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IN THE SUPREME COURT OF PENNSYLVANIA
No. 50 EAP 2024

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

PHILLIP SHIVERS,
Appellant.

Appeal From The September 7, 2023 Judgment Of The Superior Court Of Pennsylvania (No. 538 EDA 2022) Affirming The January 27, 2022 Judgment Of Sentence Of Philadelphia County, Court Of Common Pleas, Criminal Trial Division At CP-51-CR-0005546-2019.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION (ACLU) AND ACLU OF PENNSYLVANIA IN SUPPORT OF APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Investigative detentions are bulk intrusions on liberty. Many Pennsylvanians have been subjected to these stops and frisks, including in Philadelphia, where police have conducted more than a million stops in the last 15 years.[1] In the vast majority of cases, frisks yielded no evidence of criminality.[2] Yet many of these stops were conducted without reasonable suspicion and reflected large racial disparities.[3] These kinds of detentions leave a distinct impression. Sometimes, when people in heavily-policed areas see police officers, they fear being profiled, stopped, and frisked. Sometimes they run.

And sometimes the police chase them. In 1999, this Court held that a Philadelphia officer violated the Fourth Amendment to the U.S. Constitution and Article I, Section 8, of the Pennsylvania Constitution by stopping a juvenile who

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[1] *See Vehicle & Pedestrian Investigations*, City of Philadelphia Data, https://data.phila.gov/visualizations/vehicle-pedestrian-investigations (last visited Sept. 19 2024) (more than 780,000 pedestrian stops since 2014) (hereinafter "Philadelphia Stop Database"); Complaint at 21, *Bailey v. City of Philadelphia*, No. 2:10-cv-05952 (E.D. Pa. Nov. 4, 2010) (ECF No. 1) (alleging 253,333 stops in 2009 alone); David Rudovsky & David A. Harris, *Terry Stops and Frisks: The Troubling Use of Common Sense in A World of Empirical Data*, 79 Ohio St. L.J. 501, 513 n.58 (2018) (419,000 stops in 2011 and 2012 combined).

[2] *See* Chad Pradelli and Cheryl Mettendorf, *Action News Investigation: Racial disparity in Philadelphia police use of stop-and-frisk, data shows*, 6abc Action News (Feb. 3, 2021), https://6abc.com/stop-and-frisk-philadelphia-data-philly/6413942/ (last visited Sept. 19, 2024) (discussing low "hit rates" for stops and frisks).

[3] *See Id.*; *see also* Philadelphia Stop Database, *supra* n.1 (nearly 80% of pedestrian stops since 2014 were conducted on non-white individuals).

matched a generic description of a man with a gun, and who ran upon seeing the officer. *In re D.M.*, 743 A.2d 422 (Pa. 1999), *cert. granted, judgment vacated sub nom. Pennsylvania v. D. M.*, 529 U.S. 1126 (2000). Shortly thereafter, the U.S. Supreme Court held that the Fourth Amendment does not bar stopping people in high-crime areas who engage in unprovoked flight from the police. *Illinois v. Wardlow*, 528 U.S. 119 (2000). This Court then reversed course. It was duty bound to follow *Wardlow*'s Fourth Amendment holding, but the Court also extended that holding to the Pennsylvania Constitution. *In re D.M.*, 781 A.2d 1161, 1165 n.2 (Pa. 2001).

On the state constitutional question, this Court was right the first time. For two fundamental reasons, an independent analysis of the state constitutional question in *In re D.M.* demonstrates that stopping someone solely because they fled the police in a high-crime area violates Article I, Section 8.

First, the text of and case law interpreting the Pennsylvania Constitution are distinct from the text of and case law interpreting the Fourth Amendment. These distinctions warrant careful scrutiny of government seizures, particularly those, like stops and frisks, that intrude on privacy, and do so absent probable cause.

