COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO: SJC-12808

COMMONWEALTH OF MASSACHUSETTS

v

TYKORIE EVELYN

ON APPEAL VIA SUA SPONTE TRANSFER

BRIEF OF JUVENILE LAW CENTER, PROFESSOR KRISTIN HENNING, AND THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, YOUTH ADVOCACY DIVISION AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT TYKORIE EVELYN AND REVERSAL OF THE SUPERIOR COURT'S DENIAL OF THE MOTION TO SUPPRESS

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of *amicus* briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has particular expertise on the interplay between the constitutional rights of children and social science and neuroscientific research on adolescent development, especially with regard to children involved in the juvenile and criminal justice systems. Juvenile Law Center has participated in appeals to this Court addressing the protections that must be afforded to youth in the juvenile justice system, including as amicus curiae in *Commonwealth v. Brown*, No. SJC-11454; *Commonwealth v. Guthrie G.*, No. SJC-09805; *Commonwealth v. Juvenile "LN" G.*, No. SJC-12351; and *Commonwealth v. Lugo*, No. SJC-12546.

[1] This brief is submitted pursuant to Mass. R. App. P. 17(a) allowing *amicus* briefs when solicited by an appellate court and this Court's October 22, 2019 *amicus* announcement in this case.

Kristin Henning, Professor of Law, Director Georgetown Law Juvenile Justice Clinic & Initiative. The Georgetown Juvenile Justice Clinic was founded in 1973 to represent children accused of misdemeanor and felony offenses in the District of Columbia. Clinic faculty, fellows, and students provide highly effective holistic representation to their clients by protecting the rights and interests of youth in the juvenile justice system, advocating on behalf of youth in related proceedings such as special education and school disciplinary hearings, and lobbying for mental health services, drug treatment, and other interventions that are appropriately matched with the child's age, mental capacity, and developmental stage. With an emphasis on racial justice reform in its recently launched Juvenile Justice Initiative, faculty and staff also write scholarship, convene symposia and trainings, and develop resources to help juvenile justice stakeholders identify and correct racial bias and injustices throughout the system. Of most relevance to the matter before the Court, Professor Henning is the author of *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018), and is often hired as an expert to train and consult with defenders, judges, police officers, prosecutors and other system actors on implicit racial bias and the legal implications of race and adolescence in policing.

The **Committee for Public Counsel Services, Youth Advocacy Division (YAD)** is the juvenile justice division of CPCS.[2] YAD contracts with more than four hundred private attorneys who represent juveniles in a wide variety of proceedings, from delinquency and youthful offender proceedings in Juvenile Court to Superior Court murder cases. Because of the disproportionate representation of youth of color in the justice system, the Court's decision in this case will affect the interests of YAD's present and future clients.

DECLARATION PURSUANT TO MASS. R. APP. P. 17(C)(5)

No party or counsel for a party authored this brief in whole or in part or contributed money intended to fund its preparation or submission. No person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution for the preparation or submission of this brief. Neither *amici curiae* or its counsel has represented any of the parties to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

[2] The Committee for Public Counsel Services (CPCS) was created by the Legislature in 1983 "to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services" to indigent parties in the commonwealth. St. 1983, c. 673, codified in G. L. c. 211D, § 1. Aside from the appointment of counsel for the indigent youth, CPCS has no financial interest in the case.

SUMMARY OF THE ARGUMENT

Amici write in response to this Court's first question to emphasize that courts should analyze the moment of seizure under the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights from the perspective of a reasonable Black youth. This Court has defined a seizure as the point when "a reasonable person would believe that an officer would compel him or her to stay." *Commonwealth v. Matta*, 483 Mass. 357, 363 (2019) (pg. 15). In applying that standard to this case, the Superior Court gave no consideration to the fact that Tykorie Evelyn was a Black teenager. The Superior Court thus ignored Supreme Judicial Court and United States Supreme Court precedent establishing the salience of those factors.

Specifically, the United States Supreme Court has consistently recognized that children cannot be viewed simply as miniature adults, and that courts must consider their developmental characteristics when applying constitutional principles (pp. 16-18). In the analogous context of whether someone is in custody for *Miranda* purposes, the Supreme Court announced a "reasonable child" standard that takes into account the unique aspects of adolescent development and behavior when analyzing whether the child would have felt "free to leave." *J.D.B. v. North Carolina*, 564 U.S. 261, 264-65, 272 (2011) (p. 18). Failing to consider a suspect's age would be "nonsensical," the Court underscored. *Id.* at 275. These principles readily extend to

the corresponding test of whether a reasonable person would feel compelled to remain such that they are seized for Fourth Amendment purposes. (pp. 18-22).

Additionally, this Court has held race applicable to Fourth Amendment analysis—specifically that the widespread and highly publicized racial profiling of Black males in Boston must factor into the question of whether a suspect's flight gives rise to reasonable suspicion. (pp. 26-28). *Commonwealth v. Warren*, 475 Mass. 530, 539-40 (2016). From slavery to present day, police have been instigators and instruments of oppression against Black people. (p. 28). Black youth specifically experience a range of negative interactions with police in their schools and communities—which unsurprisingly give rise to an expectation that police should not be trusted. (pp. 32-38). This expectation is well founded—Black youth face routine harassment, violence, and arrests from police. (pp. 32-38).

