harlan’s line (“the answer might be a bullet”) is now routinely taken out of the context of the person he was actually describing—someone “suspected of a serious crime.” See, e.g., Commonwealth’s Brief in *Commonwealth v. Torres-Pagan* (SJC-12967), at 34 (arguing that “the answer might be a bullet” in a case involving a cracked windshield and expired inspection sticker).

¹⁴ See *Commonwealth v. Matta*, 483 Mass. 357, 361 n.3 (2019) (changing the standard for what constitutes a seizure to “line up with empirical evidence on the matter”).

(Budd, J., concurring) (“African-Americans have been killed during routine traffic stops.”).

It is a fundamental tenet of the Fourth Amendment and art. 14 that police activity “must be proportional to the degree of suspicion that prompted the intrusion.” *Commonwealth v. Borges*, 395 Mass. 788, 794 (1985). This means that the legal justification for the stop (i.e., the civil infraction) *must* be the lens through which this Court views the stop. The pretextual motivations or the departmental assignment of the officers should not cast an aura of danger around routine traffic stops. Otherwise, police will be empowered to layer pretextual frisks atop their pretextual stops. Here, the lens of a civil infraction provided no basis to suspect that Bailey-Sweeting was armed or dangerous, let alone both.

(ii) *A patfrisk of one person cannot be upheld based entirely on suspicion about another person.*

For voicing his objection to an established pattern of harassment, Mr. Paris was not only handcuffed and patfrisked, but *everyone else in the car* was subjected to that same “serious intrusion upon the sanctity of the person ... [that] is not to be undertaken lightly.” *Terry*, 392 U.S. at 17. They were dangerous by association. All three officers admitted that, but for Mr. Paris’s conduct, they would not have ordered anyone else out of the car. Tr.1/36-38; Tr.2/16; Tr.3/28, 32. For his part, Mr. Bailey-Sweeting “did nothing more than sit calmly and quietly and cooperate with police.” *Commonwealth v. Sweeting-Bailey*, 98 Mass. App. Ct. 862, 867 (2020)

(Maldonado, J., dissenting). Even so, there was nothing he could do to avoid being patfrisked.

Mr. Paris had been a lifelong target of police suspicion—by the officers here in particular. Detective Fortes testified that he had known Mr. Paris “since he was a young kid” when he was stationed as an officer at his school, and had initiated “numerous encounters with him” since. Tr.2/6-7. This was Mr. Paris’s fourth time being stopped by Detective Kubik. Tr.1/32. And Detective DaCunha testified that he also “personally ha[d] dealt with him numerous times.” Tr.3/9.¹⁵ As the CfJJ report details, Mr. Paris’s experience of police harassment is not unique among young Black men in New Bedford. The New Bedford police appear to presume Black criminality.

This Court has recognized the reality that young Black men, like Mr. Paris, are deemed suspicious from childhood to adulthood based on their race and may reasonably react to the “recurring indignity of being racially profiled.” *Warren*, 475 Mass. at 540. Such repeated police contact has a cumulative, traumatic effect,¹⁶

¹⁵ DaCunha’s stop of Mr. Paris eighteen months earlier, referenced at length during the motion to suppress hearing, was later held unconstitutional by the Appeals Court. See *Commonwealth v. Paris*, 97 Mass. App. Ct. 785 (2020).

¹⁶ See Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104(12) Am. J. Pub. Health 2321–2327 (2014) (“Participants who reported more police contact also reported more trauma and anxiety symptoms, associations tied to how many stops they reported, the intrusiveness of the encounters, and their perceptions of police fairness.”). See also Jackson et al., *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, 65 J. Adolescent Health 627 (2019); Sugie &

and Mr. Paris did nothing more than respond to this trauma by protesting further abuse. After getting out of the parked car, he asserted the police were “harassing him,” Tr.3/12, repeatedly asked why they had been pulled over, Tr.3/14, and “demand[ed] that he speak to his lawyer.” Tr.3/15. And although the police recovered nothing from Mr. Paris, the driver, or the other passenger, Tr.1/21, they ordered Mr. Bailey-Sweeting out of the car and patfrisked him as well.

The officers’ unanimous admission that they only patfrisked the other passengers because of Mr. Paris’s behavior undermines any notion that Mr. Bailey-Sweeting was *actually* patfrisked because of his own supposed “gang” affiliation or a years-old juvenile firearm adjudication.¹⁷ Here, in fact, we know what would have happened to Mr. Bailey-Sweeting without these factors because the officers *also* patfrisked the car’s driver, who “had no known gang affiliation or

Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 Am. Soc. Rev. 719 (2017); Jackson et al., *Police Stops and Sleep Behaviors Among At-Risk Youth*, J. Nat. Sleep Found. (2020); Henderson, *In Their Own Words: How Black Teens Define Trauma*, 12 J. Child & Adolescent Trauma 141 (2017).

