COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. 13816

COMMONWEALTH,

Appellee,

v.

JOSE ARIAS

Defendant-Appellant.

On Appeal from a Judgment of the Suffolk Superior Court

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AND THE AMERICAN CIVIL LIBERTIES UNION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, neither the American Civil Liberties Union, Inc. ("ACLU"), nor the American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") has a parent corporation and no publicly held corporation owns any stake in any of these organizations.

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INTERESTS OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nonprofit civil rights organization. The ACLU of Massachusetts ("ACLUM"), an affiliate of the national American Civil Liberties Union, is a statewide nonprofit membership organization dedicated to the principles of liberty and equality guaranteed by the constitutions and laws of the Commonwealth and the United States. Amici have a longstanding interest in eliminating racially disparate police practices and frequently submit amicus briefs in cases like this one that implicate the rights of citizens to be free of unreasonable searches and seizures. *See*, *e.g.*, *Commonwealth v. Daveiga*, 489 Mass. 342 (2022) (amicus brief arguing that pretextual traffic stops violate art. 14 of the Massachusetts Declaration of Rights); *Commonwealth v. Long*, 485 Mass. 711 (2020) (same); *Commonwealth v. Buckley*, 478 Mass. 861 (2018) (same); *see also* ACLU Foundation of Massachusetts, *Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007–2010* (Oct. 2014); ACLU Foundation of Massachusetts, *Stop and Frisk Report Summary* (Oct. 2014), cited in *Commonwealth v. Warren*, 475 Mass. 530, 538 n.13 (2016).

PREPARATION OF AMICUS BRIEF

Pursuant to Massachusetts Rule of Appellate Procedure 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 amici contributed money 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an opportunity to affirm the core purpose of art. 14 of the Massachusetts Declaration of Rights: protection from warrantless, unreasonable searches and seizures. The undisputed facts of this case set out a series of pretextual enforcement decisions and post hoc rationalizations that transformed a day-old minor traffic violation into a full-blown arrest and search. The officers in this case were involved in a drug investigation, but importantly, this case does not ask the Court to determine whether a defendant may be arrested for contraband. Instead, it asks the Court to determine whether, in the absence of a warrant, law enforcement may use a stale pretextual stop, a vague "neglect to stop" statute that permits officers to define "neglect" however they wish, and a statutory arrest provision for a fine-only misdemeanor to justify their actions. Each of these justifications allows law enforcement to avoid the warrant requirement, end-run reasonable suspicion, and employ arrest as an investigatory rather than protective tool in violation of the reasonableness standard of art. 14. As a result, any one of them provides a basis to grant Mr. Jose Arias's motion to suppress.

The record in this case is startling. As part of an ongoing drug investigation, officers from Boston's Drug Control Unit ("DCU") followed Arias in an unmarked car for approximately six miles before observing him commit a traffic infraction: an

improper left turn. RA.II/42 & n.3.[1] More than twenty-four hours later, a different DCU officer called for a different police car to pull Arias over for the previous day's improper turn. Over the police radio, the DCU officer made clear that the real reason he wanted to pull Arias over was because "we're looking to stop a vehicle for [a] drug investigation," RA.II/43, even though the DCU lacked sufficient evidence to pull Arias over for this purpose. Given this evidence, the Suffolk Superior Court later correctly found that the unlawful left turn the previous day was a mere pretext for the DCU to stop Arias. RA.II/44.

After a marked police car activated its lights and sirens, Arias slowed down, and proceeded about a block to try and turn off the busy street onto a side street—all reasonable actions when being told to pull over. RA.II/43. But before Arias could make the turn, another police car pulled in front and blocked his path. *Id.* The officers approached Arias, immediately ordered him to exit the car, conducted a pat-frisk, and arrested him. RA.II/43-44.

At the time, officers justified his arrest based on "Possessing/Concealing" drugs. RA.I/128, 131, 136. DCU officers did not cite Arias for his improper left turn the day before or for "neglecting" to stop the vehicle once the marked car activated its lights and sirens. *See*, *e.g.*, RA.I/128-137. But approximately one and

[1] The Record Appendices Volumes I and II are cited herein as "RA.I" and "RA.II."

a half years after arresting Arias, as part of briefing on Arias's motion to suppress the fruits of the search, the Commonwealth abandoned the assertion that the drug investigation authorized Arias's arrest and search, and instead relied on G.L. c. 90, § 21,[2] which permits police officers to arrest persons who, *inter alia*, neglect or refuse to stop when requested by a police officer and thereby violate G.L. c. 90, § 25.[3] *See* RA.I/151. Section 25 is a non-jailable offense and imposes a maximum punishment of a $100 fine for neglecting or refusing to stop for police. Before this Court, the Commonwealth has continued to rely exclusively on this statutory argument to justify its actions and—for good reason—avoided any assertion that the drug investigation could lawfully authorize the stop or search that occurred.

As a result, the question before this Court is whether evidence stemming from a pretextual stop and a warrantless, statutorily authorized arrest for a fine-only misdemeanor that vaguely defines the underlying offense, should be suppressed. For three independent reasons, the answer is yes.

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[2] "Any officer authorized to make arrests may arrest without a warrant and keep in custody . . . any person who . . .while operating or in charge of a motor vehicle, violates the provisions of section twenty-five of chapter ninety." G.L. c. 90, § 21.

[3] "Any person who, while operating or in charge of a motor vehicle, . . . shall refuse or neglect to stop when signalled [sic] to stop by any police officer . . . shall be punished by a fine of one hundred dollars." G.L. c. 90, § 25.

