COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-13009

COMMONWEALTH OF MASSACHUSETTS,

APPELLEE,

V.

JOHN VAZQUEZ DIAZ,

DEFENDANT-APPELLANT

ON RESERVATION AND REPORT FROM A SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT

BRIEF OF *AMICI CURIAE* THE BOSTON BAR ASSOCIATION, THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AT HARVARD LAW SCHOOL IN SUPPORT OF THE DEFENDANT-APPELLANT AND REVERSAL

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STATEMENTS OF INTEREST

The Boston Bar Association ("BBA") traces its origins to meetings convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston Massacre and went on to become the nation's second president. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative, and executive branches of government. The BBA's diverse, member-driven leadership draws attorneys from all areas of the legal profession.

The BBA's interests in this case relate most strongly to its goal of ensuring access to justice for all criminal defendants. The BBA recognizes that part of achieving this goal must include addressing structural and institutional racism that impact those who come before the court system. In August, 2020, the BBA established a Task Force on Ensuring Police Accountability in the wake of the tragic killing of George Floyd. The mission of this Task Force is to address legal issues that create serious structural obstacles to police reform efforts, specifically those that serve to undermine accountability for police misconduct. The Task Force includes members of law enforcement, civil rights attorneys, and the Honorable Justice Geraldine Hines.

Consistent with its sustained interest in facilitating access to justice and preventing inequitable outcomes for communities of color, the BBA filed an amicus letter in *Commonwealth v. Zachery*, SJC-12952, highlighting the risk of disproportionate impact of unchecked police investigatory power to people of color and lower-income individuals. Similarly, the BBA is presently concerned by the high likelihood that virtual suppression hearings will disproportionately harm communities of color and low-income communities.

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society

enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. Ensuring that defendants and communities of color have full and equal access to our courts and receive the protection of their fundamental constitutional rights is critical to our racial justice work, particularly during a global pandemic when they and their loved ones are specifically at heightened risk of death.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21(b)(i), the BBA is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The BBA is a bar association established almost 250 years ago and currently has nearly 13,000 members. There is no parent corporation or publicly-held corporation that owns 10% or more of the BBA's stock. Pursuant to Supreme Judicial Court Rule 1:21, MACDL represents that it is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. MACDL does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in MACDL. Pursuant to Supreme Judicial Court Rule 1:21, CHHIRJ represents that it is fiscally sponsored by Harvard University, a 501(c)(3) organization under the laws of the Commonwealth of Massachusetts, does not issue any stock or have parent corporations, and no publicly held corporations own stock in CHHIRJ.

RULE 17(C)(5) DECLARATION

Amici declare that (a) no party or party's counsel authored the brief in whole or in part, (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; (c) no person or entity—other than the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief; and (d) neither *amici* nor their counsel represent or have represented any of the parties to the present appeal in another proceeding involving similar issues, or were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

INTRODUCTION AND SUMMARY OF ISSUES

Over the last eight months, the Commonwealth and the country have confronted two overlapping crises: the COVID-19 global pandemic and police violence against people and communities of color. Both of these crises disparately cause premature death and community harm for people of color, Black and Latinx people in particular. This case puts these crises in dialogue. Given safety concerns about in-court hearings amidst an ongoing airborne viral pandemic, a Superior Court judge has ordered Mr. Vazquez Diaz to undergo a virtual suppression hearing, over his objection and despite his willingness to wait to hold the hearing until it is safe to do so indoors. Mr. Vazquez Diaz is a native Spanish speaker who requires the assistance of an interpreter and who faces more than a decade in state

prison on a drug trafficking charge carrying a mandatory minimum sentence. His motion to suppress evidence and statements—a motion that alleges unlawful police conduct—may well determine the outcome of his prosecution.