In analyzing the moment of seizure and related questions under the Fourth Amendment, this Court must consider Tykorie Evelyn as a whole person, including that he is Black and was seventeen at the time of the incident, and the undeniable impact these characteristics had on his reaction to police contact. (pg. 39). Courts must consider the effects and interplay of race and age in analyzing whether a reasonable Black youth in his situation would have felt compelled to stay. (p. 39).

ARGUMENT

A seizure occurs when "a reasonable person would believe that an officer would compel him or her to stay." *Commonwealth v. Matta*, 483 Mass. 357, 363 (2019). In originally setting forth the test "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," the United States Supreme Court acknowledged that the 22-year-old Black woman defendant's race, age, gender, and educational attainment were "not irrelevant" to considering whether she would have felt "unusually threatened" and seized. *United States v. Mendenhall*, 446 U.S. 544, 554, 558 (1980). *Accord United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015) (echoing *Mendenhall*, holding that "while [the defendant's] race is 'not irrelevant' to the question of whether a seizure occurred, it is not dispositive either," but noting "the relevance of race in everyday police encounters . . . around the country" as well as "empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system"); *United States v, Washington*, 490 F.3d 765, 773 (9th Cir. 2007) ("publicized shootings [of African-Americans] by white Portland police officers" was relevant to seizure determination). Since the *Mendenhall* decision, the Supreme Court and this Court have expanded the notion that aspects of one's identity

are critical to understanding how a person will react to police contact, and thus are central to the constitutional analysis.

I. COURTS MUST CONSIDER UNIQUE ATTRIBUTES OF YOUTH IN THEIR FOURTH AMENDMENT REASONABLE PERSON ANALYSIS

That children are "different" is a principle that permeates our law. Time and again, the United States Supreme Court has reminded us of "what any person knows": that youth is a "time and condition of life" marked by particular behaviors, perceptions, and vulnerabilities. *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). The Court's jurisprudence reflects this distinction, making clear that youthfulness is relevant to constitutional analysis and must be taken into account when applying legal standards. In reaching this conclusion, the Court has looked at national consensus as well as the scientific community's own growing understanding of adolescent development.

A. Courts Must Apply A "Reasonable Child" Standard To The Question Of Whether A Youth Would Feel Compelled To Stay

The reasonable person test must take age into account. In *J.D.B. v. North Carolina*, the United States Supreme Court held that the Fifth Amendment *Miranda* custody determination must be based on a "reasonable child" rather than a reasonable adult standard. 564 U.S. at 271-72. The Court noted that "[a] child's age is far 'more than a chronological fact,'" as it "generates commonsense conclusions

about behavior and perception." *Id*. at 272 (first quoting *Eddings*, 455 U.S. at 115, then quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)). The Court cited key distinctions between children and adults in reaching this conclusion: youth are "less mature and responsible than adults" and "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 564 U.S. at 272 (first quoting *Eddings*, 455 U.S. at 115–16; then quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion)). The Court has repeatedly found these distinctions relevant to the application of constitutional standards to youth. *See, e.g.*, 564 U.S. at 272-74; *Eddings*, 455 U.S. 104; *Bellotti*, 443 U.S. 622; *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010). Common law—including the construct of a "reasonable person" in other contexts—has also long reflected the distinctions between children and adults. *J.D.B.*, 564 U.S. at 273–74 (noting that in tort law, "[a]ll American jurisdictions accept the idea that a person's childhood is a relevant circumstance" to be considered in defining the reasonable person. (alteration in original) (quoting Restatement (Third) of Torts § 10, Comment *b*, p. 117 (2005); Reporters' Note, pp. 121–122 (collecting cases); Restatement (Second) of Torts § 283A, Comment *b*, p. 15 (1963–1964) ("[T]here is a wide basis of community experience upon which it is possible . . . to determine what is to be expected of [children]" (alteration in original)))).

The Court rejected the notion that "a child's age has no place" in the analysis of whether a minor felt free to leave or halt an interrogation. *J.D.B.*, 564 U.S. at 271–72, 278. The Court reasoned that while age may not always be determinative, "[i]t is, however, a reality that courts cannot simply ignore" under the reasonable person totality of the circumstances test. *Id.* at 277. The Court ruled that if it were "precluded from taking J.D.B.'s youth into account, it would be forced to evaluate the circumstances . . . through the eyes of . . . a reasonable adult," when some "objective circumstances [surrounding an interrogation] . . . are specific to children." *Id*. at 275–76. Applying the adult reasonable person standard to a minor would lead to "absurdity," since a minor's developmental status, including age, informs his or her perspective. *Id*. at 276. "[I]gnor[ing] the very real differences between children and adults [ ] would be to deny children the full scope of the procedural safeguards" granted to adults. *Id.* at 281.