¹⁷ Even if it were not a belated pretext to support the patfrisk, Mr. Bailey-Sweeting’s alleged juvenile adjudication deserves no weight in the reasonable suspicion calculus. Detective DaCunha testified that Mr. Bailey-Sweeting had been committed to the Department of Youth Services for a firearm offense three years earlier, in 2015. See Tr.3/18. As the Appeals Court dissent explained, see 98 Mass. App. Ct. at 868 (Maldonado, J., dissenting), such a stale and vague allegation adds nothing to reasonable suspicion. See *Commonwealth v. Allen*, 406 Mass. 575, 579 (1990) (“It is clear that the defendant’s four-year-old conviction is insufficient.”). Particularly in a community like New Bedford, where the police so aggressively target Black people, allowing years-old adjudications to provide automatic reasonable suspicion would only compound racialized policing.

prior weapons involvement.” 98 Mass. App. Ct. at 870 (Maldonado, J., dissenting). With no other evidence, these officers decided that an allegedly unsafe lane change and a protest of police harassment justified a patfrisk of every single person in the car, no matter who they were or what they did.¹⁸

Reliance on the behavior of another person to justify a patfrisk is antithetical to the foundational requirement of *individualized* reasonable suspicion.¹⁹ *Warren*, 475 Mass. at 534 (“The essence of the reasonable suspicion inquiry is whether the police have an individualized suspicion that the person seized is the perpetrator of the suspected crime.”). See also *United States v. Cortez*, 449 U.S. 411, 417-418 (1981). A person who has done nothing suspicious or threatening cannot be deemed both armed and dangerous solely due to the behavior of another person, particularly without suspicion of criminal activity to support the initial stop. Mr. Paris’s conduct did not make Mr. Bailey-Sweeting dangerous.

¹⁸ The Commonwealth also sought to support this patfrisk by reference to the “high-crime area” factor before the Superior Court (Tr.3/37) and the Appeals Court (CW’s AC Br. at 16). However, it has effectively (and correctly) disclaimed any reliance on that factor before this Court. See CW’s Br. at 48-49.

¹⁹ The Commonwealth’s “extreme example” is a red herring—if the police have a reliable tip that a person is armed and dangerous, their suspicion is individualized to that person and can justify a patfrisk. CW’s Br. at 42. But absent any information *about* that person, and any behavior *by* that person, then that person cannot be frisked no matter what other people do. Suspicion need not necessarily be behavioral, but it must always be individualized.

(iii) *The police cannot reject obvious, commonsense reasoning in favor of unreasonable speculation.*

To infer life-threatening danger during a routine traffic stop from one man complaining about harassment and another doing nothing at all, the police had to ignore *both* what Mr. Paris said *and* how Mr. Bailey-Sweeting acted.²⁰ They failed to appreciate the impact of repeated, unwanted police contact for a young Black man—an impact recognized by this Court and not remotely unique to Mr. Paris.²¹ Instead, the officers acted on an admitted “hunch” that he was trying to distract them from a gun in the car, Tr.I/35, and followed their gut down a rabbit-hole of increasingly speculative assumptions:

- Perhaps Mr. Paris was feigning anger because he was trying to *distract the police from something*;
- Perhaps he was covering for a fellow *gang member* in the car;²²
- Perhaps he was trying to distract the police from some *physical object* another gang member had in the car;

²⁰ The Commonwealth seeks to make the *absence* of evidence suspicious, arguing that “the officers could not know what [the passengers] had been doing during the time when the officers had been unable to observe them.” CW’s Br. at 39. Of course, that is true of everyone not within the line of sight of a police officer. But the police cannot operate from a baseline of suspicion; they are not “*entitled* to be concerned” for safety and conduct a patfrisk without specific and articulable facts to justify that concern. CW’s Br. at 40 (emphasis added).

²¹ Given that *Evelyn* and *Warren* held that the police must consider flight and nervousness by Black men as understandable reactions to racial profiling, a Black man’s *direct contemporaneous complaint* about racism and police harassment is similarly reasonable and not “suspicious.”

²² Significantly, Mr. Bailey-Sweeting and Mr. Paris were allegedly members of *different* gangs. Tr. 3/9, 26.

- Perhaps that physical object *was a weapon*;
- Perhaps that weapon was on *somebody else's person*;
- Perhaps *Mr. Bailey-Sweeting had a gun*; and
- Perhaps Mr. Bailey-Sweeting was prepared to *use that gun* against the officers to protect Mr. Paris from arrest.

No link in this chain of inferences was reasonable. This is not a close case.

C. The Appeals Court's decision will erode the constitutional rights of people of color across the Commonwealth.

“[I]t is easy to forget that [the Court's] interpretations of such rights apply to the innocent and the guilty alike.” *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (Marshall, J., dissenting). Because of the nature of the judicial process, in the police-community interactions that come to the attention of courts, a person is usually alleged to have committed a crime. This creates a skewed perception of police infallibility; this Court does not hear from the hundreds of people of color who are stopped and searched every day where criminal charges never arise. In this case alone, the police patfrisked four people, allegedly finding an unlicensed firearm on only one.

The Commonwealth's proposed “patfrisk by association” rule would compound racial disparities in New Bedford policing, as only people of color like Mr. Paris will complain of racial profiling. If those legitimate complaints lead to patfrisks of *both* the person harassed *and* their silent companions, the law acts to

both silence Black people and other people of color who complain of racial trauma and those who remain passive despite it, undermining both their First and Fourth Amendment rights. To uphold the patfrisk in this case would send a devastating signal to Black and Latinx people, who already live under a system of racialized policing, that they “are not [citizens] of a democracy but the subject[s] of a carceral state, just waiting to be cataloged.” *Utah v. Strieff*, 136 S. Ct. 2056, 2070-2071 (2016) (Sotomayor, J., dissenting).

II. Because police apply gang labels using unreliable, overbroad, and racially discriminatory criteria, this Court should sharply curtail asserted “gang membership” as a factor justifying reasonable suspicion.