Requiring virtual suppression hearings upends the fundamental rights of the accused and will work particular harm against defendants of color and their communities. The character of a suppression hearing is nearly indistinguishable from a trial, where the credibility of witnesses and the participation of the community through public attendance are central to factual determinations and the legitimacy of the hearing. "[T]here is power in the act of observation: audiences affect the behavior of government actors inside the courtroom, helping to define the proceedings through their presence."[1] Suppression hearings raise additional concerns because of the available remedy: the exclusionary rule, which exists to deter unlawful police conduct. At a time when public concerns about police practices are at their zenith, when legislation is being debated about curtailing aggressive police tactics, and when the country is newly awakened to the fraught history and present of policing of people and communities of color, ensuring full and equitable public access to hearings that are centrally about whether the police

[1] Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2174, 2177 (2013-2014).

engage in unconstitutional practices is of paramount importance—especially where such hearings may offer notice of systemic policing issues.

SUMMARY OF ARGUMENT

Requiring virtual suppression hearings over defendants' objections will exacerbate profound inequities and systemic racism in the Commonwealth's criminal cases. Virtual hearings erect barriers for poor people and people of color due to racial and socio-economic disparities in access to broadband and Zoom-capable devices (*infra* at 17–28). Mandating virtual suppression hearings over defendants' objections will specifically harm communities of color, as suppression hearings invite public reckoning with unconstitutional policing in Black and Hispanic communities (*infra* at 28–31). Further, as Harvard Law School's Criminal Justice Policy Program recently confirmed in a study of racial disparities in sentencing commissioned by the late Chief Justice Ralph Gants, Black and Hispanic defendants are disparately charged with drug and weapons offenses, especially those which carry mandatory minimums. Empirical evidence has long shown that suppression is most often sought and most often successful in such cases. Undermining defendants' constitutional rights in suppression hearings will therefore disparately impact people of color (*infra* at 31–35). Against this backdrop, there are no circumstances under which a hearing conducted by video conference satisfies constitutional considerations absent a defendant's consent—

and in the case of a defendant's consent to a virtual hearing, additional safeguards are necessary to ensure consent represents an informed, knowing, and voluntary waiver (*infra* at 35–36).

ARGUMENT

As the Defendant-Appellant's brief comprehensively explains, requiring Mr. Vazquez Diaz to submit to a suppression hearing over his objection would violate a slew of constitutional rights: the defendant's right to confront the witnesses against him, the defendant's right to be present at all critical stages of the proceeding, the defendant's right to a public trial, the public's right to physically attend the hearing, and the defendant's right to effective assistance of counsel. Studies showing that virtual hearings result in worse outcomes for defendants than in-person hearings[2] provide particularly persuasive evidence that a virtual evidentiary

[2] *See* Def. Br. at 24–25 (collecting studies); *see also* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Nw. U. L. Rev. 933, 966 (2015) (finding, based on a national sample of 153,835 adult detained removal immigration cases in which judges reached a decision on the merits during fiscal years 2011 and 2012, that cases heard by televideo were "significantly more likely" to end in deportation and less likely to be granted relief, allowed to voluntarily depart, or have their cases terminated than in-person hearings); Bill MacKeith & Bridget Walker, Bail Observation Project, Still a Travesty: Justice in Immigration Bail Hearings 5 (2013), https://bailobs.files.wordpress.com/2015/03/2nd-bop-report.pdf (in observations of 212 immigration bail hearings in the United Kingdom, bail was granted to 21 out of 41 applicants (50%) appearing in person, but 54 out of 170 applicants (32%) appearing by video link); Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 L. & Pol'y 211, 221–23 (2006) (collecting additional studies).

hearing may profoundly and materially prejudice a defendant, taking the claims in the Defendant-Appellant's brief beyond constitutional abstractions. *Amici* adopt and concur with the Defendant-Appellant's brief and write to offer additional information that bears on this Court's evaluation of the threat to these many constitutional rights.

I. Given racial and socio-economic disparities in access to broadband and Zoom-capable devices, virtual hearings will disparately burden and exclude poor people and people of color—whether defendants, their loved ones, victims, witnesses, or public observers.