B. The Reasonable Youth Standard Extends To Search And Seizure Cases

1. The United States Supreme Court has repeatedly recognized that youth is relevant to all aspects of constitutional protections, including criminal procedure

"'[O]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." *J.D.B.*, 564 U.S. at 274 (quoting *Eddings*, 455 U.S. at 115-16). *See Miller v. Alabama*, 567 U.S. 460, 473-74, 481 (2012) (sentencing); *Graham*, 560 U.S. at 76 (sentencing); *Roper*, 543 U.S. at 578

(sentencing). As Justice Frankfurter articulated more than a half-century ago, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning it [sic] uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

The Supreme Court has been clear that "youth matters" for criminal procedure purposes. *See Miller*, 567 U.S. at 473 (citing *Graham*, 560 U.S. at 71-74). Indeed, in *Graham v. Florida*, the Supreme Court wrote that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 560 U.S. at 76. In *Miller*, the Court reiterated its prior rulings that "children are constitutionally different from adults." 567 U.S. at 471-72; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) (holding *Miller* retroactive on collateral review). The Court stressed that the State cannot simply treat youth accused of committing crimes "as though they were not children." *Miller*, 567 U.S. at 474. Grounding its decision in commonsense and on scientific research, the Court explained that children differ from adults in their developmental maturity, susceptibility to outside influences, and capacity for change. *Id.* at 471-73; *see also Roper*, 543 U.S. at 569 (explaining that adolescence is a period when youth are "most susceptible . . . to psychological damage") (quoting *Eddings*, 455 U.S. at 115).

2. The reasonable child standard is particularly applicable in the Fourth Amendment context

The reasonable child test is particularly applicable to the Fourth Amendment seizure inquiry due to the similarities with the Fifth Amendment *Miranda* custody determination; the two tests are indeed "virtually identical." Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. L. REV. 1513, 1528 (2018). In both instances, the inquiry rests on whether a reasonable person would feel free to terminate the encounter and leave, or feel pressure to stay. *See* Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles be Far Behind?*, 47 Harv. CR-CL L. Rev. 501, 503 (2012); *Matta*, 483 Mass. at 363.

Courts across the country have applied a "reasonable child" standard to Fourth Amendment inquiries. In *Doe v. Heck*, for example, the Seventh Circuit held that a fourth-grader removed from his classroom and questioned in a church nursery about allegations that he had been abused was seized within the meaning of the Fourth Amendment because "no reasonable child would have believed that he was free to leave the nursery." 327 F.3d 492, 510 (7th Cir. 2003), *as amended on denial of reh'g* (May 15, 2003). Similarly, the Tenth Circuit noted that "'whether the person being questioned is a child or an adult' is 'relevant' to whether a person would have felt free to leave" and found a seizure where a sixteen-year-old was confronted by two

government officials in the school counselor's office who threatened to arrest her if she did not agree to live with her father. *Jones v. Hunt*, 410 F.3d 1221, 1226 (10th Cir. 2005) (quoting *United States v. Little*, 18 F.3d 1499, 1505 n.6 (10th Cir. 1994)). In overturning the district court, the Tenth Circuit recognized that a "reasonable sixteen-year-old" would have felt she had to stay with the two officials in "an office to which she had been sent." *Id.* at 1226-27.

This trend has continued since *J.D.B.* The Supreme Court of Delaware, for example, relied on *J.D.B.* in concluding that "a child's age is one of the circumstances to be considered in evaluating the reasonableness of a seizure." *Hunt ex rel. DeSombre v. State*, 69 A.3d 360, 366 (Del. 2013) (youth seized for Fourth Amendment purposes because "a reasonable child would not believe he was free to leave"). In *Halley v. Huckaby*, the Tenth Circuit reiterated the "reasonable child" standard and found the child in question "would not have 'felt free to terminate the encounter' with [the chief of police] who picked him up from school." 902 F.3d 1136, 1145-46 (10th Cir. 2018). *See also In re I.R.T.*, 647 S.E.2d 129, 134 (N.C. Ct. App. 2007) (finding that "the age of a juvenile is a relevant factor in determining whether a seizure has occurred within the meaning of the Fourth Amendment"); *Moore v. Weekly*, 159 F. Supp. 3d 784, 790-91 (E.D. Mich. 2016) (applying "reasonable child" standard and finding "a jury could find that a person of tender years would have concluded that such conduct indicated that she was not free to

leave"); *see also In re Elijah W.*, 74 N.E.3d 176, 185 (Ill. App. Ct. 2017) (finding *J.D.B.* applies to Fourth Amendment analysis in context of whether consent to search was consensual).

Indeed, in *In re J.G.*, the Court of Appeal for the First District of California explained that "[*J.D.B.*'s] holding seems particularly fitting for search-and-seizure analyses since the tests for custody under the Fifth Amendment and detentions under the Fourth Amendment both focus on how reasonable persons would perceive their interaction with the police." *In re J.G.*, 228 Cal. App. 4th 402, 410 (2014).

C. Social Science Confirms Youth Are Particularly Vulnerable To Police Pressure And Coercion, Necessitating A Reasonable Child Standard For Fourth Amendment Inquiries

In *Roper*, *Graham*, *Miller*, and *J.D.B.*, the Supreme Court explicitly relied on research demonstrating developmental differences between youth and adults. *Roper* 543 U.S. at 569; *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 476; *J.D.B.*, 564 U.S. at 273 n.5. This social science research is no less applicable to a Fourth Amendment analysis; these developmental differences impact how youth will interact with police during encounters and are critical to the evaluation and assessment of those interactions.