Second, the notion that fleeing the police is more suspicious when it occurs in high-crime areas does not satisfy common sense, much less Pennsylvania Constitutional scrutiny. As decisions from other state courts recognize, innocent

people may flee from the police due to a fear of being stopped or racially profiled. Those fears are more likely to be present in high-crime areas with histories of fraught encounters between police and residents. Yet, under the rule of *In re D.M.*, flight by Philadelphians and other residents of Pennsylvania high-crime areas provides conclusive evidence of reasonable suspicion.

It is entirely appropriate for this Court to reexamine *In re D.M.* now. This Court's cases emphasize "that it is both important and necessary [to] undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated." *Commonwealth v. Edmunds*, 586 A.2d 887, 894–95 (Pa. 1991). Thus, this Court recently overruled a decision in which it had adopted, for purposes of Article I, Section 8, the same automobile exception to the warrant requirement that the U.S. Supreme Court applies to the Fourth Amendment. *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020), *overruling Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014). That same independent approach is warranted here. In *In re D.M.*, the state constitutional issue was not briefed until after a remand from the U.S. Supreme Court, and this Court addressed it only in a footnote. *Compare In re D.M.*, 781 A.2d at 1165 n.2, *with Oberholzer v. Galapo*, No. 104 MAP 2022, 2024 WL 3869294, at *11 n.9 (Pa. Aug. 20, 2024) (explaining that a new, "full-blown" state constitutional analysis is unnecessary if this Court has previously analyzed the issue "extensive[ly]" (citing *DePaul v. Commonwealth*, 969 A.2d 536, 547 (2009))).

This Court should now overrule *In re D.M.* To uphold the text, structure, and values of the Pennsylvania Constitution, and to avoid relegating certain Pennsylvanians to second-class status, this Court should hold that presence in a high-crime area does not render flight any more suspicious than flight that occurs elsewhere.

STATEMENT OF INTEREST OF *AMICI CURIAE*[4]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization dedicated to defending the civil liberties and civil rights guaranteed by the federal and state constitutions, and the ACLU of Pennsylvania is the Pennsylvania state affiliate.

ARGUMENT

At least four factors bear on whether the Pennsylvania Constitution should be construed more broadly than the U.S. Constitution: (1) the text of the relevant constitutional provisions; (2) the history of the provisions, including Pennsylvania case law; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence. *Edmunds*, 586 A.2d at 895; *Alexander*, 243 A.3d at 181. In this case, the *Edmunds* factors operate at two levels. First, on a general level, each

[4] No other person or entity paid for or authored this brief.

Edmunds factor counsels in favor of recognizing strong protections against investigative stops under the Pennsylvania Constitution. Second, on a more specific level, the notion that flight from the police becomes more suspicious when it occurs in a high crime area simply does not make sense, and the *Edmunds* factors help to demonstrate why.

I. The Pennsylvania Constitution supports broader investigative-stop protections than have been recognized under the U.S. Constitution.

Investigative stops and frisks are serious invasions of privacy, liberty, physical security, and personal possessions. Each *Edmunds* factor indicates that, in regulating these stops, the Pennsylvania Constitution provides broader protection than the U.S. Constitution.

First, there are significant textual and structural differences between the Pennsylvania Constitution and the U.S. Constitution that bear on search-and-seizure rights. Unlike the Fourth Amendment to the U.S. Constitution, Article I, Section 8 of the Pennsylvania Constitution expressly protects "possessions," which this Court has interpreted "to mean intimate things about one's person." *Alexander*, 243 A.3d at 190. Moreover, the Warrant Clause of Section 8 expressly refers to protections for "things," a broader term than appears in the Fourth Amendment. Further, the protections of Section 8 are enhanced by the inherent rights clause of Article I, Section 1. Pa. Const. art. I, § 8. That clause, which has no federal analog, guarantees that "All men are born equally free and independent, and have certain inherent and

indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." This Court has recognized that Section 1 may strengthen the protections of Section 8. *See Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 309 A.3d 808, 900 (Pa. 2024); *see generally* Ken Gormley and Joy G. McNally, *The Pennsylvania Constitution: A Treatise on Rights and Liberties,* Chapter 11, Searches and Seizures, by David Rudovsky (George T. Bisel Co., 2d ed. 2020).