Mr. Vazquez Diaz contends that a virtual suppression hearing violates the defendant's Sixth Amendment right to a public trial as well as the public's First Amendment right to attend the hearing, and *amici* agree. "[A]n open court room 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" *Commonwealth v. Cohen*, 456 Mass. 94, 107 (2010), *quoting Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 508 (1984). The right of the public "to participate in and serve as a check upon the judicial process," *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606 (1982), and to "prevent the courts from becoming instruments of persecution," *Commonwealth v. Bohmer*, 374 Mass. 368, 380 (1978), *citing In re Oliver*, 333 U.S. 257, 270 (1948), is rendered especially hollow when disempowered communities of color whose residents are disparately swept into the criminal legal system are also disparately excluded from

the proposed virtual substitute. Poor people and people of color are overrepresented in criminal prosecutions,[3] and also overrepresented among those who lack access to broadband internet and to adequate internet-accessible devices to observe or participate in virtual hearings. Requiring defendants to undergo suppression hearings virtually, over their objection, compromises "basic fairness" including principles of equal protection and risks undermining "the appearance of fairness" and "public confidence in the system." *Cohen*, 456 Mass. at 107.

According to a 2019 Pew Research Center analysis, 10% of American adults do not use the internet, but the percentage increases depending on income, socio-economic background, and educational attainment[4]—all of which also track with the people and communities who have the most involvement in the criminal legal

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[3] *See, e.g.*, Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 Yale L.J., 2176, 2181 (2013), add. 123-51 (noting that as of 2006, 80% of people charged with crimes were poor); *see also* Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. Mich. J. L. Reform 323, 329 (2009) ("The majority of criminal defendants qualify for appointed counsel—about 80% of state prosecutions, and 66% of federal cases."); Simonson, *supra* note 1, at 2185 ("Who are the members of the criminal court audience? They are people who wait in lines and fill courtrooms to watch the cases in which they or their friends, family, or community members appear as victims, defendants, or witnesses to a crime. As such, they are more likely than not to be poor people, people of color, or both. Overwhelmingly, people arrested for crimes in the United States are poor people of color, predominantly African Americans and Latinos. Victims, too, disproportionately come from the same communities.").

[4] Monica Anderson et al., *10% of Americans don't use the internet. Who are they?*, Pew Res. Ctr. (Apr. 22, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they.

system.[5] Roughly 30% of adults with less than a high school education and 18% of adults from households earning less than $30,000 a year do not use the internet.[6] When it comes to home broadband, access gaps are starker. A 2018 report of the U.S. Census Bureau based on 2016 data from the American Community Survey found that 42% of households with an income of less than $25,000 lacked a broadband internet subscription.[7] "Racial minorities, older adults, rural residents, and those with lower levels of education and income are less likely to have broadband service at home."[8] As of February 7, 2019, 79% of white respondents to a Pew Research survey had home broadband access, compared to 66% of Black respondents and 61% of Hispanic respondents.[9] In other words, nationally, more

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[5] *See generally* Alexi Jones & Wendy Sawyer, Prison Policy Initiative, Arrest, Release, Repeat: How police and jails are misused to respond to social problems (2019), https://www.prisonpolicy.org/reports/repeatarrests.html (analyzing all 4.9 million arrests in 2017, and finding that Black Americans are overrepresented among people arrested, comprising 13% of the general population but 21% of people arrested once and 28% of people arrested multiple times; poverty is strongly correlated with arrests; low educational attainment increases the likelihood of arrest; and people with multiple arrests are 4 times more likely to be unemployed (15%) than those with no arrests in the past year (4%)).

[6] Anderson, *supra* note 4.

[7] Camille Ryan, U.S. Dep't of Commerce, U.S. Census Bureau, American Community Survey Reports, Computer and Internet Use in the United States: 2016 at 9 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf.

[8] *Internet/Broadband Fact Sheet*, Pew. Res. Ctr. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#who-has-home-broadband.

[9] *Id.*

than one-third of Black people and almost four in ten Hispanic people do not have home broadband.