Special legal protections for youth are strongly rooted in research. Youth are impulsive with a tendency to over-emphasize short-term gains over possible long-term consequences and are susceptible to coercion. Elizabeth Cauffman & Laurence

Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice,* 7 VICTIMS & OFFENDERS 428, 432-37 (2012). Advances in neuroscience confirm the less developed decision-making capacities of youth as compared to adults. The regions of the brain which control higher-order functions, such as reasoning, judgment, and inhibitory control, are the last to fully develop and mature, after other areas of the brain which control more basic functions (*e.g.*, vision, movement). Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT'L ACAD. SCI. 8174, 8177 (2004). Indeed, the pre-frontal cortex, the brain's "CEO" that controls important decision making processes, does not reach full growth until individuals are in their early- to mid-20s. Christian Beaulieu & Catherine Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into* Adulthood, J. NEUROSCIENCE 31 (2011); *see also* B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 243-46 (2000).

The stress of a police encounter may be particularly problematic for minors. Research has established that even casual police encounters can increase stress in adolescents. *See* Michael J. McFarland, et al., *Police Contact and Health Among Urban Adolescents: The Role of Perceived Injustice*, 238 SOCIAL SCI. & MED. 1 (2019); Tove Pettersson, *Complaints as Opportunity for Change in Encounters*

Between Youths and Police Officers, 2 SOCIAL INCLUSION 102, 105–06 (2014) ("In some of the cases the youths merely express uneasiness at the police presence, not for any special reason, but rather because you never know what might happen if the police are present; they might just search you or check you out even if there is no reason for doing so, according to the youths."). Youth may react by attempting to avert the encounter, or feel compelled to stay and respond to questions.

Additionally, minors may lack the legal system experience needed to successfully navigate an encounter with police. "[M]inors, as compared to adults, are less likely to know that a police officer cannot stop them without an articulable reasonable suspicion." Lourdes M. Rosado, *Minors and the Fourth Amendment: How Juvenile Status Should Invoke Different Standards for Searches and Seizures on the Street*, 71 N.Y.U. L. REV. 762, 794 (1996); *see also*, Cauffman & Steinberg, *supra*, at 433 ("The most important cognitive capacities involved in decision making are understanding (i.e., the ability to comprehend information relevant to the decision) and reasoning (i.e., the ability to use this information logically to make a choice.)").

J.D.B. makes clear that a "reasonable child" standard is appropriate when considering a minor's encounters with police; the research on police encounters underscores the extent to which extending this approach to the Fourth

Amendment context is grounded in social science. The law must therefore recognize distinctions between minors and adults.[3]

[3] Youth and race also matter when analyzing whether there was reasonable suspicion to justify a stop under the Fourth Amendment. Fellow *Amici* Massachusetts Association of Criminal Defense Lawyers (MACDL) et al. explain how Tykorie's race and the phenomenon of "stereotype threat" point to a reason for his avoiding eye contact with police, turning away from them (what police term his "blading" posture), and fleeing from the police unrelated to consciousness of guilt. (MACDL Amicus Curiae Br.) We additionally note that Tykorie's youth also shapes these behaviors. For example, youth are more likely to be impulsive, less risk averse, not think through long term consequences of their actions, and prefer short-term gain. Henning, *supra*, at 1551. "Even when youth can anticipate the long-term consequences of a given course of conduct, they tend to make impetuous decisions and actions, especially when they are under stress." Henning, *supra*, at 1551 (citations omitted). Professor Henning notes, "[a] child's decision to flee may be impulsive, emotional, or rebellious, particularly in the face of perceived unfairness." Henning, *supra*, at 1550 (citing David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision*-Making, 14 STAN. L. & POL'Y REV. 13, 13 n.2 (2003). This contributes to a quick decision merely to flee to avoid an uncomfortable interaction. Although not a factor in this case, when groups of youth run from police it may also be driven by youth's greater susceptibility to peer pressure. Henning, *supra*, at 1552-53. Moreover, the heightened stress youth experience with even casual police encounters may lead to "avoidance" behaviors such as turning away, non-responsiveness or lack of eye contact. *See* Brittany N. Fox-Williams, *The Rules of (Dis)engagement: Black Youth and Their Strategies for Navigating Police Contact*, 34 SOCIOLOGICAL FORUM 115, 118, 123-27 (2019). One recent study that examined young people's reactions to police found that avoidance was one of three common responses to police contact:

> Most male respondents described feeling a wave of anxiety when passing a police officer on the street or spotting a police vehicle. They feared being viewed with suspicion and arbitrarily stopped. This fear loomed even when they were not guilty of any wrongdoing. To cope with this feeling and avoid unwelcome police contact, some of the participants described steering clear of police officers that come into their line of sight. For the young men, this mainly entailed averting their