First, on this clean record of undisputed pretext, this Court should hold that art. 14 prohibits pretextual stops. As this case aptly demonstrates, a contrary rule undermines the right to be free from unreasonable searches and seizures. It cannot be reasonable to permit police officers to follow a target for miles until a minor traffic violation occurs, and then use that violation as justification to conduct a warrantless search 24 hours later. As other amici explain, *see* Brief for the Comm. for Pub. Counsel Servs. et al. as Amici Curiae ("CPCS Br."), pretextual stops function as the very general warrants that art. 14 was designed to prevent, and too often provide the foundation for the discrimination that lies at the root of the disparities in our criminal legal system. Pp. 17-18.

Second, this Court should clarify that where, as here, there is no evidence of breach of the peace, warrantless arrests for misdemeanors are unreasonable under art. 14, even where a statute authorizes the police to arrest a person for that misdemeanor. This holding logically follows from the reasoning in *Lunn v. Commonwealth*, 477 Mass. 517, 530 & n.20 (2017), which already rejected the overbroad "*Atwater* doctrine" for non-statutorily authorized arrests. In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the U.S. Supreme Court held that the Fourth Amendment allows warrantless arrests even for fine-only misdemeanors committed in an officer's presence and even where there is no breach of the peace. That broad ruling granted police boundless discretion to arrest people for trivial offenses,

inviting arbitrary and discriminatory enforcement that is prohibited by the more protective art. 14. *Lunn* rightly rejected its application to common law offenses under Massachusetts law. *Lunn*, 477 Mass. at 530 & n.20. This Court should extend *Lunn*'s reasoning and clearly reject the *Atwater* doctrine in all contexts: under art. 14, an arrest for a misdemeanor—whether "authorized" by G.L. c. 90, § 21 or any other statute—must still satisfy the common-law requirement of a breach of the peace. Pp. 18-34.

Third, this Court should hold that the "neglect to stop" statute is unconstitutionally vague as applied to Arias. If Arias's reasonable attempt to slowly move off a busy street onto a safe side street constitutes neglecting to stop in violation of the statute, then its reach would be limitless. *See* G.L. c. 90, § 25. A statute that permits police boundless discretion to determine when a motorist's prompt attempt to find a safe place to pull over transforms into an unlawful "neglect to stop" fails to provide motorists with notice of what conduct is prohibited and, more importantly, provides officers with a broad license for arbitrary enforcement. Pp. 35-40.

While this Court can reach all three of these arguments—and should do so to safeguard the constitutional interests implicated by each issue—it need not do so to reverse the decision below. Any one of these holdings on its own is sufficient to grant Arias's motion to suppress.

ARGUMENT

I. Pretextual stops are inherently unreasonable.

The facts of this case clearly paint the unreasonableness of pretextual stops. DCU officers wanted to stop Arias for a "drug investigation" but lacked the requisite cause. *See* RA.I/145-46, II/41-43. So, they followed him for miles until he committed a ubiquitous traffic violation and used that violation *the following day* as a pretext to conduct a traffic stop rather than undergoing the constitutional requirements of proving reasonable suspicion or pursuing a warrant. RA.I/199, II/41-43. When they stopped him, they did not ask for his license or registration, or cite him for any traffic-related violation, but instead immediately called for a drug-sniffing dog. RA.II/44. On this record of obvious pretext, affirmed by the Superior Court's factual findings, *id.*, the Court should adopt Chief Justice Budd's view that pretextual stops "are not justifiable under art. 14." *Commonwealth v. Long*, 485 Mass. 711, 750 (2020) (Budd, J., concurring).

The "nearly unlimited discretion" granted by pretextual stops "is an anomaly under our art. 14 jurisprudence." *Id.* at 743. Permitting officers to use minor traffic infractions as justification for stopping a car, even if the officer's real intention is to conduct a search unrelated to the infraction, allows officers to evade the protections that this Court otherwise strives to protect and that art. 14 requires. As amici explain, pretextual stops function as general warrants and violate the core of art. 14's

protective principles. *See* CPCS Br. at 13-24. They encourage arbitrary and discriminatory enforcement and propel racial disparities in traffic stops and in our criminal system as a whole. *Id*.

Pretextual stops are contrary to the principles of art. 14. On this clear record the Court should hold they are per se unreasonable and therefore unconstitutional. In its place, this Court should adopt a "would have" test, namely, "whether a reasonable officer would have made the stop solely for the purpose of traffic enforcement." *Long*, 485 Mass. at 745-46 (Budd, J., concurring). Under such a test "the defendant need not prove, and the motion judge is not required to determine, the officer's true motive." *Id*. at 745 (Budd, J., concurring). The analysis is similar to that which judges regularly undertake under *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). *See also* CPCS Br. at 28-31 (describing workability of implementing "would have" test). This Court should, in place of authorizing pretextual stops, implement this workable "would have" test which is more consistent with art. 14.

II. This Court should apply *Lunn's* reasoning to hold that statutorily authorized misdemeanor arrests without a breach of the peace are unreasonable, and therefore unconstitutional under art. 14.

After conducting a pretextual traffic stop, the officers compounded their art. 14 violation by arresting Arias without a warrant and searching him incident to arrest to try to find contraband supporting their intended drug investigation. RA.II/43-44. The Commonwealth's post hoc rationalization for the arrest relies on their allegation

that Arias violated G.L. c. 90, § 25—a fine-only misdemeanor—by "neglect[ing] to stop," RA.I/155. This purported violation of § 25 triggered two broad statutory authorizations: G.L. c. 90, § 21, which authorizes warrantless custodial arrest for certain violations including § 25, and then G.L. c. 276, § 1, which authorizes a search incident to arrest "for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made." *See* RA.I/155, II/43-47.