The Commonwealth exhibits similar concerning disparities. According to a May 2020 report by nonpartisan thinktank MassINC on the digital divide in the Commonwealth's 26 designated Gateway Cities,[10] there are roughly 100 Massachusetts neighborhoods where at least one-quarter of residents have no internet access.[11] There are certain neighborhoods in Lawrence, Lowell, New Bedford, and Pittsfield where more than 40% of households lack internet, and five census tracts in Fall River where between 40% and 55% of residents lack internet.[12] This problem also affects rural communities: "32,000 residents in 32 western towns cannot get [broadband] connection into their homes, according to

[10] *See* G.L. c. 24A, § 3A (defining "gateway municipality" as "a municipality with a population greater than 35,000 and less than 250,000 with a median household income below the commonwealth's average and a rate of educational attainment of a bachelor's degree or above that is below the commonwealth's average").
[11] Ben Forman, *Gateway Cities at the center of the digital divide in Massachusetts*, MassINC (May 5, 2020), https://massinc.org/2020/05/05/gateway-cities-at-the-center-of-the-digital-divide-in-massachusetts.
[12] *Id.*; *see also* Lauren Chambers, *Internet Deserts Prevent Remote Learning During COVID-19*, ACLU of Mass.: Data for Justice Project (May 13, 2020), https://data.aclum.org/2020/05/13/internet-deserts-prevent-remote-learning-during-covid-19 ("Boston, Lowell, Lawrence, Worcester, Springfield, and Northampton [] all have neighborhoods in which over 30 percent of residents live without wi-fi. But rural areas are affected as well: northwestern and southwestern Massachusetts also have large regions where almost 20 percent (1 in 5) of folks don't have access.").

the Massachusetts Broadband Institute (MBI)."[13] MassINC found that internet access in the Commonwealth's communities is highly correlated with neighborhood poverty rates. These high-poverty neighborhoods also disproportionately bear the brunt of policing and incarceration in Massachusetts.[14] There is substantial overlap between households lacking internet and households affected by criminal prosecution—and these households are concentrated in poor communities of color.

Inequitable access to devices that support all features of virtual hearings compounds the barrier posed by disparate access to broadband service in poor communities of color. While virtual hearings may be accessed via the Zoom app on a smartphone, the Zoom platform has reduced functionality when accessed from a smartphone as compared to a computer.[15] As the Pew Research Center found,

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[13] Hiawatha Bray, *Spotty broadband challenges Western Mass. schools*, Bos. Globe (Sept. 2, 2020), https://www.bostonglobe.com/2020/09/02/business/spotty-broadband-challenges-western-mass-schools.

[14] *See, e.g.*, Benjamin Forman & Lindiwe Rennert, The Geography of Incarceration in a Gateway City: The Cost and Consequences of High Incarceration Rate Neighborhoods in Worcester (2017), https://massinc.org/wp-content/uploads/2017/09/geography.crime_.report.8.pdf; Benjamin Forman, Laura van der Lugt & Ben Golberg, The Geography of Incarceration: The Cost and Consequences of High Incarceration Rates in Vulnerable City Neighborhoods (2016), https://massinc.org/wp-content/uploads/2016/11/The-Geography-of-Incarceration.pdf.

[15] "When you use Zoom on your phone, you can only see a maximum of four people at a time in the gallery view." Kaitlyn Wylde, *7 Differences Between Zoom On Your Phone Vs. Laptop*, Bustle (Apr. 1, 2020), https://www.bustle.com/p/7-differences-between-zoom-on-your-phone-vs-laptop-22678806. By contrast, on a

people increasingly turn to internet-capable smartphones as their primary means of online connection in their home: "roughly one-in-five American adults are 'smartphone-only' internet users – meaning they own a smartphone, but do not have traditional home broadband service."[16] This is especially true for people of color—25% of Hispanic Americans and 23% of Black Americans were "smartphone-only" internet users as of 2019, roughly double the 12% of white Americans who rely exclusively on smartphones for internet access.[17] Lower-income Americans are also more likely to use smartphones only: 26% of those earning under $30,000 per year, 20% of those earning between $30,000 and