This case concretely demonstrates the epistemological danger of letting police and courts rely on unsupported allegations of gang membership to justify stops and patfrisks.²³ The danger is that “gang membership” operates as much more than merely one factor among several in the reasonable suspicion calculus; rather, it serves as a lens through which all other facts get interpreted. Once the specter of gang membership is invoked, it becomes difficult for police officers and reviewing courts to dispassionately assess and weigh other facts without reference

²³ This Court has already shown reluctance to endorse, without sufficient and reliable foundational proof, police experts’ proffered gang designations at trial. See, e.g., *Commonwealth v. Wardsworth*, 482 Mass. 454, 470 (2019); *Commonwealth v. Akara*, 465 Mass. 245, 267-268 (2013). *Wardsworth* cited studies on the distorting effects of gang designations upon juror deliberations about guilt, see 482 Mass. at 470 n.29, and there is little reason to think that judges and police officers are uniquely immune from these same biases.

to purported gang membership: even when the other facts objectively do not remotely support—or cut squarely against—reasonable suspicion. This problem merits this Court’s direct attention. There is ample evidence to conclude that gang designations operate as a proxy for race—in New Bedford and across Massachusetts—and that uncritical adoption of gang designations for reasonable suspicion risks smuggling racism into the art. 14 framework by another name.

A. Gang designations and gang lists are unreliable, overbroad, and racist.

In Massachusetts, police purport to “validate” gang membership with variations of a 10-point scale.²⁴ The rubrics used in New Bedford and Boston are reproduced in the Addendum. Two criteria used in both rubrics bear different point values in each city, underscoring *amici*’s concerns about arbitrariness and reliability.²⁵ These rubrics have no justification or empirical foundation to establish (1) why each criterion was given its point value or (2) to what extent these labels actually interrupt or prevent gang violence. Although the assignment of numerical points lends this system an air of objectivity, the point allocations have

²⁴ See Dunlop, *2019 Newsmaker of the Year: Youth seeking self worth are vulnerable to New Bedford gang families*, South Coast Today (Dec. 22, 2019), <https://www.southcoasttoday.com/news/20191222/2019-newsmaker-of-year-youth-seeking-self-worth-are-vulnerable-to-new-bedford-gang-families>; Morales & Miller, *Advocates say innocent teens are stamped with gang label*, Bay State Banner (May 1, 2018), <https://www.baystatebanner.com/2018/05/01/advocates-say-innocent-teens-are-stamped-with-gang-label>.

²⁵ Those criteria are “group related photograph” (4 points in New Bedford; 2 points in Boston) and “possession of documents if in custody or incarcerated” (4 points in New Bedford; 3 points in Boston).

never been subjected to serious scrutiny or proven reliable. The point allocations can be circular: being seen with others who were “validated” as gang members under the same rubric can establish gang membership. There is no published external validation of this arbitrary, subjective, and discretionary system of points compiled and applied without due process, or any process at all.²⁶

Reading the New Bedford gang assessment criteria sheet reveals its irredeemable overbreadth and unreliability. The ten-point threshold is based on more than twenty possible factors, including the color of clothes one is seen wearing (criterion 22, 4 points), appearing in photographs with other people labeled gang members (criterion 6, 4 points), having a loved one who was killed or targeted (criteria 23, 3 points or 24, 8 points), and having contact with known gang members or associates (criterion 2, 2 points *per interaction*). It is highly offensive—not to mention, grossly inaccurate—to label someone a gang member because their loved one was murdered, or because they have regular interactions with a family member labeled a gang associate, but that is a natural and probable outcome of this point system. This has real-world consequences:

One New Bedford young person who has been labelled by NBPD as a gang member said that the police regularly stop him in a car, as well as his family members when he is not present, with guns drawn. One officer “pulled my mother over and told her that her son is a ‘Code 4’ gang member” which gives the police the “right” to pull over

²⁶ See *We are the Prey* at 7.

the car. It appears that the gang label is being used to skirt constitutional protections against illegal searches and seizures.²⁷

The “facts” in the ten-point rubric implicate many law-abiding people. Like the label “high crime area,” which paints entire neighborhoods with the broad brush of suspicion, gang labels are geographically overbroad, functionally criminalizing association within hyper-segregated neighborhoods and familial and social networks. As New Bedford City Councilor Dana Rebeiro cautioned in 2019, “I would have been considered a gang member.”²⁸

Mr. Bailey-Sweeting was apparently “validated” as a gang member prior to this incident based upon having been seen with another “validated” gang member (with no suspicion of criminal involvement with that person) (2 points), being in a photograph with other “validated” gang members (4 points), and wearing “red bandannas” and using “well-known” gang hand signs (4 points). See Tr.3/23-25. Several of these point assignments are predicated on criteria acknowledged as racial stereotypes by the State Police Gang Unit,²⁹ yet New Bedford continues to

²⁷ *Id.* at 22.

²⁸ Dunlop, *Rebeiro on gang motions: ‘Black and brown people are already over-policed and over-prosecuted’*, South Coast Today (Dec. 13, 2019), <https://www.southcoasttoday.com/news/20191213/rebeiro-on-gang-motions-black-and-brown-people-are-already-over-policed-and-over-prosecuted>.

²⁹ See G.A. Nadeau, *Street Gangs: Intelligence & Awareness Training Provided by the Massachusetts State Police Gang Unit* (2013), <https://learningfirstcharter.org/wpup/gang-awareness-ma-state-police1.pdf> (“The stereotype of the young inner-city minority male dressed in baggie clothes and

employ them. At the time of this stop, based on these non-criminal police observations, Mr. Bailey-Sweeting had *exactly* ten points, just meeting the New Bedford Police Department’s arbitrary threshold for “validation” of gang membership.³⁰ Tr.3/26. On such specious inputs, the Appeals Court nevertheless concluded the police “*knew*” he “was a member of the Bloods” *Sweeting-Bailey*, 98 Mass. App. Ct. at 862-63 (emphasis added).