II. COURTS MUST ALSO CONSIDER RACE WHEN APPLYING THE FOURTH AMENDMENT REASONABLE PERSON ANALYSIS

A. This Court Has Recognized That Race Is Relevant To The Interpretation Of Criminal Procedure Protections

Just as youth matters to constitutional analysis, so too does race. "The problem of racial discrimination in the criminal justice system has not escaped the attention of this [C]ourt." *Commonwealth v. Williams*, 481 Mass. 443, 451 n.6 (2019) (citing *Commonwealth v. Buckley*, 478 Mass. 861, 877 (2018) (Budd, J., concurring); *Commonwealth v. Warren*, 475 Mass. 530, 539-540 (2016); *Commonwealth v. Gonsalves*, 429 Mass. 658, 670 (1999) (Ireland, J., concurring)). Even twenty years ago, Justice Ireland noted in a concurring opinion that racial profiling in the context of traffic stops means automobile exit orders were likely to "pose unique hardships" on people of color and highlighted that discriminatory enforcement was worthy of the Court's attention. *See Gonsalves*, 429 Mass. at 670-71 (Ireland, J., concurring). Justice Budd echoed these sentiments last year in her *Buckley* concurrence. 478 Mass. at 876-80 (Budd, J., concurring). In highlighting

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> gaze away from the direction of officers. Jason describes an old habit he developed as a child where he pretends police officers are invisible in hopes they, too, will not notice him. Similarly, Chris reports that instead of looking at officers when he passes them, "I fixate on one thing with my eyes and don't look in [their] direction usually."

Id. at 123-24 (alteration in original). *Amici* urge the Court to consider the effect of race and youth for reasonable suspicion purposes to account for these youth reactions as well as the influence of racial bias discussed by other *Amici*.

continued racial profiling in traffic stops caused by explicit and implicit bias, and the particular injury these stops cause drivers of color, Justice Budd similarly called for the Court "to explore what can be done to mitigate the harm caused by this practice." *Id.* at 876. *See also Commonwealth v. Feyenord*, 445 Mass. 72, 87-88 (2005) (Greaney, J., concurring) (noting the importance of protections for "less powerful citizens who often feel the brunt of *Terry*-type stops" and pointing out that "[g]etting a traffic ticket if you are a black or Hispanic person who has committed a minor traffic violation and then been questioned in public view by an armed police officer determined to find a basis, or extract consent, to bring in a police dog, is humiliating, painful, and unlawful").

Similar to the United States Supreme Court's reliance on "commonsense conclusions" and scientific research, this Court has relied on empirical evidence of the over-policing of communities of color in holding that race affects the application of criminal procedural standards. *See Warren*, 475 Mass. at 539-40. In *Warren*, this Court held that the Superior Court must consider the widespread racial profiling of Black males when evaluating whether there was reasonable suspicion under the Fourth Amendment.[4] *Id.* Citing data demonstrating that Black men in Boston were

[4] Subsequent research confirms continued racial disparities in Boston Police Department "Field Interrogation, Observation, Frisk and/or Search" practices. *See* Jan Ransom, *Blacks Remain Focus of Boston Police Investigations, Searches*, BOS. GLOBE, Aug. 28, 2017, https://www.bostonglobe.com/metro/2017/08/28/blacks-

more likely to be targeted by police, this Court reasoned that Black men fleeing the police "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled." *Id.* at 540. The Court's analysis turned on the race of the defendant—a Black man's reaction to police contact "cannot be divorced" from the reality Black men in Boston face as regular targets of police. *See id.* at 539. The fear of racial profiling as a valid reason for flight would not apply when a defendant is white. *Warren* makes clear that race must be considered in applying constitutional standards to police contact with individuals.

B. Black People Will Experience Police Interactions Differently Because Of Pervasive Police Oppression

Considering race in the Fourth Amendment framework is critical in light of the many anecdotal and qualitative studies demonstrating that Black people's interactions with police leads to more negative views of police than their white peers. Police oppression of Black people is pervasive throughout American history—from police enforcing fugitive slave codes and "Jim Crow" laws, failing to protect Black

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remain-focus-boston-police-investigations-searches/PDbFr2QZexCEi3zJTO9mOJ/story.html; Philip Marcelo, *APNewsBreak: Boston Police Make Little Progress on Race Gap*, ASSOCIATED PRESS, Apr. 26, 2017, https://apnews.com/e2afc1f50c8342e3be988c9039d619ab; Travis Anderson, *Boston Police Release New Data on FIO Stops*, BOS. GLOBE, Jan. 8, 2016, https://www.bostonglobe.com/metro/2016/01/08/boston-police-release-new-data-fio-stops/6iPbS7E0QEYjLJIut5KnxL/story.html; Todd Curtis, *Observed Racial Disparities in the Boston Police Department FIO Program*, AIRSAFE.COM, Feb. 8, 2016, https://rpubs.com/airsafe/bpd_fio.

people from lynching and other civilian violence, Civil Rights era violence often perpetrated by police, to present day mass incarceration and the increasing number of police killings of Black people. *E.g.*, Henning, *supra*, at 1530 (citing Mia Carpiniello, Note, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion" Terry Stops*, 6 MICH. J. RACE & L. 355, 361-62 (2001)). "In every critical era," notes *Amicus* Professor Henning, Black people "have perceived police to be proponents of discrimination and subordination through violence and intimidation." Henning, *supra*, at 1530.