This Court has previously held that where an arrest is not otherwise authorized by statute, Massachusetts law requires a breach of the peace for officers to make an arrest for a misdemeanor. *See Lunn*, 477 Mass. at 530 & n.20. However, this Court has not squarely addressed whether a breach of peace is required for a warrantless misdemeanor arrest, where the arrest is authorized by statute—for example, the type of arrest authorized by G.L. c. 90, § 21. *See id.* at 529 (noting statutes authorizing arrest were inapplicable to facts of case without addressing breach of peace requirement); *see also id.* at 530 n.20 ("[W]e have also consistently enforced the [breach of the peace] requirement, when necessary, by holding warrantless misdemeanor arrests that were not authorized by statute and that did not involve any breach of the peace to be unlawful"). But without evidence of a breach of the peace, the government interest in a warrantless arrest for a misdemeanor cannot outweigh the liberty interests at stake, and broad statutory license to conduct arrests for

misdemeanors without a breach of the peace exacerbates biases and erodes civil liberties. This Court should clarify that art. 14 does not permit warrantless arrests for misdemeanors where there is no breach of peace, even where police officers are statutorily authorized to make such an arrest.[4]

A. This Court has previously confirmed that under Massachusetts law, warrantless misdemeanor arrests not otherwise authorized by statute require a breach of the peace.

It is well-established that art. 14's protections are broader than those afforded by the Fourth Amendment.[5] That extends to Massachusetts law governing misdemeanor arrests, where this Court has highlighted the breach of the peace

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[4] As discussed below, *Lunn's* reasoning applies with equal force to all misdemeanors, and this Court could and should so hold in this case. However, if the Court prefers to limit its analysis to the circumstances of this case, it should hold that a breach of the peace is at least required for statutorily authorized arrests of a person for a non-jailable, fine-only misdemeanor, and leave for another day the question of art. 14's interaction with statutorily authorized arrest for jailable misdemeanors.

[5] *See*, *e.g.*, *Commonwealth v. Rodriguez*, 430 Mass. 577, 584 n.7 (2000) (collecting cases); *see also Commonwealth v. Lyles*, 453 Mass. 811, 812 n.1 (2009) (art. 14 more protective in defining moment of seizure); *Commonwealth v. Upton*, 394 Mass. 363, 373 (1985) ("We conclude that art. 14 provides more substantive protection to criminal defendants than does the Fourth Amendment in the determination of probable cause."); *Commonwealth v. Ford*, 394 Mass. 421, 426 (1985) (similar); *Commonwealth v. Gonsalves*, 429 Mass. 658, 662 (1999) (similar); *Commonwealth v. Alexis*, 481 Mass. 91, 99-100 (2018) (similar). Massachusetts law governing misdemeanor arrests is likewise more protective than the Fourth Amendment. *See* discussion of *Lunn v. Commonwealth*, 477 Mass. 517 (2017), *infra*; *see also Commonwealth v. Mekalian*, 346 Mass. 496, 497-98 (1963) (arrest without warrant or statutory authorization for misdemeanor without breach of peace was unlawful); *Commonwealth v. O'Connor*, 7 Allen 583, 584-85 (1863).

requirement for misdemeanor arrests, and rejected Federal case law that dispenses with that requirement.

In *Atwater*, the U.S. Supreme Court held that the Fourth Amendment did not "forbid[] a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine." 532 U.S. 318, 323 (2001). In seeking to understand the scope of the Fourth Amendment's safeguards for warrantless arrests, the Supreme Court looked to the "state of pre-founding English common law" to determine whether "'founding-era common-law rules' forbade peace officers to make warrantless misdemeanor arrests except in cases of 'breach of the peace.'" *Id.* at 327. After examining historical evidence and the state of common law since the founding, the Supreme Court concluded that the history of warrantless misdemeanor arrests is "two centuries of uninterrupted (and largely unchallenged) state and federal practice permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace." *Id.* at 318. Therefore "if an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender," "without the need to balance the interests and circumstances involved in particular situations." *Id.* at 354 (quotation omitted).

In *Lunn*, this Court recognized a different history and tradition animating protections under Massachusetts law, explicitly contrasting the holding in *Atwater*.

The issue in *Lunn* was "whether Massachusetts court officers have the authority to arrest someone […] pursuant to a civil immigration detainer." 477 Mass. at 518-19. Answering this question in the negative, the Court detailed the authority of police officers to make warrantless arrests. *Id.* at 529. "[T]he sum and substance of the power of police officers to make warrantless arrests under Massachusetts common law," includes: (1) the "authority to arrest without a warrant any person whom he or she has probable cause to believe has committed a felony"; and (2) the "authority to arrest without a warrant any person who commits a misdemeanor, provided the misdemeanor involves an actual or imminent breach of the peace, is committed in the officer's presence, and is ongoing at the time of the arrest or only interrupted by the arrest." *Id.* at 518-19. This Court described how, in contrast to the history analyzed in *Atwater*, here the breach of the peace requirement for a misdemeanor arrest "has become firmly embedded in the common law of Massachusetts." *Id.* at 530 & n.20 (citing cases). The Court cited Massachusetts cases as far back as 1863 requiring a breach of the peace for misdemeanor arrests. *See id*. at 530 n.20 (citing *Commonwealth v. O'Connor*, 7 Allen 583, 584-85 (1863)). The Court specifically rejected the analysis in *Atwater*, describing that case as "surveying common law

[and] holding that Fourth Amendment to United States Constitution does not require breach of peace for warrantless misdemeanor arrest." *Lunn*, 477 Mass. at 530 n.20.[6]