Field incidents often serve as the basis for gang “validation,” which then becomes a pretext for more intrusive police contact, a self-perpetuating cycle.³¹ Although the New Bedford Police Department’s critique of the CfJJ Report explains that field incidents “do not necessarily indicate that an individual was approached, stopped, or interviewed, nor do they imply criminal behavior,”³² this defense only raises further concerns of unreliability and unconstitutionality. Incident reports lacking reasonable suspicion or probable cause of criminal activity nevertheless may be used to “validate” people as gang members. Once the

bandanas, gang beads draped around their necks, tossing hand signs, is no longer the rule.”).

³⁰ Per Boston’s rubric, Mr. Bailey-Sweeting would have received only 2 points for the photograph, putting him shy of gang member “validation.”

³¹ See Cannell, *Assumed Dangerous Until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation at Bail Hearings*, 63 DePaul L. Rev. 1027, 1037–1038 (2014) (“Considering that field interviews are the initial step in entering individuals into gang databases, the high number of field interviews conducted on minorities helps explain the disproportionately high inclusion of minorities in gang database lists.”).

³² New Bedford Police Dep’t, *supra* note 7.

“validated” gang label attaches, the police effectively indemnify their own unconstitutional surveillance, allowing these unjustified field incidents to supply a basis for future suspicion.

Gang labels are especially pernicious because they are also *temporally* overbroad: people age out of gang membership,³³ yet the label endures until the police arbitrarily determine otherwise (if at all). Once a person has been branded, the label follows them everywhere they go, through every law enforcement interaction; all too often, it serves as the justification for the interaction in the first place. It becomes the basis for more frequent stops and more aggressive policing.³⁴ There is no due process afforded prior to “validation,” nor is there a process to remove oneself from the “validated” list.

Two perverse incentives encourage police to expand these secret lists. Where gang labels *supply* suspicion, expanding the list creates carte blanche to stop and search whoever they please. But there are also financial incentives: “[b]ecause Safe and Successful Youth Initiative funding becomes available to the

³³ See, e.g., Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 St. Thomas L. Rev. 620, 637-639 (2011) (“Fear Itself”).

³⁴ See, e.g., J. Trujillo & A.S. Vitale, Policing & Social Justice Project, Brooklyn College, *Gang Takedowns in the de Blasio Era: The Dangers of ‘Precision Policing,’* at 13 (2019), <https://static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+Policing+Report+-+FINAL%29.pdf>.

district attorney's office and police as the gang list grows, the current law provides an incentive to err on the side of including youth on this list, despite the harm this may cause to them.”³⁵ Predictably, the list of “verified” gang members in New Bedford grew from 505 in 2019³⁶ to 613 by October 2020. If this trendline continues, the result will be an ever-growing manifold mostly comprised of people of color, coupled with court-sanctioned erosion of their constitutional rights.

A gang designation is an improper basis for reasonable suspicion precisely because it is not a specific, articulable fact or reasonable inference therefrom—it is a conclusory label that serves as a better proxy for race than dangerousness.³⁷ According to the CfJJ report, Black people in New Bedford are *13 times* more likely to be subject to a field incident than white people, *21 times* more likely to be on the gang list than white people, and comprise *more than half* of the “validated” gang members in the city despite comprising only 7 percent of its population.³⁸ And, as noted *supra*, two of the officers with the most field incidents and starkest racial

³⁵ *We are the Prey* at 7. See also Brown, *New Bedford receives 87 percent funding hike to combat gang violence*, South Coast Today (Feb. 6, 2019), <https://www.southcoasttoday.com/news/20190206/new-bedford-receives-87-percent-funding-hike-to-combat-gang-violence>.

³⁶ Mass. Exec. Office of Public Safety and Security, Office of Grants and Research, 2019 Charles E. Shannon Community Safety Initiative: New Bedford at 2 (2019), <https://www.mass.gov/doc/2019-shannon-brief-new-bedford/download>. See also Dunlop, *supra* note 24.

³⁷ See generally Howell, *Fear Itself*, at 649-654.

³⁸ *We are the Prey* at 12, 20-22.

disparities in the entire department conducted the stop and patfrisk of Mr. Bailey-Sweeting.³⁹ This racism is not unique to New Bedford: gang databases are almost uniformly comprised of the names of young Black and Latinx men, in every place that has one.⁴⁰

The New Bedford Police Department concedes that field incidents do not necessarily “imply criminal behavior,” making the racial breakdown of the people captured in field incidents particularly concerning. If these incidents do not reflect legitimate police suspicion, one wonders what—besides “untruths and unfair stereotypes” about Black people—explains the stark racial demographic breakdown in both people subjected to field incidents and the gang list.

B. As with so-called “high-crime areas,” this Court should require specific proof of a gang label’s reliability and relevance before it can justify an intrusive patfrisk.

Amici propose a more rigorous framework to analyze alleged gang membership as a factor in the reasonable suspicion calculus by analogy to this

³⁹ DaCunha: 459 incidents, 84% involving Black or Hispanic people (66% Black, 18% Hispanic). Fortes: 266 incidents, 77% involving Black or Hispanic people (60% Black, 17% Hispanic). *We are the Prey* at 14.