Second, consistent with those textual and structural distinctions, this Court has deemed it "axiomatic that the Supreme Court of Pennsylvania may provide more protection for the citizens of Pennsylvania under the Pennsylvania Constitution than the federal courts provide under the United States Constitution." *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995). That extra protection includes the search-and-seizure context. In *Alexander*, the Court pointed to Section 1 and Section 8 in holding that warrantless vehicle searches require both probable cause and exigent circumstances. 243 A.3d at 207. In *Commonwealth v. Shaw*, 770 A.2d 295, 296 (Pa. 2001), this Court considered both Section 1 and Section 8 in announcing state constitutional protections for the results of a blood alcohol test performed by a hospital for medical purposes. In other cases, the Court has rejected U.S. Supreme Court doctrine under Section 8 alone. *See, e.g.*, *Commonwealth v. DeJohn*, 403 A.2d

1283, 1290-91 (Pa. 1979) (legitimate expectation of privacy in canceled check).[5]

This broad interpretation of the Pennsylvania Constitution applies as well to seizures. *See, e.g.*, *Commonwealth v. Grossman*, 555 A.2d 896, 899 (Pa. 1989) (holding that warrant authorizing seizure of "all files" violated Article I, Section 8). And the logic of these decisions applies with special force to stops and frisks. They are fraught encounters that not only intrude on people's liberty and dignity, but also their personal possessions and bodily integrity.

Third, other state courts interpreting state constitutions have recognized search-and-seizure protections that exceed those recognized under the Fourth Amendment As detailed in Part II, *infra*, state courts have charted their own course, including with respect to flight from the police and high-crime areas. *See, e.g.*, *Washington v. State*, 287 A.3d 301, 309 (Md. 2022) ("we conclude that unprovoked flight in a high-crime area does not automatically equal reasonable articulable suspicion for a *Terry* stop"); *Commonwealth v. Warren*, 58 N.E.3d 333 (Mass. 2016)

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[5] *See also Commonwealth v. Sell*, 470 A.2d 457, 459 (Pa. 1983) (rejecting elimination of automatic standing to challenge evidence in pretrial proceedings involving possessory crimes); *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996) (holding that pursuit by a police officer without probable cause or reasonable suspicion constitutes a seizure and there required suppression of contraband discarded during the chase); *Edmunds*, 586 A.2d at 887 (rejecting federal good faith exception to the exclusionary rule); *Commonwealth v. Melilli*, 555 A.2d 1254 (Pa. 1989) (recognizing that Article I, Section 8 of the Pennsylvania Constitution was violated by the installation of a pen register device without probable cause whereas such conduct was not considered a search for Fourth Amendment purposes).

(no reasonable suspicion even though defendant fled in high-crime area). *State v. Edmonds*, 145 A.3d 861, 884 (Conn. 2016) (no reasonable suspicion even though defendant turned and left in high-crime area).

Indeed, on matters of stop and frisk, state supreme courts have *had* to chart their own course. In the roughly 24 years since *Wardlow*, the U.S. Supreme Court has not decided a case that provides guidance on which pedestrian behaviors do, or do not, contribute to reasonable suspicion. Particularly given recent public debates concerning police-pedestrian interactions, state supreme courts are filling that doctrinal void left by the U.S. Supreme Court. *Cf. City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 157 (Minn. 2017) (explaining that departure from federal constitutional doctrine may be warranted if "the United States Supreme Court has 'retrenched on Bill of Rights issues'") (citation omitted).

Fourth, in enforcing search-and-seizure guarantees, it is not only permissible but advisable for state courts to consider state and local concerns, and to do so in ways that provide broader protection than the U.S. Constitution. Generally speaking, "[f]ederalism considerations may lead the U.S. Supreme Court to underenforce (or at least not to overenforce) constitutional guarantees in view of the number of people affected and the range of jurisdictions implicated." *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 175 (2018). In contrast, state courts are well equipped to tailor constitutional rights to

their state's circumstances, leaving them no "reason to apply a 'federalism discount.'" *Id.*[6]