The only other time this Court substantively addressed *Atwater*, it similarly rejected its reasoning and the more limited protections of the Fourth Amendment. *See Commonwealth v. Hernandez*, 456 Mass. 528, 531 (2010).[7] *Hernandez* involved the off-campus execution of a misdemeanor arrest warrant by two university police officers acting as special State officers. *See id.* at 529. The Commonwealth conceded that the campus police officers did not have statutory authority to execute the warrant, and that the officers had "no common-law authority to execute an arrest

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[6] In rejecting *Atwater*, this Court is among many state courts that have found *Atwater* inconsistent with state constitutional protections. *See*, *e.g.*, *State v. Bauer*, 307 Mont. 105, 111 (2001) (under Montana Constitution, "it is unreasonable for a police officer to effect an arrest and detention for a non-jailable offense when there are no circumstances to justify an immediate arrest"); *State v. Brown*, 99 Ohio St.3d 323, 327 (2003) (Ohio constitution provides greater protection than Fourth Amendment "against warrantless arrests for minor misdemeanors"); *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004) ("following *Atwater*'s proposition that the existence of probable cause of a minor traffic violation eliminates the need for balancing individual and governmental interests would threaten the integrity and coherence of" state constitutional interpretation); *see also New York v. Abdul-Akim*, N.Y.S.2d 764 at *11 (N.Y. Sup. Ct. May 6, 2010) (trial court "d[id] not find *Atwater* to be controlling or even persuasive authority," and held that "even if [the officer] had probable cause to believe that defendant . . . drove his car while unlawfully using a cell phone, that was not a valid predicate for the resultant arrest").

[7] Although *Commonwealth v. Buckley*, 478 Mass. 861, 868 (2018), quoted *Atwater* for the proposition that art. 14, like its federal counterpart, must often be applied on the spur of the moment, it did not adopt the holding in *Atwater*, refer to the case's reasoning, nor indicate any alteration of its analysis in *Lunn.*

warrant for a misdemeanor in the circumstances presented." *Id.* at 530. However, the Commonwealth argued, relying on federal case law building on *Atwater*, that suppression of evidence was not constitutionally required for evidence discovered because of an admittedly unlawful arrest where there was otherwise probable cause to effectuate it. *See id.* at 531. This Court declined to adopt such a position, noting that Massachusetts precedent, statute, and art. 14 were more protective than their federal counterparts and required exclusion of evidence obtained from an unlawful arrest. *Id*. at 532-33.

B. This Court should apply *Lunn's* reasoning to hold that art. 14 does not permit misdemeanor arrests absent a breach of the peace, regardless of statutory authorization.

This Court should apply *Lunn*'s reasoning to hold that, regardless of statutory authorization, a warrantless arrest for a misdemeanor where there is no breach of the peace is unreasonable and therefore unconstitutional under art. 14. This is because: (1) without a breach of the peace, the governmental interest in a warrantless arrest for a misdemeanor cannot outweigh the liberty interests at stake; and (2) broad statutory license to conduct arrests for misdemeanors without a breach of the peace exacerbates biases and erodes civil liberties.

1. Warrantless arrests for misdemeanors absent a breach of the peace unreasonably intrude on liberty interests without serving any significant governmental interest.

Reasonableness is the "ultimate touchstone" of art. 14. *Commonwealth v. Rodriguez*, 472 Mass. 767, 775-76 (2015). As a result, "to evaluate the permissibility of particular law enforcement practices" courts should "balance[] the intrusiveness of the police activities at issue against any legitimate governmental interests that these activities serve." *Id.* (quotations and alterations omitted). Where there is no breach of peace, there is no applicable governmental interest in maintaining safety in public places, because there is no public disturbance or endangerment. The significant individual liberty interest in remaining free from custodial arrest (and subsequent searches) must take precedence in such an instance where there is little, if any, recognizable government interest. *E.g.*, *id*. (stops based on reasonable suspicion of civil marijuana infraction that do not implicate any safety concerns are unreasonable and violate art. 14).

Statutory authorization cannot evade art. 14's reasonableness requirement.[8] Indeed, other state courts have held that reasonableness—not statutory authorization—is the dispositive factor in determining an arrest's constitutionality,

[8] This Court's authority to render void legislation that is incompatible with the Massachusetts Declaration of Rights predates even the U.S. Supreme Court's 1803 articulation of judicial review under the U.S. Constitution in *Marbury v. Madison*. *See Commonwealth v. Jennison*, unpublished (Mass. 1783).

and the latter does not automatically confer the former.[9] Here, "[i]t is well known that art. 14 was adopted to prohibit the abuse of official power brought about by two devices which the British Crown used in the colonies: the general warrants and the writs of assistance. . . . The writs of assistance were a special kind of general warrant which permitted their bearer, usually a customs official, to search with unlimited discretion for smuggled goods without special application to a court." *Jenkins v. Chief Justice of District Court Dep't*, 416 Mass. 221, 229 (1993). Unfettered discretion to arrest almost any person without a warrant is akin to the abuse of power enabled by a writ of assistance.