⁴⁰ See, e.g., City of Chi., Office of Inspector General, Review of the Chicago Police Department’s “Gang Database,” at 4 (2019), <https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf> (“Black, African American, and Latinx persons comprise 95% of the 134,242 individuals designated as gang members”); Hum. Rights Watch, Groups Urge NYPD Inspector General to Audit the NYPD “Gang Database,” (Sept. 22, 2020), <https://www.hrw.org/news/2020/09/22/groups-urge-nypd-inspector-general-audit-nypd-gang-database> (“[T]he database is 98.5% nonwhite, and a majority of those individuals are Black (66%) and Latino (31.7%).”).

Court’s recent case law on the “high crime area” factor. These two factors share similar problems and features, and therefore invite similar treatment. Like gang designations, “high-crime areas” are defined with extreme overbreadth,⁴¹ are unreliably associated with actual crime rates,⁴² and generally target communities of color.⁴³ And both labels alter patterns of policing, inviting greater police surveillance and enforcement, which leads to more incarceration, and so on.⁴⁴

Both are also conclusory labels often attached without foundational support. In the high crime area context, “[t]he majority of jurisdictions ... primarily have relied on an officer’s testimony that an area is a ‘high-crime area’ without much analysis as to the basis for that conclusion.” Ferguson & Banache, *The ‘High-Crime Area’ Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 Am. U. L. Rev. 1587, 1607 (2008), cited

⁴¹ See, e.g., *Commonwealth v. Pena*, 69 Mass. App. Ct. 713, 714 (2007) (“Chinatown [2010 population: 4,444] is a high crime area”); *Commonwealth v. Franklin*, 456 Mass. 818, 819 (2010) (Mattapan [2010 population: 36K] “identified by police as a high crime area”).

⁴² See Grunwald & Fagan, *The End of Intuition-Based High-Crime Areas*, 107 Cal. L. Rev. 345 (2019) (finding that “the racial composition of the area and the identity of the officer are *stronger predictors* of whether an officer calls an area high crime than the crime rate itself”), cited in *Torres-Pagan*, 484 Mass. at 42.

⁴³ See *Evelyn*, 485 Mass. at 709, quoting *Wright*, 485 F.3d at 54 (noting “concern that ‘high crime’ could be ‘used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business’”).

⁴⁴ See Fagan et al., *Reciprocal Effects of Crime & Incarceration in New York City Neighborhoods*, 30 Fordham Urb. L.J. 1551, 1554 (2003) (“It is, quite literally, a vicious cycle.”).

in *Torres-Pagan*, 484 Mass. at 41. This problem persists in the gang designation context as well; here, the trial court accepted, and the Appeals Court ratified, an officer’s conclusory assertion that Mr. Bailey-Sweeting was a “validated” gang member.

And these factors share an important structural similarity: they tend to operate not as mere factors in the reasonable suspicion calculus, but as explainers or interpreters of other facts. But absent proof of the label’s reliability, its significant explanatory potential leads to unreasonable interpretations of otherwise-innocuous facts. In the high-crime area context, innocent behaviors appear suspicious simply by reason of the neighborhood in which they take place. See, e.g., *Commonwealth v. Johnson*, 454 Mass. 159, 163 (2009).

Mr. Bailey-Sweeting’s case exemplifies this phenomenon in the gang context, where gang labels were given explanatory power on two levels. First, the purported fact of Mr. Paris’s gang membership “explained” why his protestations of harassment were a mere ruse to distract from the presence of a gun in the car, despite the well-documented reality of unequal police treatment of Black people in New Bedford. Second, the purported fact of Mr. Bailey-Sweeting’s gang membership, in conjunction with his years-old juvenile firearm adjudication,⁴⁵

⁴⁵ Like alleged gang membership, a prior adjudication operates as a status that persists over time, rendering certain people more searchable than others irrespective of their conduct. See *supra* note 17.

“explained” why a gun might be found on his person—and why he might even be willing to use it to “protect a fellow gang member from arrest,” 98 Mass. App. Ct. at 866—despite the uncontroverted evidence that he was calmly and compliantly sitting in the car. While these are *conceivable* interpretations of the facts, *amici* submit that they are not remotely *reasonable*, even though a gun was ultimately recovered. See *United States v. Di Re*, 332 U.S. 581, 595 (1948) (“[A] search is not to be made legal by what it turns up.”).

No untested and unempirical label—affixed with such overwhelming racial inequality—should be assigned such a significant role in search-and-seizure analysis. As this Court recognized in both *Torres-Pagan* and *Evelyn*, the “high crime area” label should receive little (if any) weight unless the Commonwealth proves its accuracy with underlying information that establishes a “direct connection with the specific location and activity being investigated,” *Torres-Pagan*, 484 Mass. at 41. An allegation of gang membership should be treated the same way. When admitted as a factor for reasonable suspicion, without rigorous scrutiny of its foundation or relevance, asserted gang membership distorts the interpretation of all other facts. This is not justified even when police happen to locate contraband in a given case. Deference to successful searches, without evidence of the hit rate of these types of searches, leads to a “base-rate fallacy.” See *Commonwealth v. Karen K.*, 99 Mass. App. Ct. 216, 948 n.32 (2021) (Milkey, J.,

dissenting). In fact, to the extent that data on hit rates are available, it appears police guess wrong the vast majority of the time.⁴⁶

To add to reasonable suspicion, an allegation of gang membership must be subjected to rigorous scrutiny, just like the high crime area factor. See *Evelyn*, 485 Mass. at 709; *Commonwealth v. Meneus*, 476 Mass. 231, 238 (2016). The Commonwealth must prove (1) the validity and reliability of the information used to support the attribution of gang membership at the time of the stop; and (2) the relevance of gang membership to the underlying basis for the stop or patfrisk. This test requires the Commonwealth to establish a valid and up-to-date evidentiary foundation before the “gang member” label can adhere. It also requires a showing that the fact of gang membership bears a specific nexus to the justification for the stop. This would ensure that, as here, a stop for a benign traffic offense does not become a pretext to patfrisk the occupants of the car upon police assertion of gang affiliation.