State courts are particularly well-suited to conduct this tailoring in the search-and-seizure context, where the relevant texts ask courts to decide what is "unreasonable." The U.S. Supreme Court may hesitate to deem a particular police tactic "unreasonable," under the Fourth Amendment, in every jurisdiction in the country. But state supreme courts need not hesitate to rule what is unreasonable in their state, based on their state's practices and values. *See State v. Gunwall*, 720 P.2d 808, 811 (1986) (en banc) (noting that state courts should consider "matters of particular state or local concern" when reading state constitutions); *State v. Hunt*, 91 N.J. 338, 357 (1982) (Pashman, J., concurring) (explaining that the U.S. Supreme Court must set minimum standard for "a vastly diverse nation," and its "lack of familiarity with local conditions … do[es] not similarly limit state courts").

II. Flight in high-crime areas is not inherently more suspicious than flight elsewhere.

There are also granular reasons to interpret the Pennsylvania Constitution more broadly than the U.S. Constitution in this case. It is well established that fleeing

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[6] *See also* Robert F. Williams and Lawrence Friedman, *The Law of American State Constitutions* 203 (2d ed. 2023) ("[T]he U.S. Supreme Court Often under enforces the federal Constitution out of deference to the states." (citing Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1218–20 (1978))).

the police, without more, cannot justify a stop. *Matos*, 672 A.2d at 769; *Commonwealth v. Barnett*, 398 A.2d 1019, 1021 (Pa. 1979). Accordingly, the rule of *In re D.M.* boils down to a claim that someone's presence in a high-crime area transforms their flight from *never* sufficient to justify a stop, to *automatically* sufficient. For several reasons, informed by the *Edmunds* factors, that claim is wrong.

A. People may be more likely to flee due to fear, rather than guilt, in high-crime areas.

There is no principled basis for concluding that running from the police becomes more suspicious when it occurs in high-crime areas. If anything, the opposite is true. That is because, as reflected in reasoning of other state court decisions, residents of high-crime areas may be more likely to flee from the police due to fear rather than guilt. *See Edmunds*, 586 A.2d at 895 (third factor).

The Supreme Court of Tennessee has explained that "innocent reasons for flight" may "includ[e] . . . fear of being wrongfully apprehended as a guilty party." *State v. Nicholson*, 188 S.W.3d 649, 660-62 (Tenn. 2006). The Supreme Judicial Court of Massachusetts has concluded that a black male in Boston, "when approached by the police, might just as easily be motivated [to flee] by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity." *Warren*, 58 N.E.3d at 342. Similarly, the District of Columbia Court of Appeals, as well as five out of the seven justices of the California Supreme

Court, have agreed that many individuals '"commonly hold a perception that engaging in any manner with police, including in seemingly casual or innocuous ways, entails a degree of risk to one's safety."' *Mayo v. United States*, 315 A.3d 606, 631 (D.C. 2024) (quoting *People v. Flores*, 546 P.3d 1114 (Cal. 2024) (Evans, J., concurring)). *See, e.g.*, *State v. Tucker*, 642 A.2d 401, 407 (1994) ("That some city residents may not feel entirely comfortable in the presence of some, if not all, police is regrettable but true."); *People v. Horton*, 142 N.E.3d 854, 868 (Ill. App. Ct. 2019) ("[O]ne can readily understand why a young black man having a conversation with friends in a front yard would quickly move inside when seeing a police car").

These decisions recognize that fear can more readily explain flight from the police in communities that are heavily policed—in other words, *high-crime areas*. The Connecticut Supreme Court has said that "[t]here are a number of legitimate reasons why a law-abiding citizen may not desire to remain on the scene when the police appear, *especially in a dangerous neighborhood where police-citizen relations may be strained*." *Edmonds*, 145 A.3d at 884 (emphasis added). The D.C. Court of Appeals has identified "highly policed communities" as places where "some individuals . . . might fear over-aggressive police conduct and may flee as a result even if they are innocent of any wrongdoing." *Mayo*, 315 A.3d at 630. Similarly, the Supreme Court of Maryland pointed to the history of police misconduct in Baltimore in "reiterat[ing] that the circumstance that unprovoked

flight may be consistent with innocence is a factor that a court may take into account in determining whether officers had reasonable suspicion to detain a person, particularly a young African American man." *Washington*, 287 A.3d at 325.