Any statutory authority to effect a warrantless arrest must meet the minimum protections of art. 14. Allowing the Legislature to enable and expand infringements

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[9] *See*, *e.g.*, *State v. Bayard*, 119 Nev. 241, 247 (2003) (finding that officer acted unreasonably in conducting a statutorily authorized arrest of a suspect who committed minor traffic violation because "Reasonableness requires probable cause that a traffic offense has been committed and circumstances that require immediate arrest" statutorily authorized arrest following minor traffic violation unreasonable because "[r]easonableness requires probable cause . . . and circumstances that require immediate arrest"); *State v. Rodarte*, 138 N.M. 668, 672-73 (2005) (holding that although the arrests were facially authorized by statute, "all arrests must be reasonable, and statutory authority does not automatically make an arrest reasonable," under the New Mexico constitution), *cert. granted*, 138 N.M. 773 (2005) & 2006 N.M. LEXIS 247 (2006), *cert. quashed*, 140 N.M. 280 (2006); *State v. Harris*, 916 So.2d 284, 289 (La. Ct. App. 2005) (holding that a search incident to a statutorily authorized warrantless arrest for the misdemeanor of littering was unconstitutional and concluding that "an officer's exercise of the discretion to arrest for a minor misdemeanor offense must be reasonable rather than arbitrary").

at will by statutorily authorizing arrest for minor misdemeanors that do not breach the peace—and so neither disturb nor endanger the public—is unreasonable, and therefore incompatible with art. 14.

Notably, deputy sheriffs are already limited in their ability to execute warrantless arrests for misdemeanors, even for those violations specifically enumerated in statutes such as § 21, if there is no concomitant breach of the peace. *See Commonwealth v. Baez*, 42 Mass. App. Ct. 565, 569 (1997). General Laws chapter 37, § 13 codified a deputy sheriff's common law authority to make an arrest of a person for a breach of the peace. *See Commonwealth v. Howe*, 405 Mass. 332, 334 (1989). In *Baez*, the Appeals Court held that, notwithstanding G.L. c. 90, § 21's authorization of warrantless misdemeanor arrests, the outer bounds of a deputy sheriff's authority to arrest without a warrant is set by G.L. c. 37, § 13, and therefore deputy sheriffs "cannot arrest without a warrant, even for those violations specifically enumerated in § 21, if there is no concomitant breach of the peace." *Baez*, 42 Mass. App. Ct. at 569. Given that police officers are also subject to this common law limitation, it would make no sense for deputy sheriffs to be limited to warrantless statutorily authorized arrests for misdemeanors only where there is a breach of the peace, and for police officers to avoid the requirement. *Cf. Commonwealth v. Gernrich*, 476 Mass. 249, 255-56 (2017) (noting that the "Appeals

Court has recognized that the common-law and statutory powers of deputy sheriffs and police officers are coextensive in certain respects").

The opposite holding leads to absurd results, particularly within the context of fine-only misdemeanors. In addition to the statute at issue in this case (G.L. c. 90, § 21), the Massachusetts General Laws authorize arrests for other non-jailable, fine-only misdemeanors. For instance, G.L. c. 270, § 15 permits warrantless arrest for "spitting" in some circumstances, and § 16A permits warrantless arrests for littering under § 16 and refusing to identify oneself. Chapter 56 § 57 authorizes warrantless arrest for any violation of laws regulating election conduct, which includes misdemeanors such as possessing liquor at a polling place, c. 54, § 73. And c. 91, § 58 authorizes warrantless arrest of anyone committing *any* misdemeanor "in or upon any of the rivers, harbors, bays or sounds." Permitting statutory authorization for warrantless arrests of minor crimes without any sort of safety interest would subject anyone in violation of the above misdemeanors—including people who spit or litter—to full custodial arrest. While those may be behaviors that the government hopes to decrease in our community, such a heavy-handed response cannot comport with art. 14.[10]

[10] For example, without § 21's authorization for arrest, Arias would have been subject to only a $100 fine, rather than a complete erosion of his liberty interests.

Such indiscriminate power to initiate warrantless arrests cuts to the core of the abuses the Massachusetts Declaration of Rights was designed to combat by giving life to general warrants that permit police to conduct unbounded searches of persons and property. Thus, warrantless arrests for misdemeanors, absent a breach of the peace—even for those statutorily authorized—are unreasonable and impermissible under art. 14.

2. Permitting warrantless arrests for misdemeanors absent a breach of the peace exacerbates biases and erodes civil liberties.

In *Atwater*, the Supreme Court expressed skepticism about "how bad the problem is out there," speculated that warrantless misdemeanor arrests were infrequent, and "wonder[ed] whether warrantless misdemeanor arrests" even "need constitutional attention." 532 U.S. at 352-53. The reality on the ground reveals the fallacy of these misgivings. In truth, there are hundreds of thousands of arrests annually for minor traffic violations. *See* Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 Fordham L. Rev. 329, 366 nn. 172-75 (2002). And each arrest intrudes on critical liberty and dignity interests.

Arrests for minor misdemeanors can inflict long-lasting harm. Studies have found that arrests for lower-level misdemeanors negatively affect people and their communities in a variety of ways, including "decreasing the likelihood of

cooperation with law enforcement in the future," "[r]educing opportunities related to education, employment, and housing," and "[i]ncreasing the likelihood that an individual is stopped or arrested again as a consequence of reduced access to education, employment, and housing."[11] Any arrest, even for minor offenses, can have long-term effects on employment stability.[12] Some arrestees are unable to pay bail, and many others are forced to languish in jail while waiting to gather bail money.

Moreover, research has validated the *Atwater* dissent's concern that "unbounded discretion" in performing misdemeanor arrests "carries with it grave potential for abuse." 532 U.S. at 372 (O'Connor, J., dissenting). Research focused on the specific issue here—misdemeanor arrests—has found patterns of racial disparities. A 2020 study found that a higher rate of Black people were arrested for misdemeanors than any racial or ethnic group, and this disparity persisted despite fluctuations in overall rates of arrest.[13] Misdemeanor arrest rates for Latinx people

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[11] Becca Cadoff, M.P.A., Preeti Chauhan, Ph.D, Erica Bond, J.D., *Misdemeanor Enforcement Trends across Seven U.S. Jurisdictions*, Data Collaborative for Justice at John Jay College, at 4 (Oct. 2020), https://datacollaborativeforjustice.org/wp-content/uploads/2020/10/2020_20_10_Crosssite-Draft-Final.pdf. (citing studies).