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computer, the Zoom gallery view supports 25 participants at a time on a single screen. *See Zoom Rooms Display Options*, Zoom Support, https://support.zoom.us/hc/en-us/articles/115003322603-Zoom-Rooms-Display-Options (last visited Nov. 18, 2020). Imagine, for example, if in the case at bar Mr. Vazquez Diaz had been released pretrial on his $25,000 bail instead of detained by it, and he only had access to a smartphone to participate in a mandated virtual suppression hearing. If that were the case, Mr. Vazquez Diaz would not be able to see all of the hearing's participants—the judge, his attorney, his translator, the witness, and the attorney for the Commonwealth—in a single view as the hearing proceeded. Without being able to see everyone in the gallery view, Mr. Vazquez Diaz would either be deprived of the opportunity to read the reactions of at least one other participant in real time or be unable to see the interpreter, either of which would dramatically impede his ability to participate in his own defense.

[16] *Internet/Broadband Fact Sheet*, *supra* note 8.

[17] *Id.*; *see also* Ryan, *supra* note 7, at 2 ("A small percentage of households have smartphones but no other type of computer for connecting to the Internet. These 'smartphone only' households were more likely to be low income, Black or Hispanic.").

$49,999, 10% of those earning between $50,000 and $74,999, and 6% of those earning $75,000 or more.[18]

"According to estimates from 2014-2018 census data, over 500,000 Massachusetts residents either do not have a computer or, while having a computer, do not have access to the internet."[19] In Boston, as many as one in five families don't have a computer at home.[20] MassINC reports that nearly 30,000 Gateway City households—28% of Gateway City families with school-age children—do not have a laptop or desktop computer at home.[21] In certain cities with particularly large populations of poor people and people of color, more than one-third of households lack home computers: Lawrence (40%), Fall River and Springfield (37% each), New Bedford (36%), Holyoke (35%), and Chelsea (34%).[22]

The COVID-19 pandemic adds further strain to the existing digital divide. Even among families that have home broadband, some families may only have one

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[18] *Internet/Broadband Fact Sheet*, *supra* note 8.
[19] Chambers, *supra* note 12, *citing* U.S. Dep't of Commerce, U.S. Census Bureau, American Community Survey (2018).
[20] Julia Mejia et al., *We need to close digital divide in Boston*, Commonwealth Mag. (Nov. 1, 2020), https://commonwealthmagazine.org/opinion/we-need-to-close-digital-divide-in-boston.
[21] Forman, *supra* note 11.
[22] *Id.*

phone, tablet, or computer that is Zoom-capable,[23] and during business hours it may be claimed for virtual schooling. As of November 8, the Commonwealth's Department of Elementary and Secondary Education confirmed that 23% of the state's 371 school districts—including all three of the Commonwealth's largest districts: Boston, Worcester, and Springfield—were fully remote.[24] When a household has only one Zoom-capable device, families will have to choose between virtual schooling and attending court.[25] Further, a defendant's family may be unable to participate by video if the sole household device is needed for the defendant's personal use during the hearing. In the decision below, Judge Ames offered that members of the public could "attend" the hearing via an audio-only

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[23] *See, e.g.*, Naomi Martin, *Hundreds of Boston students who need laptops have not received them, advocates say*, Bos. Globe (Sept. 17, 2020), https://www.bostonglobe.com/2020/09/17/metro/hundreds-boston-students-who-need-laptops-have-not-received-them-advocates-say ("Cassellius acknowledged that as the pandemic hit, the district struggled amid the global rush for laptops to supply all 53,000 students with their own laptops, and many siblings had to share with each other.").

[24] Nik DeCosta-Klipa, *New database shows how the 40 largest school districts in Massachusetts have responded to the coronavirus*, Boston.com (Nov. 10, 2020), https://www.boston.com/news/coronavirus/2020/11/10/massachusetts-school-districts-database-coronavirus.