The Supreme Judicial Court of Massachusetts elaborated on this point in *Warren*, which involved a young Black man who was stopped after running from police officers in Boston. The court started with the proposition that "[u]nless reasonable suspicion for a threshold inquiry already exists, our law guards a person's freedom to speak or not to speak to a police officer." 58 N.E.3d at 341. Based on a study finding that "black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations." *Id.* at 342. The court recognized that in heavily policed areas of Boston, people might choose to run from the police for reasons "totally unrelated to consciousness of guilt." *Id.*[7]

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[7] *See also State v. Clinton-Aimable*, 232 A.3d 1092, 1100 (Vt. 2020) ("'Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.'" (quoting *Wardlow*, 528 U.S. at 132 (Stevens, J., concurring and dissenting))); *Alexander v. State*, No. 500, 2022 WL 833375, at *12 (Md. Ct. Spec. App. Mar. 21, 2022) ("[I]t is beyond dispute that many members of the Black community," along with other people of color in highly policed communities, "have justified fear of interaction with the police.") (Friedman, J., concurring); *State v. Nicholson*, 2005 WL 434646,

These cases undermine the theory that flight from the police becomes more suspicious when it occurs in high-crime areas. If anything, non-criminal explanations for flight from the police are more plausible in neighborhoods that have been heavily policed, leaving residents with a potentially lasting fear of racial profiling, undue intrusion, or police violence.[8] Put another way: even assuming that

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at *6 (Tenn. Crim. App. Jan. 25, 2005), *aff'd*, 188 S.W.3d 649 (Tenn. 2006) ("In fact, innocent reasons for flight abound in high crime areas, including: fear of retribution for speaking to officers, unwillingness to appear as witnesses, and fear of being wrongfully apprehended as a guilty party.").

[8] *See, e.g.*, Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure,* 90 J. Crim. L. & Criminology 733, 792 (2000) (describing New York City data reflecting a ratio of only one arrest for every 45 stops of people who fled the police in high-crime areas, and noting that this "astoundingly high relationship between stops and arrests is suggestive that in high-crime urban communities where the population is disproportionately minority, flight from an identifiable police officer is a very poor indicator that crime is afoot."); Monica L. Wendel et al., *"Their help is not helping": Policing as a Tool of Structural Violence against Black Communities*, Psychol Violence (July 2022), at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10242413/ (study of West Louisville, Kentucky, finding that "[y]outh reported heightened mistrust of law enforcement owing to negative personal experiences with police and witnessing mistreatment of Black Americans in media and in their communities"); U.S. Dep't of Justice, Office of Community Oriented Policing Services, *Stop and Frisk: Balancing Crime Control with Community Relations* (2014), available at https://www.urban.org/sites/default/files/publication/33661/413258-Stop-and-Frisk-Balancing-Crime-Control-with-Community-Relations.PDF ("Distrust toward police officers is also likely to be a challenge in communities that have experienced hot spots policing and/or the targeted use of stop and frisk in recent years."); Jennifer Fratello et al., Vera Institute of Justice, *Coming of Age with Stop and Frisk: Experiences, Perceptions, and Public Safety Implications* at 73 (2013), available at https://www.vera.org/downloads/

there is less crime in Sewickley Heights than in Pittsburgh, why would courts or police officers assume that someone who runs from the police in Sewickley Heights has less to hide than someone who runs from the police in Pittsburgh?

B. The history of policing in Philadelphia points to fear, rather than guilt, as a potential reason for flight in high-crime areas.