[12] *See*, *e.g.*, Gary Fields, John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, The Wall Street J. (Aug. 18, 2014) https://www.wsj.com/articles/as-arrest-recordsrise-americans-find-consequences-can-last-a-lifetime-1408415402.

[13] Cadoff, *et al.*, *supra* n.11 at 2.

were generally the second highest of any racial or ethnic group.[14] Providing broad discretion for misdemeanor arrests, which can often serve as the entry into the criminal legal system, encourages and perpetuates racial disparities in the system. *See* Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the proof*, Washington Post (June 10, 2020) https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ (cataloguing dozens of recent empirical studies describing racial profiling in law enforcement).

Warrantless arrests for minor misdemeanors infringe precisely on the type of liberty interests art. 14 protects. This Court should expressly reject *Atwater* and hold that art. 14 does not permit misdemeanor arrests absent a breach of the peace, regardless of statutory authorization.

C. Determining whether a breach of the peace occurred is a fact-dependent analysis.

Implementing the breach of the peace requirement for all misdemeanor arrests is not onerous. If this court extends its rejection of *Atwater* to statutorily authorized arrests, *supra* Sections II.A-B, then the case-by-case breach of the peace analysis that courts have long used for other misdemeanor arrests under common law can easily be applied in this context.

[14] Cadoff, *et al.*, *supra* n.11 at 9.

"The breach of the peace requirement for a misdemeanor arrest has its roots in English common law, and has become firmly embedded in the common law of Massachusetts." *Lunn*, 477 Mass. at 530 n.20 (citations omitted). To breach the peace, a misdemeanor must "cause[] a public disturbance or endanger[] public safety in some way." *Id.* at 530; *see also Black's Law Dictionary* (12th ed. 2024) (defining breach of the peace as "creating a public disturbance or engaging in disorderly conduct, particularly by making an unnecessary or distracting noise."). "Not every misdemeanor involves a breach of the peace." *Commonwealth v. Mekalian*, 346 Mass. 496, 497 (1963) (citation omitted). To satisfy a breach of the peace sufficient to justify a warrantless misdemeanor arrest, "an act must at least threaten to have some disturbing effect on the public." *Commonwealth v. Jewett*, 471 Mass. 624, 630 (2015) (*partially abrogated on other grounds by Lange v. California*, 594 U.S. 295 (2021)) (quoting *Baez*, 42 Mass. App. Ct. at 570). It must also be "committed in the presence or view of the officer" and be "still continuing at the time of," or "interrupted" by, the arrest. *Jewett*, 471 Mass. at 630.

To determine what constitutes disruptive conduct that breaches the peace, courts conduct a two-pronged analysis that requires both a normative definition and an actual detrimental impact. *See Commonwealth v. Orlando*, 371 Mass. 732, 735 (1977) (defining breach of the peace in the context of a vagueness challenge); *Commonwealth v. Twombly*, 50 Mass. App. Ct. 667, 670-71 (2001) (citing *Orlando*

to determine that driver's "conduct of speeding and passing . . . does not constitute a breach of the peace" and extraterritorial arrest was unauthorized), *aff'd*, 435 Mass. 440, 444 (2001). First, the conduct must be such that "most people would find [it] to be unreasonably disruptive." *Orlando*, 371 Mass. at 734-35. Second, the conduct must "in fact infringe someone's right to be undisturbed." *Id*. at 735. "Whether conduct disturbs the peace will depend on when and where it occurs, for what may be perfectly appropriate conduct at one time and place may at another be a breach of the peace." *Twombly*, 50 Mass. App. Ct. at 670-71 (citing *Orlando*, 371 Mass. at 735).

For instance, courts have found that potentially disruptive, criminal conduct that does not actually disturb or endanger others is not a breach of the peace. *Mekalian*, 346 Mass. at 497 (citations omitted) ("voluntary drunkenness in private, though a crime, is not of itself a breach of the peace"). These same requirements apply equally to motorist-related infractions. *E.g.*, *Commonwealth v. Ubilez,* 88 Mass. App. Ct. 814, 821 (2016) (driving with revoked registration not breach of peace where "there was no evidence that the defendant's operation of the vehicle was erratic or negligent, or that it in any other way. . . had a disturbing effect on the public"); *Twombly*, 50 Mass. App. Ct. at 668-71 (speeding and improper passing "uneventfully, but illegally" not breach of peace); *Baez,* 42 Mass. App. Ct. at 566-70 (defective headlight infraction not breach of peace).

Applying the standard here, where the justification for Arias's stop is a minor traffic violation, no such breach occurred.[15] There is no evidence in the record that Arias caused any unreasonable noise or presented a danger to anyone. The record shows he slowly drove for 350 feet without a place to pull over before attempting to pull onto a side street to stop for police. Appellant's Br. at 14-15; *see* RA.I/63, II/43. Even assuming Arias's actions violated § 25 (which they did not, *see infra* Section III), they did not amount to reckless operation and did not endanger or disturb others.[16]

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[15] If this Court concludes that the pretextual stop was unconstitutional, but the arrest pursuant to § 25 for failure to stop was constitutional, the fruits of the search should still be suppressed. Arias' reasonable efforts to respond to the police stop are inextricably intertwined with and immediately follow the illegal stop. It is contrary to the deterrence purposes of the exclusionary rule to permit the police to engage in an illegal pretextual stop but reap its benefits by the automatic application of the statutorily authorized arrest to a defendant's response to the illegal pretextual stop. "It is the Commonwealth's burden to establish that the evidence it has obtained and intends to use is sufficiently attenuated from the underlying illegality so as to be purged from its taint." *Commonwealth v. Diaz*, 496 Mass. 210, 214 (2025) (quotation omitted). That burden has not been met here.