But even if the Commonwealth proves both the accuracy of a gang label and its pertinence to the stop or patfrisk, the weight assigned to this evidence must still be carefully limited so as not to overwhelm the more particularized factors

⁴⁶ See Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 Ohio St. J. Crim. L. 7, 10-11 (2010) (90% of New York street stops ended in no arrest); ACLUM, *Black, Brown and Targeted* (Oct. 2014) (2.5% of Boston police-civilian FIOs from 2007 to 2010 led to seizure of contraband or a weapon).

for reasonable suspicion. Here, even if the police had actually proven that Paris and Bailey-Sweeting were gang members, this patfrisk would *still* be plainly unreasonable. Gang members can complain about police harassment and sit calmly in a car. A particularized inquiry into an individual's actions must always take precedence over an arbitrary identity-based or status designation like gang membership.

Amici do not ask that police “blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members” *Commonwealth v. Elysee*, 77 Mass. App. Ct. 833, 841 (2010). However, neither should courts uncritically defer to police judgments about the existence or significance of gang affiliations—and use asserted gang affiliations to cloud the circumstances of a stop or search. For these reasons, *amici* urge the Court to provide clear instructions to lower courts about the foundational requirements for, and weight to be given to, designations of gang membership in the reasonable suspicion calculus.

CONCLUSION

Upholding the patfrisk of Mr. Bailey-Sweeting would exacerbate the very ills the Constitution seeks to guard against: non-individualized determinations, unreasonable inferences, unreliable evidence, and unequal protection. There is undeniable injury in Massachusetts police maintaining unreliable, overbroad,

and racist databases of purported gang members—something other cities have abandoned because of precisely these concerns.⁴⁷ This Court must not place its imprimatur on this patfrisk. The convictions should be reversed.

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Dated: April 23, 2021

⁴⁷ Chicago and Portland, Oregon both eliminated their gang databases due to concerns about racism, inaccuracy, and overbreadth. Khan, *Damning Report On NYPD Gang Database Increases Calls To End ‘A Tool Of Mass Criminalization’*, Gothamist (Dec. 13, 2019), <https://gothamist.com/news/damning-report-nypd-gang-database-increases-calls-end-tool-mass-criminalization>.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to those specified in Rule 16(k), 17, and 20. It complies with the type-volume limitation of Rule 20(2)(C) because it contains 7,488 words, excluding the parts of the brief limited by the rule. It complies with the type-style requirements of Rule 20 because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Athelas font.

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CERTIFICATE OF SERVICE

Pursuant to Massachusetts Appellate Rule of Procedure 13(2), I certify that on April 23, 2021, I have made service of this Brief upon the attorneys of record for each party by Electronic Filing System.

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ADDENDUM

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APPENDIX: NEW BEDFORD POLICE DEPARTMENT SAMPLE GANG ASSESSMENT CRITERIA SHEET

10-11-2018

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Gang Assessment Criteria for _____

(Assessed by Detective Roberto C DaCunha (2C-3974) on 10/11/2018)

Total Points = 0 (Gang Member Assessment Threshold = 10) ...does not qualify as a gang member

[x]	Criteria	Point Value	Agency Defined	Per Transaction	# Transactions
1 []	ASSOCIATE	10	Y	Y	
2 []	Contact with known gang members/associates	02	N	Y	
3 []	Court and investigative documents	09	N	N	
4 []	Documented association, if in custody or incarcerated	04	N	Y	
5 []	Documented association, if not in custody or incarcerated	04	N	Y	
6 []	Group related photograph	04	N	N	
7 []	Information developed during investigation and/or surveillance	05	N	N	
8 []	Information from anonymous informant or tipster	01	N	N	
9 []	Information from reliable, confidential informant	05	N	N	
10 []	Information not covered by other selection criteria	01	N	N	
11 []	Information received from an unaffiliated law enforcement agency	08	N	N	
12 []	Known group tattoo or marking	08	N	N	
13 []	Membership documents	09	N	N	
14 []	Named in documents as a member	08	N	N	
15 []	Participation in publications	08	N	N	
16 []	Possession of documents, if in custody or incarcerated	04	N	N	
17 []	Possession of documents, if not in custody or incarcerated	08	N	N	
18 []	Possession of gang publications	02	N	N	
19 []	Prior validation by a law enforcement agency	09	N	N	
20 []	Published news accounts	01	N	N	
21 []	Self admission	08	N	N	
22 []	Use and or possession of group paraphernalia or identifiers	04	N	N	
23 []	Victim/Target affiliated with / member of rival group, if in custody or incarcerated	03	N	N	
24 []	Victim/Target affiliated with / member of rival group, if not in custody or incarcerated	08	N	N	

Excerpted from "We are the Prey."



Rule 335 - GANG ASSESSMENT DATABASE

GENERAL CONSIDERATIONS:

In 1993, the Boston Police Department created a coordinated, multi-agency enforcement unit to address the youth violence problem affecting the City of Boston. The Youth Violence Strike Force, as it was named, has since evolved to incorporate prevention, intervention, and enforcement strategies. The following Rule delineates the responsibilities of the Youth Violence Strike Force as well as the process for gang member verification and entry into the Gang Assessment Database.

YOUTH VIOLENCE STRIKE FORCE:

Established in 1993 in response to the increased use of violence amongst youth in the City of Boston.