Pennsylvania is no stranger to the dynamics that can make flight even less suspicious when it occurs in high-crime areas. In Philadelphia, where the stop in this case occurred, there has been litigation challenging the Police Department's stop-and-frisk practices as violative of the U.S. and Pennsylvania Constitutions. *See Bailey v. City of Philadelphia*, No. 2:10-cv-05952 (E.D. Pa. June 21, 2011) (hereinafter "*Bailey*"). In 2011, following two consecutive years with more than 200,000 stops,[9] the plaintiffs and the City entered into a consent decree in which the City agreed to implement certain measures designed "to ensure that stops and frisks by the PPD are conducted consistent with constitutional mandates." *See id.*, Settlement Agreement, Class Certification, and Consent Decree at 2, (ECF No. 16).

With respect to search-and-seizure issues, there was some gradual improvement but also, for many years, substantial non-compliance with the consent

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publications/stop-and-frisk-technical-report-v4.pdf (finding, in study of New York Police Department, that "with every additional stop, a young person is eight percent less likely to report a violent crime in which they are the victim").

[9] *See supra*, n.1.

decree in terms of stops and frisks without reasonable suspicion. *See* David Rudovsky & David Harris, *Terry Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 Ohio St. L.J. 501, 536 (2018) ("an analysis of stops and frisks in the first half of 2015 [by the PPD] showed that approximately 33% of all stops were made without the requisite reasonable suspicion and 56% of all frisks were made without reasonable suspicion or were the 'fruit' of an illegal stop") (footnote omitted).

With respect to racial discrimination issues, in 2020 the City's statistical expert agreed with plaintiffs' expert that "there exists a significant association between detainee race (African-American) and the likelihood of being stopped." City of Philadelphia Supplemental Tenth Report on Fourteenth Amendment Issues at 1, *Bailey* (E.D. Pa. July 17, 2020) (ECF No. 113); *see also* Defendant City of Philadelphia's Response to Plaintiffs' Motion to Mandate Racial Bias Remedial Measures at 3, *Bailey* (E.D. Pa. Apr. 5, 2021) (ECF No. 131) (city's acknowledgment that its expert had conceded in 2020 "that there appeared to be a racial disparity that was not explained by crime rates or other factors"). In the wake of this development, the Court ordered remedial measures to reduce racial disparities. *See* Order, *Bailey* (E.D. Pa. June 2, 2021) (ECF 136).

This litigation confirms that Philadelphia residents—especially people of color—may well run from the police due to fears arising from current or former

unlawful police actions.[10] Given this constitutionally cognizable context, *see Edmunds*, 586 A.2d at 895, a Philadelphian's presence in a high-crime area tends to suggest that their flight from police is not due to criminality but instead to something else: a desire to avoid "over-aggressive police conduct," *Mayo*, 315 A.3d at 630, or "the recurring indignity of being racially profiled," *Warren*, 58 N.E.3d at 342.

C. High-crime-area designations risk apportioning rights by neighborhood, class, and race.

Finally, a police license to stop people solely because their flight occurred in high-crime areas undermines the protections of Article I, Section 8, along geographic and demographic lines. As Justice Wecht observed, "the blanket assertion that an area is a high-crime area contravenes the requirement that reasonable suspicion (or probable cause) be particular to the individual suspect." *Commonwealth v. Dobson*, 307 A.3d 612, 625 (Pa. 2024) (Wecht, J., supporting reversal) (footnote omitted). In fact, there is no consensus as to what a "high-crime area" even is. Is it some absolute measure of crime (e.g., per 100, 000 residents) or is it comparative to communities (if they exist) that the police categorize as low-

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[10] *Cf.* Sammy Caiola, *Democratic mayoral nominee Cherelle Parker wants to strengthen police, lean on stops and searches to tackle gun violence*, WHYY (May 30, 2023), https://whyy.org/articles/philadelphia-cherelle-parker-policing-mayor-election-stop-and-frisk-gun-violence/ (quoting now-Mayor of Philadelphia, Cherelle Parker, as saying: "I've seen what it's like, particularly when I've had Black men who I've loved and cared about stopped for no apparent reason other than the fact that they were Black.").

crime areas? Regardless, no matter how defined, high-crime-area designations will inevitably create flawed doctrine.