[16] The Commonwealth appears to acknowledge that a breach of the peace is necessary for a lawful arrest by arguing that Arias *did* breach the peace by not stopping for police immediately. *See* Comm. Br. at 28-29. But Arias's slow attempt to turn off a busy street after driving 350 feet so he could safely pull over can hardly be described as a "breach of the peace." *See* Appellant's Reply Br. at 19. If anything, Arias's actions evidence a desire to *avoid* breaching the peace by not restricting the traffic flow. Thus, under the Commonwealth's own statement of the legal standard, Arias's warrantless arrest was unlawful.

III. G.L. c. 90, § 25 is unconstitutionally vague as applied to Arias.

The "basic tenet[s] of due process" guaranteed by the Massachusetts Declaration of Rights[17] require that a criminal statute define a criminal offense: (1) "with sufficient definiteness that ordinary people can understand what conduct is prohibited"; and (2) "in a manner that does not encourage arbitrary and discriminatory enforcement." *Commonwealth v. Williams*, 395 Mass. 302, 304 (1985); *see also Commonwealth v. Sefranka*, 382 Mass. 108, 110 (1980) (vagueness based on "failure to give fair warning," and "lack of reasonably clear guidelines for law enforcement" leading to "consequent encouragement of arbitrary and erratic" enforcement"). Courts have noted that the potential for arbitrary enforcement is the more important of the two prongs. *E.g.*, *Commonwealth v. Cassidy*, 479 Mass. 527, 538 (2018) ("statutes are determined to be unconstitutionally vague when officials possess unfettered discretion to decide whom to charge"), *cert. denied*, 586 U.S. 876 (2018); *Williams*, 395 Mass. at 304 ("it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large")*; Commonwealth v. Wilbur W.*, 479 Mass. 397, 405 (2018) (U.S.

[17] The Massachusetts Declaration of Rights is equally, if not more, protective than the U.S. Constitution with respect to due process rights implicated by vagueness challenges to criminal statutes. *See Commonwealth v. Ellis*, 429 Mass. 362, 371 (1999); *Gillespie v. City of Northampton*, 460 Mass. 148, 153 n. 12 (2011).

Supreme Court "has observed that 'the most meaningful aspect of the vagueness doctrine is. . . the requirement that a legislature establish minimal guidelines to govern law enforcement'") (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

This Court should hold that G.L. c. 90, § 25—the neglect to stop statute used to justify Arias's arrest—is unconstitutionally vague at least as applied to this case. *See Commonwealth v. Rajiv R.*, 495 Mass. 646, 660 (2025) (differentiating challenges based on "outer boundaries" of standard and defendant's conduct). In an as-applied challenge, "the question is whether the statute, or, more closely, the particular words objected to, identify for citizens and law enforcement authorities a core of condemned conduct, and whether this case, as it shaped up, appears to be within the core: the inquiry is contextual." *Commonwealth v. Schafer*, 32 Mass. App. Ct. 682, 688 (1992). The context of this case makes clear that Arias's conduct was not within the core of prohibited activity. Officers used a broad and indefinite statute as rationalization for arresting Arias based on his attempt to slowly and safely turn onto the closest open street rather than block traffic when officers activated their sirens. The vague language of § 25 in combination with § 21 gave officials "unfettered discretion" to arrest him even though he acted in accordance with Massachusetts' Registry of Motor Vehicle ("RMV") safety guidelines. *Cassidy*, 479 Mass. at 538. This provides a third reason that Arias's motion to suppress should be granted.

A. Section 25's "neglect to stop" language is indefinite and does not clearly communicate to ordinary motorists what conduct is prohibited.

G.L. c. 90, § 25 criminalizes "[a]ny person who, while operating or in charge of a motor vehicle, . . . shall refuse or neglect to stop when signalled [sic] to stop by any police officer . . . ." Section 25 does not define "neglect to stop," but rather, leaves the interpretation to the enforcing officer's discretion. Law-abiding drivers can interpret "neglect" in myriad ways, with no way of knowing what constitutes unlawful neglect as opposed to safe driving. Does a driver "neglect to stop" for police if he continues to drive 2,000 feet on the highway so he can safely pull over on the next exit? Or if she drives 100 feet to a lighted parking lot that she views as a safer place to pull over? Or, in this case, if the driver slowly drives a block to turn onto a side street, rather than slamming on the brakes and immediately blocking traffic?

In *Commonwealth v. Donoghue*, the Appeals Court held a statute requiring physicians to report information concerning patients suffering from the "chronic use of narcotic drugs" was unconstitutionally vague because "definitions of 'chronic' provide so much latitude that it could have been expected that the statute would be applied differently by different practitioners." 4 Mass. App. Ct. 752, 755-56 (1976). Section 25 similarly presents limitless interpretations. Rather than identifying "an imprecise but comprehensible normative standard," the term "neglect to stop" can

be interpreted in so many ways that it is impossible for "ordinary people [to] understand" where the line is drawn, and therefore, "what conduct is prohibited." *Williams*, 395 Mass. at 304.