Indeed, several studies confirm that Black people generally are more suspicious of police; in particular, they fear police will perceive them as criminal and will treat them unfairly, they are more likely than white people to perceive police force as excessive, and they view police as a controlling force rather than a source of protection. Carpiniello, *supra*, at 360-61, 360 n.32-35 (citations omitted). This suspicion transcends socio-economic stratification. *See* Susan McNeeley & Garrett Grothoff, *A Multilevel Examination of the Relationship Between Racial Tension and Attitudes Toward the Police* 41 AM. J. CRIM. JUST. 383, 397 (2016) (finding that Black individuals are more likely to be dubious of police regardless of whether they live in an affluent or disadvantaged neighborhood).

Research and commonsense confirm that this mistrust is well founded. In addition to the studies cited by this Court in its previous decisions and by counsel

and fellow *Amici* in this case, data show Black people are disproportionately arrested for certain crimes. THE SENTENCING PROJECT, *Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System* (2013), https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/; RAHSAAN HALL & NASSER ELEDROOS, FACTS OVER FEAR: THE BENEFITS OF DECLINING TO PROSECUTE MISDEMEANOR AND LOW-LEVEL FELONY OFFENSES, ACLU OF MASS., 13, 13 n.31, 18-19 (2019), https://www.aclum.org/sites/default/files/20180319_dtp-final.pdf (In 2012-2016, "Black people made up 60 percent of the people [the Boston Police Department] arrested for license violations (e.g., driving with a suspended license), despite the fact that they only make up 24 percent of the city's population" and Suffolk County prosecution data from 2013-2014 shows Black people were more than three times as likely as white people to be arrested for trespass, resisting arrest, and disorderly conduct with intent to distribute and more than four times as likely to be charged for traffic offenses); ACLU OF MASS., THE WAR ON MARIJUANA IN BLACK AND WHITE: A MASSACHUSETTS UPDATE 2, 8-9 (2016), https://www.aclum.org/sites/default/files/wp-content/uploads/2016/10/TR-Report-10-2016-FINAL-with-cover.pdf (Black people are three times more likely to be charged with marijuana possession, even after decriminalization and legalization).

National data from 2001 forecasted that one of three Black males born that year could expect to go to prison. *Criminal Justice Facts*, THE SENTENCING PROJECT, https://www.sentencingproject.org/criminal-justice-facts/; *see also* SELECTED RACE STATISTICS, MASS. SENTENCING COMMISSION, 2–3, 5–8 (2016), https://www.mass.gov/files/documents/2016/09/tu/selected-race-statistics.pdf#page=3 (In Massachusetts, Black people are incarcerated at roughly eight times the rate of white people.). Recent data show that Black people are over three times more likely to be shot by police than are white people. Michael Siegel et al., *The Relationship between Racial Residential Segregation and Black-White Disparities in Fatal Police Shootings at the City Level, 2013-2017*, J. OF THE NAT'L MED. ASSOC. 1, 1 (2019). These disparities can be substantially attributed to implicit racial bias and structural racism related to racial segregation and policing of neighborhoods with high numbers of Black residents as opposed to higher crime rates. *See* The Sentencing Project, Shadow Report, *supra* (citing, *e.g.*, Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 485 (2004); Lauren Krivo & Ruth Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. F. 619, 642 (1996) (discussing arrest rates)); Siegel et al., *supra*, at 6 (discussing effect of neighborhood segregation on racial disparities in police shootings). These disturbing realities underscore the importance of this Court's acknowledgement that

race must factor into the analysis of criminal procedural protections, especially for police encounters. *See Warren*, 475 Mass. at 539-40.

B. Black Youths' Interaction With Police Makes Them More Likely To Feel Compelled To Remain When Stopped By Police

Rather than employing either the "reasonable youth" or race-specific analysis alone, the Court must consider all aspects of Tykorie's identity in analyzing whether a reasonable person in his position would have felt compelled to remain. *See Doe v. City of Naperville*, No. 17 CV 2956, 2019 WL 2371666, at *5 (N.D. Ill. June 5, 2019) (In a Section 1983 suit alleging Fourth Amendment violations, the court considered whether a "reasonable twelve-year-old African American child" would feel free to leave). Courts should not consider Black youth's race, age and other characteristics separate from one another. Black youth share the developmental traits of adolescents described in Section I, experience the racial oppression described in Section II, and also have their own experiences that provoke specific reactions to police contact—either they feel compelled to remain or to act quickly to avoid the situation.

C. Black Youth Face Disproportionate Police Surveillance, Harassment, And Arrests, Causing Fear And Mistrust

Data across the country justify Black youth's wariness of police contact. Although Black youth made up only 14% of all youth in the United States in 2017, they accounted for 35% of all juvenile arrests, 36% of juvenile court referrals, 40%