[25] Dubin Research & Consulting, *COVID-19's Next Victim? The Rights of the Accused*, Nat'l Ass'n of Crim. Defense Lawyers (2020), https://www.nacdl.org/Article/COVID19sNextVictim202005-PD ("Low-income potential jurors trying to meet the requirements of virtual jury duty may face multiple challenges, including accessing a computer (or a computer that is not being [used] for another purpose, such as a child attending virtual school) or connecting to the internet.").

public bridge line if they lacked access to a broadband connection or internet-capable device. This alternative is insufficient, as an audio-only option does not come anywhere close to meeting the public's First Amendment right to physically attend the hearing or the defendant's right to a public trial.[26]

Barriers to a public audience may have a material effect on the outcome of the hearing. Having members of the public in the gallery can change how factfinders view defendants and how prosecutors and judges conduct hearings—including potentially altering the hearing's outcome.[27] Indeed, this is the policy

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[26] *See* Simonson, *supra* note 1, at 2176 ("[T]he criminal court audience is not just normatively important; it is *constitutionally important*. The criminal court audience is protected by both the defendant's right to a public trial under the Sixth Amendment and the public's right to access criminal proceedings - the 'freedom to listen' - under the First Amendment. As a result, the audience can and should be a central constitutional mechanism for popular accountability in modern criminal justice."); *id.* at 2203 ("[T]he Court's jurisprudence displays an unmistakable focus on the physical presence of locals inside the courtroom.").

[27] *See, e.g.*, Jamiles Lartey, *The Judge Will See You On Zoom, But The Public Is Mostly Left Out*, The Marshall Project (Apr. 13, 2020), https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out ("'What we've seen over the past few years is that our presence really does matter,' said Zoë Adel, a lead organizer with the New York City court watch. 'It changes people's behavior—judges set lower bail—when they know court watchers are watching and they're being held accountable.'"); *see also* Simonson, *supra* note 1, at 2182 ("When community members gain access to a nontrial courtroom, their presence in court does not just affect the case that they are there to see. The effect of their presence in the courtroom can be to change the nature of the nontrial proceedings as well. Audience members watch the players in the courtroom; they react to what they see and hear through facial expressions, laughs, and grumbles. Most of all, they sit, look, and listen. Their presence can have a palpable effect on the speakers in the courtroom."), *citing* Akhil Amar, The Constitution and Criminal Procedure 118

rationale for the public trial right: "for the protection of the accused—to discourage misconduct through the disinfectant of outside scrutiny . . . ."[28] Establishing public access via an audio-only conference line, where members of the public are represented only by a phone number, is categorically different than physical appearance in court. Having the faces of loved ones in the gallery humanizes the defendant and may combat implicit bias by showing community support and that loved ones are invested in, even participating in, building the defendant's case.[29] By the same token, having people appearing by phone or from the Zoom smartphone app may render the opposite effect—triggering implicit bias to the extent that low-quality video or audio arising from systemic lack of access to broadband raises implicit race- or class-based judgments.[30]

(1997); Philip G. Zimbardo & Ann L. Weber, Psychology 445 (1994) (discussing studies that measure the effects of an audience on an individual performing a task).

[28] Jessica A. Roth, *The Constitution Is On Pause in America's Courtrooms*, Atlantic (Oct. 10, 2020), https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-americas-courtrooms/616633.

[29] *See* Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 Alb. L. Rev. 1281, 1287 (2015) ("The tangible impact of family and community participation on case outcomes is undeniable. The participatory defense model has led to acquittals, charges dismissed and reduced, and prison terms changed to rehabilitation programs.").