The Commonwealth argues that "[u]nder certain circumstances, an almost immediate stop may be required under the statute." Comm. Br. at 26. The Commonwealth makes no effort to define these "certain circumstances." Moreover, this position is unsafe, especially in light of the facts before the Court. Not every driver who sees police lights behind them is the object of a traffic stop, but if a driver immediately stops after seeing police lights, they may block officers from reaching the intended object. What is more, the RMV expressly advises drivers to, during a traffic stop, "[t]urn on the appropriate turn signal and check your mirrors. *Carefully and slowly move your vehicle* completely to the side of the road." MassDOT Registry of Motor Vehicles Driver's Manual (July 2023) at 103, https://www.mass.gov/doc/english-drivers-manual/download (emphasis added). Additionally, the RMV prohibits drivers from "stop[ping] your vehicle in an intersection, in front of a driveway, or in a travel lane" during a traffic stop. *Id.*

By all accounts, Arias followed the RMV's guidance. He travelled at a "slow[] crawl . . . under the speed limit." Appellant's Reply Br. at 14 (citing T4/67-68). He attempted to make a left turn to avoid "stop[ping his] vehicle . . . in a travel lane." RA.I/195-97; RA.II/at 42-43, 56. Despite his compliance with safety

guidelines, law enforcement appears to have determined—under the immense discretion afforded to them by the statute, *see infra* Section III.B—that Arias "neglect[ed]" to stop. *See* Comm. Br. at 22-25 (characterizing Arias's actions as having "failed" to stop and leaving vague whether Arias's stop was prompted by his alleged "refusal" or "neglect" to stop, or some other pretextual reason). No "ordinary person" would understand a statute prohibiting neglecting to stop for police to be so broad that it criminalizes safe driving practices authorized by the state agency responsible for motor vehicles. *Williams*, 395 Mass. at 304.

B. Section 25 encourages arbitrary and discriminatory enforcement.

In addition to notice, a "penal statute must define the criminal offense […] in a manner that does not encourage arbitrary and discriminatory enforcement." *Williams*, 395 Mass. at 304 (quotation omitted)*; see also American Dog Owners Ass'n, Inc. v. City of Lynn*, 404 Mass. 73, 79 (1989) ("Vague laws violate due process because laws that do not limit the exercise of discretion by officials engender the possibility of arbitrary and discriminatory enforcement") (quotation omitted); *Wilbur W.*, 479 Mass. at 405 (noting arbitrary enforcement prong is "'the most meaningful aspect of the vagueness doctrine'") (quoting *Goguen*, 415 U.S. at 574); *Cassidy*, 479 Mass. at 538 (statutes are unconstitutionally vague "when officials possess unfettered discretion" to decide against whom to enforce).

Section 25 is unconstitutionally vague because it casts a net "large enough to catch all possible offenders" and provides law enforcement with no guidelines that would cabin their interpretation of "neglect." *Williams*, 395 Mass. at 304. In *Williams*, this Court held an ordinance was unconstitutionally vague where it failed to provide a "standard by which to distinguish between the lawful conduct of mere sauntering and loitering and that which escalates to obstructing travelers." *Id.* at 306. "Thus, the police possess unfettered discretion that could result in arbitrary or discriminatory enforcement." *Id.* Section 25 similarly grants police complete discretion in distinguishing between safe and cautionary driving and unlawful "neglect" to stop for law enforcement.

These dangers are magnified by G.L. c. 90, § 21, which permits arrest for a § 25 violation. As explained above, the Court should hold that an arrest for a § 25 violation absent a breach of the peace is unconstitutional. *See* Point II, *supra*. But if this Court concludes that such arrests are permitted, the due process concerns arising from the opportunity for arbitrary and discriminatory enforcement under § 25 would be compounded. The statutes enable law enforcement to arrest and search anyone who is "vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense" by initiating a stop based on any traffic infraction and then using the broad discretion of § 25 to determine that the driver's response, however safe, was too slow. *Alegata v. Commonwealth*, 353 Mass. 287,

296 (1967) (holding vagrancy statute void for vagueness). Given the erosion of both due process and art. 14 protections against warrantless searches engendered by the context of §§ 21 and 25, particularly if this Court does not affirm that the breach of the peace requirement applies to § 21 arrests, *see* Section II *supra*, this Court should hold that § 25 is unconstitutionally vague.

CONCLUSION

Arias's arrest and search resulted from three separate constitutional violations. Officers violated art. 14 by using a stale minor traffic infraction as pretext to conduct a warrantless stop. In further violation of art. 14, they then justified an arrest and search with G.L. c. 90, § 21's blanket arrest authorization that, here, applied to a fine-only misdemeanor without any breach of the peace. And finally, the arrest was triggered by the unconstitutionally vague neglect to stop statute, G.L. c. 90, § 25, in violation of art. 12. For any of these reasons, the evidence seized from Arias should have been suppressed. Amici respectfully request that the Court reverse the decision denying Arias' motion to suppress.

Respectfully submitted,
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CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(K)

I hereby certify that this brief complies with the Massachusetts Rules of Appellate Court pertaining to the filing of briefs, including Rules 17 and 20. This brief is set in Times New Roman 14-point font and contains 7488 non-excluded words, as determined through the "Word Count" feature in Microsoft Word.

/s/ Jessie J. Rossman
Jessie J. Rossman

CERTIFICATE OF SERVICE

I, Jessie J. Rossman, counsel for *amici curiae* American Civil Liberties Union and American Civil Liberties Union of Massachusetts, hereby certifies under the penalties of perjury that on November 21, 2025, I caused a true copy of the foregoing document to be served through the electronic filing service provider and e-mail to Assistant District Attorney Brooke Hartley of the Suffolk County District Attorney's Office, Brooke.Hartley@mass.gov, and to Attorney John Warren, counsel for Mr. Arias, johnpwarren@warrenlaw.com.

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