First, in part because high-crime area designations lack agreed-upon objective criteria, they lend themselves to the influence of implicit or explicit racial bias. According to a 2019 study of policing in New York City, for example, "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." Grunwald & Fagan, *The End of Intuition-Based High-Crime Areas*, 107 Cal. L. Rev. 345 (2019). Similarly, a study in Boston indicated that the perception of "high crime" in an area shapes policing patterns, which cause "[m]inority neighborhoods [to] experience higher levels of [police-resident] activity, controlling for crime and other social factors." Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 Fordham Urb. L.J. 539, 540, 544-45 (2016).

Consistent with those findings, judges have recognized that "the term 'high-crime area' is not only amorphous and undefined, but that it can be used as a proxy for race and ethnicity." *Johnson v. State*, No. 2465, 2018 WL 5977917, at *4 (Md. Ct. Spec. App. Nov. 14, 2018) (Arthur, J., concurring) (collecting examples); *see also, e.g., Commonwealth v. Evelyn*, 152 N.E.3d 108, 126 (Mass. 2020) (noting concerns about the effect of high-crime-area designations on minority groups). The U.S. Department of Justice, too, has warned of "the use of pretexts as an excuse to

target minorities," particularly when law enforcement is "focused on 'high crime areas.'" U.S. Dep't of Justice, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity, at 5-6 (Dec. 2014). Here, then, it is no surprise that, in the asserted high-crime area where police stopped Mr. Shivers, Black people have been statistically more likely to be stopped for reasons that cannot be explained by crime or other non-race factors.

Second, even if it were somehow possible to apply an objective high-crime-area designation, that designation would still "relegate those unfortunate enough to live in such 'high crime areas' to second-class citizenship." *United States v. Griffin*, 589 F.3d 148, 158 (4th Cir. 2009) (Gregory, J., dissenting) (criticizing Fourth Amendment doctrine). Here, for example, both the trial court and the prosecutor appeared to agree that the City of Philadelphia, in its entirety, is a high-crime area. *See* Shivers Pet. at 25 & Exh. D. If that is so, and if the rule of *In re D.M.* is allowed to stand, then it means that some Pennsylvanians have a constitutional right to flee the police, while others do not. For the latter group, although this Court's decisions in *Matos* and *Barnett* nominally afford them the constitutional right to refuse voluntary police encounters by running away, this Court's decision in *In re D.M.* extinguishes that right. *Cf. Ex parte Bird*, 594 So. 2d 676, 682 (Ala. 1991) (describing striking a venire-member for being from a '"high crime"' area as

"constitutionally deficient" because, were that justification "given credence," it could "serve as [a] 'convenient talisman[] transforming *Batson*'s protection against racial discrimination in jury selection into an illusion") (citations omitted).

And unlike where courts deem individual *behavior* to be suspicious, there is nothing that Pennsylvanians can do to overcome the extinguishment of constitutional rights that arises from a high-crime area designation. When a court deems a behavior suspicious, law-abiding residents can at least try to avoid being stopped and frisked by not engaging in that behavior. But when a court deems an entire community suspicious, law-abiding residents cannot do anything—short of moving—to avoid the consequences of that ruling.

Drawing high-crime areas more narrowly will not cure that fundamental problem. For example, if a court were to say that only parts of Philadelphia are high-crime areas, rather than the entire City, that designation would still have the effect of overruling *Matos* and *Barnett* for all residents of the designated areas. What is more, drawing high-crime areas more narrowly might tend to exacerbate racial disparities. After all, "African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas." David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 677–78 (1994). So if police officers were invited to designate smaller high-crime-areas, those designations could be

expected to exempt the wealthiest and whitest neighborhoods. It is unclear what law enforcement benefit would arise from that exemption because, as noted above, there is no reason to assume that running from the police is more suspicious when undertaken by residents who historically have had the most to fear from the police.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and hold that flight from the police in a high-crime area, without more, cannot justify an investigative stop.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of Pa. R.A.P. 2135 because it contains less than 7,000 words, exclusive of those materials identified as excepted from the word limit in subpart (b) of the rule.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts*, which require filing confidential information and documents differently than non-confidential information and documents.

/s/ *Veronica Miller*