The mission of the Boston Police Department's Youth Violence Strike Force (YVSF) is to proactively reduce gun violence, particularly concentrating on individuals affiliated with gangs or violent criminal behavior. YVSF utilizes traditional policing strategies, incorporating prevention, intervention and enforcement efforts, as well as intelligence-led policing strategies to inform decision-making at every level. Patrol officers and detectives collect information and focus on sources of firearm and gang violence through the identification of individuals, groups, and locations. YVSF works collaboratively with community partners and other stakeholders to garner information on illegal firearms and related violence. Officers aim to prevent ongoing conflicts among street gangs through direct interaction with individuals and groups. Officers not only respond to but anticipate retaliatory violence between groups, and make every effort to deter further violence. Through community-based partnerships, suitable individuals with whom the YVSF makes contact are referred to social services and offered a variety of opportunities.

DEFINITIONS:

Gang

A gang is an ongoing organization, association, or group of three (3) or more persons, whether formal or informal, which meets both of the following criteria:

1. Has a common name or common identifying signs or colors or symbols or frequent a specific area or location and may claim it as their territory and
2. Has members or associates who, individually or collectively, engage in or have engaged in criminal activity which may include incidents of targeting rival gang members and/or being targeted by other gangs.

Gang Associate—Any person, whether juvenile or adult, that has been verified using the 10 Point Verification System defined by this Rule and has obtained at least six (6) points.

Gang Member—Any person, whether juvenile or adult, that has been verified using the 10 Point Verification System defined by this Rule and has obtained ten (10) points.

Gang Assessment Database—Database maintained by the BRIC that includes Gang Members and Gang Associates that have been verified using the 10 Point Verification System.

Active Status: An individual who has met the point criteria to be considered at least an associate and has had contact with another gang member / associate or has participated in some form of gang activity within the past 5 years to include instances where the individual may have been incarcerated.

Inactive Status: An individual who has met the point criteria to be considered at least an associate and has NOT had documented contact with another gang member / associate, law enforcement agency within the past 5 years.

Primary Affiliation: The group to which an individual is associated with. In cases where an individual associates with more than 1 group, the primary affiliation should be considered the group in which Law Enforcement can most clearly articulate the individual having the strongest ties.

Secondary Affiliation: A secondary group that an individual could be verified as being at least an associate (6 points). This is in addition to their Primary Affiliation.

Profile Page / Face Sheet: A printable summary detailing a gang member / associate's key identifiers to include: Name, DOB, Race, Known Addresses, Affiliation status and Verification status, Criminal Record Number, Booking Numbers and Booking Photo.

Gang Member Verification Report: A printable summary of any items used to verify an individual as a gang member / associate.

GANG MEMBER VERIFICATION:

The Department uses a **"10 Point Verification System"** to determine when an individual will be considered a Gang Associate or Gang Member. An individual that does not have a minimum of six (6) points using the 10 Point Verification System will not be included in the Gang Assessment Database.

The following list of items or activities are examples of conduct that could result in an individual's verification for entry into the Gang Assessment Database and are not meant to be all inclusive.

- Prior Validation by a Law Enforcement Agency (9 points)
- Information Received from an Unaffiliated Law Enforcement Agency (8 points)
- Self Admission (8 points)
- Use and or Possession of Group Paraphernalia or Identifiers (4 points)
- Group Related Photograph (2 points)
- Known Group Tattoo or Marking (8 points)
- Information from Reliable, Confidential Informant (5 points)
- Information from Anonymous Informant or Tipster (1 point)
- Victim/Target Affiliated with Member of Rival Group (8 points if not in custody or incarcerated; 3 points if in custody or incarcerated)
- Possession of Documents (8 points if not in custody or incarcerated; 3 points if in custody or incarcerated)
- Named in Documents as a Member (8 points)
- Possession of Gang Publications (2 points)
- Participation in Publications (8 points)
- Court and Investigative Documents (9 points)
- Published News Accounts (1 point)
- Contact with Known Gang Member/Associate (FIO) (2 points per interaction)
- Documented Association (BPD Incident Report) (4 points per interaction)
- Membership Documents (9 points)
- Information Developed During Investigation and/or Surveillance (5 points)
- Information Not Covered By Other Selection Criteria (1 point)

10 Points will result in a person being identified as a Gang Member.

6-9 Points will result in a person being identified as a Gang Associate.

A blank verification form is attached to this rule as Appendix A.

ACCESS:

The Department will provide access to the Gang Assessment Database for each sworn officer and authorized user. All authorized users must complete a User Agreement before gaining access. Officers must have a legitimate law enforcement purpose, which may include an ongoing investigation or in support of a prosecution, for accessing the Gang Assessment Database. The Boston Regional Intelligence Center (BRIC) will serve as the administrator of the central database and ensure that users have adequate access.

Officers will have the following access permissions:

- **READ** all Gang Assessment Database Entries within the system
- **SEARCH** all entries within the system
- **PRINT** specific Gang Associate and/or Member profile pages / face sheets in order to comply with court discovery or to include in an investigative file

Additional access permissions may be granted at the discretion of the Commander of the BIA or his/her designee or the Commander of the Youth Violence Strike Force or his/her designee.

SUBMISSION TO THE GANG ASSESSMENT DATABASE:

Employees will be able to submit an individual for consideration for admission into the Gang Assessment Database. All submissions for verification shall include documentation to support the individual's entry into the Gang Assessment Database using the 10 Point Verification System. This documentation may include, but is not limited to, Incident Reports, FIOs, Intelligence Reports, Form 26s, and information gathered from social media.