of detained youth, 40% of youth formally processed by the juvenile court, 37% of adjudicated youth, and 47% of youth judicially waived to criminal court. Charles Puzzanchera et al., Easy Access to Juvenile Populations: 1990-2018 (2019), https://www.ojjdp.gov/ojstatbb/ezapop/; OJJDP Statistical Briefing Book (Juvenile Arrests), 2017, https://www.ojjdp.gov/ojstatbb/crime/qa05104.asp?qaDate=2017&text=yes; OJJDP Statistical Briefing Book (Juvenile Arrest Rate Trends), http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05274. Black youth often experience extensive surveillance and harmful police encounters in their communities, including constant police presence and frequent pedestrian or vehicle stops. Henning, *supra*, at 1554-56 (citing Ronald Weitzer & Rod K. Brunson, *Strategic Responses to the Police Among Inner-City Youth*, 50 SOC. Q. 235, 235-36, 250 (2009) [hereinafter *Strategic Responses*]). Studies show that youth of color, "who tend to experience a significant share of police attention, are more likely to hold critical opinions of the police and adopt protective responses, such as avoidance and resistance, compared to other youth." THE NAT'L ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 317 (2019). A national survey of Black millennials ages 18-29—young people just slightly older than Tykorie Evelyn at the time of his arrest—found that Black youth experience police harassment at a rate nearly two

times that of other groups. JON C. ROGOWSKI & CATHY J. COHEN, BLACK YOUTH PROJECT, BLACK MILLENNIALS IN AMERICA: DOCUMENTING THE EXPERIENCES, VOICES, AND POLITICAL FUTURE OF YOUNG BLACK AMERICANS 33-34 (2014). In 2006, only 37% of Black youth in a representative sample of Boston public schools said they were likely to trust police a lot or even some. Harvard Youth Violence Prevention Center, *2006 Boston Youth Survey Highlights* 2 (2007), https://cdn1.sph.harvard.edu/wp-content/uploads/sites/120/2012/10/Final_2006_BYS_Highlights_and_tables.pdf#page=2 ("46% [of all youth] said they trust the police a lot (13%) or some (33%)"). "Unlike white youth, who tend to see police misconduct as an aberration, black male youth experience that misconduct as ubiquitous." Henning, *supra*, at 1554 (citing, *e.g.*, *Strategic Responses*, *supra*, at 252-53). Black youth describe police officers as mean, disrespectful, belligerent and antagonistic. *Id.* at 1532 (citations omitted).

Qualitative studies indicate that Black boys "expect to be stopped and mistreated." Henning, *supra*, at 1532 (citing Rod. K. Brunson & Jody Miller, *Gender, Race, and Urban Policing: The Experience of African American Youths*, 20 GENDER & SOC'Y 531, 535 (2006) [hereinafter *Gender, Race, and Urban Policing*]). Research into Black youths' opinions of police has found Black youth complain of officers repeatedly peppering them with questions; using racial slurs, profanity, or other demeaning terms; officers grabbing, pushing, shoving, tackling or otherwise

employing aggressive physical force against youth at the beginning of a stop; subjecting youth to strip searches or cavity probes, often without basis; stealing money from suspects; driving youth around the city and dropping them off in unfamiliar neighborhoods rather than taking them to the station. Henning, *supra*, at 1532, 1554-56 (citing *Gender, Race, and Urban Policing*, at 539-49; *Strategic Responses*, *supra*, at 244; Rod K. Brunson, *"Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL. 71, 85–86 (2007); Michael E. Miller, *Calif. Police Officer Scuffles with 16-Year-Old over Walking in the Bus Lane*, WASH. POST, September 18, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/09/18/calif-cop-scuffles-with-16-year-old-over-walking-in-the-bus-lane). "Fear of violence by police is now the norm for black boys." Henning, *supra*, at 1556. Black youth are less likely than white or Latino youth to believe police in their neighborhood are there to protect them; instead they view police themselves as the danger. *Id*.; ROGOWSKI & COHEN, *supra*, at 33-34; *See* ACLU OF MASS., BLACK, BROWN, AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007-2010 13 (2014), https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf (quoting youth discussing negative views of police, including that the police "think badges give them the power to do whatever they want," always feeling targeted by police, that

police action "makes you feel like you're a criminal when you're not even doing anything wrong," and that police's behavior "make people build a type of hatred toward them").

Black youths' experiences with law enforcement in schools mirrors the oppression they experience from police on the street. As the Advancement Project notes in its report, "We Came to Learn: A Call to Action for Police-Free Schools," over half of high schools nationwide with high enrollment of Black or Latinx students have some version of school police ("SROs"). ADVANCEMENT PROJECT, WE CAME TO LEARN: A CALL TO ACTION FOR POLICE-FREE SCHOOLS 48 (2018), https://advancementproject.org/wp-content/uploads/WCTLweb/index.html#page=1. In many school districts, the tools of law enforcement, including metal detectors, K-9 units, and military grade weapons, confront students of color every day. *Id.* at 22. Black students are also more likely than their white peers to attend a school with police officers but no counselor. *Id.* at 38 (also noting that "Black students are three times more likely to attend a school with more security staff than mental health personnel"). And while there is no evidence demonstrating increased misbehavior, Black students disproportionately bear the brunt of school-based policing. *Id.* In the 2015-2016 school year, Black students made up 15% of the student population nationwide but were 31% of the students arrested or referred to law enforcement. *Id.* (citing *2015-*

2016 Civil Rights Data Collection, School Climate & Safety, U.S. Department of Education Office for Civil Rights (2018), https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf). Black students are arrested in school at more than twice the rate of white students. *Id.* at 22. "Students of color in policed schools must try to learn in hostile school climates where they face daily microaggressions, risk police brutality, and suffer from an overinvestment in law enforcement infrastructure and an underinvestment in education." *Id.* at 31. Studies have shown that "[o]verly aggressive officers who treat students like criminals undermine students' respect for law enforcement, and cause students to believe that SROs are representative of how all officers will treat them." *See* Henning, *supra*, at 1532 (citations and quotations omitted).