Submissions can be made to the Commander of the BRIC or his/her designee or the Commander of the Youth Violence Strike Force or his/her designee.

If the individual is verified as a gang member or gang associate, the name and supporting documentation shall be forwarded to the BRIC for entry into the Gang Assessment Database.

DISSEMINATION OF GANG ASSESSMENT DATABASE INFORMATION:

All data contained in the Gang Assessment Database is considered Law Enforcement Sensitive. Officers may access the Gang Assessment Database when there is a legitimate law enforcement purpose for doing so, such as an ongoing investigation or in support of a prosecution. All court ordered, defense requested, or public requested production of information contained in the Gang Assessment Database should be directed to the Office of the Legal Advisor.

REVIEW OF GANG ASSESSMENT DATABASE ENTRIES

The Commander of the BIA or his/her designee, in collaboration with the Commander of the Youth Violence Strike Force or his/her designee, shall be responsible for ensuring that files are maintained in accordance with the goals and objectives set forth in this Rule. To that end, entries in the Gang Assessment Database shall be reviewed in accordance with state and federal law to determine current Active / Inactive status based on the definitions provided above. Individuals with an Inactive status who have NOT had documented association with another gang member / associate or law enforcement agency within the past 10 years may be reviewed for purge from the system.

[Click to view the Gang Member Verification](#)

William B. Evans
Police Commissioner



GANG ASSESSMENT DATABASE

maintained by the BOSTON REGIONAL INTELLIGENCE CENTER

Gang Member Verification

Person: TESTY, TESTY II (1/2/2003)

In accordance with 28 CFR 23.20 (c), information may not be entered into the Gang Assessment Database unless a reasonable suspicion standard has been met. This standard is met either by a participating agency having a reasonable basis to believe that there is the possibility that an individual or entity is involved in a specific criminal activity or enterprise; or the presumption of reasonable suspicion arises from the accrual of ten (10) points using the following selection criteria. The criminal justice agency submitting the data to the Gang Assessment Database is responsible for establishing the existence of reasonable suspicion of criminal activity.

The headings provided below are illustrative and do not constitute a complete list of the items or activities that could lead law enforcement officials to include an individual in this database.

Gang:

PRIOR VALIDATION BY A LAW ENFORCEMENT AGENCY

For purposes of this database, the agency in question must utilize these selection criteria.

9 points

INFORMATION RECEIVED FROM AN UNAFFILIATED LAW ENFORCEMENT AGENCY

An unaffiliated law enforcement agency is an agency which does not utilize these selection criteria.

8 points

SELF ADMISSION

The individual describes him or herself as a gang member.

8 points

USE AND OR POSSESSION OF GROUP PARAPHERNALIA OR IDENTIFIERS

These may included, but are not necessarily limited to, symbols, sayings or slogans, grafitti, hand signs or signals, nicknames, attire, articles of clothing, drawings, or other identifiers used by a particular gang.

4 points

GROUP RELATED PHOTOGRAPH

2 points

KNOWN GROUP TATTOO OR MARKING

8 points

INFORMATION FROM RELIABLE, CONFIDENTIAL INFORMANT

5 points

INFORMATION FROM ANONYMOUS INFORMANT OR TIPSTER

1 points

VICTIM / TARGET AFFILIATED WITH/MEMBER OF RIVAL GROUP

An individual participated in a gang related threat or assault, or an individual has been the victim or target of rival gang members.

Add.54

- If not in custody or incarcerated: 8 points
- If in custody or incarcerated: 3 points

POSSESSION OF DOCUMENTS

Documents include by-laws, ceremonial procedures, rosters, hit list, address book, or other documents related to gang membership.

- If not in custody or incarcerated: 8 points
- If in custody or incarcerated: 4 points

NAMED IN DOCUMENTS AS A MEMBER

An individual who is named in letters, by-laws, rosters, address books, or similar internal documents as a member of a gang.

- 8 points

POSSESSION OF GANG PUBLICATIONS

- 2 points

PARTICIPATION IN PUBLICATIONS

An individual submits articles, illustrations, advertisements to a known gang publication.

- 8 points

COURT AND INVESTIGATIVE DOCUMENTS

Possession of documents that identify a defendant as a gang member in a true bill indictment, probation report, or similar official court record, or possession of documents (including but not limited to police reports, gang jury minutes, proffer letters, reports of proffer sessions, cooperation agreements, and other law enforcement investigative materials) that identify individuals as gang members.

- 9 points

PUBLISHED NEWS ACCOUNTS

Detailed news articles in legitimate print or electronic media indicating gang membership or association.

- 1 point

CONTACT WITH KNOWN GANG MEMBERS/ASSOCIATES (FIO)

Visiting, corresponding, or engaging in financial transactions with gang members or associates.

- 2 points per interaction or transaction

DOCUMENTED ASSOCIATION (BPD 1.1/Incident Report)

Walking, eating, recreating, communicating, or otherwise associating with confirmed gang members or associates.

- If not in custody or incarcerated: 4 points per interaction or transaction
- If in custody or incarcerated: 4 points per interaction or transaction

MEMBERSHIP DOCUMENTS

Possession of membership documents, certificate of rank or title, letter of introduction or recognition.

- 9 points

INFORMATION DEVELOPED DURING INVESTIGATION AND/OR SURVEILLANCE

- 5 points

INFORMATION NOT COVERED BY OTHER SELECTION CRITERIA

Add.55

1 point

total: 0

The Gang Assessment Database shall not contain any information that has been obtained in violation of any federal, state or local law or ordinances.

save

Add.56