Black youths' fear of police also stems from family and community experiences and perceptions. Given the documented risks of police contact, Black families proactively instruct their children on how to respond to police interaction. Henning, *supra*, 1530-31 (citing Craig B. Futterman et al., *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125, 138 (2016) (noting that black children have had their expectations about police shaped by conversations with family, friends, and elders)); Rod K. Brunson & Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 J. CONTEMPORARY ETHNOGRAPHY 425 (2011).

Black youth are also more likely than white youth to have a family member who has personally experienced verbal or physical police abuse, which further influences their view of police. Yolander G. Hurst et al., *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, 23 POLICING 37, 49 (2000). Black "[c]hildren grow up watching their friends and family members accosted for minor infractions like not wearing a seat belt, having car windows too tinted, and playing the radio too loud." Henning, *supra*, at 1555 (citing *Gender, Race, and Urban Policing*, *supra*, at 543). From even an early age, therefore, Black children are steeped in the notion that police pose a danger.[5]

[5] Other youth with marginalized identities, too, have negative experiences with police that courts should consider in applying Fourth Amendment principles. For example, Latinx youth, *see generally, e.g.*, Christy E. Lopez, *The Reasonable Latinx: A Response to Professor Henning's "The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment,"* 68 AM. U. L. REV. F. 55 (2019), youth who identify as LGBT, *see generally, e.g.*, CHRISTY MALLORY ET AL., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY (2015), girls of color, *see generally, e.g.*, Brooklyn K. Hitchens at al., The Context for Legal Cynicism: Urban Young Women's Experiences With Policing in Low Income, High-Crime Neighborhoods (2017), youth of color with disabilities, *see generally, e.g.*, Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUMBIA J. OF RACE AND L. 265 (2019), and other youth with overlapping marginalized identities, have reason to mistrust police.

D. A Reasonable Black Youth In Tykorie's Position Would Have Felt Compelled To Remain And Submit To Police Contact, Or Else Act To Avoid The Encounter

Tykorie, a Black teenager, was walking alone on a frigid evening—the only person on the street—when a patrol car pulled up beside him. (Record Appendix (RA) II:113-14.) When Tykorie tried to ignore them, the officers began to follow Tykorie in their car for "a distance of around 100 yards or the length of a football field." (Evelyn's Br. at 18-19; RA II:114.) When the police asked him questions and then, not hearing a direct response, stopped their vehicle and opened the door to exit (RA II:114-15), a seizure occurred. A reasonable Black youth in Tykorie's situation would have felt coerced to stay. There is a particular power differential when two uniformed police officers leave their vehicle to approach a Black youth on the street. As discussed in Section I(C), any youth in this situation would likely feel increased stress that impacts behavior; a Black youth experiences this encounter not just with those developmental differences but also with the full weight of personal, community, and historical instructions to be wary of police. The combination of Tykorie's age, developmental status and race infected Tykorie's perception of this encounter, causing him to feel more intimidated and fearful. Under these

circumstances, the officers' actions were likely to make a reasonable Black youth in his position feel coerced to submit to questioning or otherwise avoid the encounter.

CONCLUSION

For the reasons set forth above, the Superior Court should have considered Tykorie's youth and race in its assessment of whether there was a seizure. Failing to consider Tykorie's identity as a Black youth will deny him the "full scope of the procedural safeguards" that the Fourth Amendment and Article 14 guarantee to white adults. *See J.D.B.*, 564 U.S. at 281. *Amici* respectfully request that this Court rule that the moment of seizure should be analyzed from the perspective of a reasonable Black youth and reverse the Superior Court's denial of Tykorie's Motion to Suppress.

Respectfully submitted

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 17(c)(9)

I hereby certify that the foregoing brief complies with the rules of this Court pertaining to the filing of briefs, including but not limited to: Mass. R. App. P. 17 and 20. The brief uses Times New Roman 14-point font and was composed in Microsoft Word 2016. This brief contains 7,277 non-excluded words as calculated by Microsoft Word's word count function.

/s/Katherine E. Burdick
Katherine E. Burdick, 675736

CERTIFICATE OF SERVICE

I, Katherine E. Burdick, Esq., Attorney for Amici Curiae, in the above-captioned matter, hereby certify that on December 17, 2019, I served the parties via the Court's electronic filing system by e-mailing, to Janice Bassil, Bassil & Burdreau, 20 Park Plaza, Ste. 1005, Boston, MA 02116; Kathryn Hayne Barnwell, 401 Andover Street, Ste. 201-B, N. Andover, MA 01845; and to Cailin M. Campbell and David Bradley, District Attorney's Office, One Bulfinch Place, 3rd Floor, Boston, MA 02114. I further certify that on December 17, 2019, I electronically filed the Brief of Amici Curiae with the Massachusetts Supreme Judicial Court and mailed 7 paper copies via UPS Next Day Air.

/s/Katherine E. Burdick
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