[30] Elizabeth Brico, *Virtual Hearings Have Created A 'Caste System' In America's Courts*, The Appeal (July 31, 2020), https://theappeal.org/virtual-hearings-have-created-a-caste-system-in-americas-courts ("'[There is a] caste system now via court,' said Rob Mason, director of the juvenile division for the Public Defender's Office in Florida's Fourth Judicial Circuit. 'When you call in, we've got people that are on laptops or desktops, and are perfectly centered, and the audio is great

As Prof. Jocelyn Simonson explains, the defendant's right to a public suppression hearing and the public's right to attend a suppression hearing are governed by overlapping constitutional values: "(a) the audience as a check on government abuse; (b) the connection between courtroom observation, self-government, and democracy; and (c) the focus on protecting an audience of local community members . . . ."[31] Conducting a suppression hearing by Zoom risks exacerbating existing racial and ethnic disparities in the criminal legal system and undermining the legitimacy of our courts. The defendant-appellant compared the effect of the digital divide to "posting a court officer at the courtroom door with instructions to turn away every third person who seeks to enter." Def. Br. at 50. This comparison of stopping every third person at the door captures the significant scale of the potential exclusion, but not its disparate effect on poor people and people of color. "When court officials exclude the audience from attending or listening in the courtroom, their actions underscore the relative political powerlessness of residents of neighborhoods most affected by local criminal justice policies."[32] Moving to a virtual setting undermines fundamental fairness

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and everything is perfect. Then we have some people that are calling in on their cellphones; then we have some people that only call in on their [home] phone and so suddenly we have this different class of people. I can't help but think of the implicit bias between prosecutors and judges and even defenders as to how you look at these people.'").

[31] Simonson, *supra* note 1, at 2197.

[32] *Id.* at 2178.

and may stoke distrust and resentment among disempowered communities already excluded from membership and participation in core civic functions, including participation in the criminal trial process.

II. Mandating virtual suppression hearings over defendants' objections will specifically impinge the constitutional rights of defendants of color.

Suppression hearings particularly implicate the rights of defendants of color for three reasons: (1) police use unconstitutional tactics against people of color more often than white people; (2) defendants most commonly seek suppression in drug and weapons cases; and (3) people of color are especially overrepresented in drug and weapons cases.

A. By design, suppression hearings enable public reckoning with unconstitutional policing in communities of color.

The purpose of the exclusionary rule is to deter unconstitutional policing. It is beyond dispute that Black and Hispanic people are disproportionately subject to particularly aggressive and otherwise unconstitutional policing tactics.[33] Systemic

[33] *See, e.g.*, *Commonwealth v. Long*, 485 Mass. 711, 740 (2020) (Budd, J., concurring) ("If 'systemic racism' is defined as a 'system[or] institution[ ] that produce[s] racially disparate outcomes, regardless of the intentions of the people who work within [it],' then our criminal justice system is rife with it."); *Commonwealth v. Warren*, 475 Mass. 530, 539 (2016) (noting statistical data establishing "a pattern of racial profiling of black males in the city of Boston"); *Commonwealth v. Phillips*, 413 Mass. 50, 53 (1992) (stop and search policy of Boston police created "martial law" for some young African-Americans in Roxbury); Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 Alb. L. Rev. 703, 708 (2000) ("We are talking about a national policy which is training police

racism permeates our daily lives, and constitutional protections are a vital tool in combatting its harms. This court acknowledges its role in the "urgent need to deter discriminatory policing." *Long*, 485 Mass. at 718–19. The late Chief Justice Gants penned eloquent and pointed words on this issue just a few months ago:

> [T]oo often, by too many, black lives are not treated with the dignity and respect accorded to white lives. . .
>
> And as members of the legal community, we need to reexamine why, too often, our criminal justice system fails to treat African-Americans the same as white Americans, and recommit ourselves to the systemic change needed to make equality under the law an enduring reality for all. This must be a time not just of reflection but of action.[34]

Historically, systemic racism was among the motivating factors that led Chief Justice Earl Warren of the U.S. Supreme Court to steward the revolution in criminal procedure doctrine in the 1960s, crafting new protections for the rights of criminal defendants, notably by applying the exclusionary rule against the states. The due process revolution developed through landmark Supreme Court decisions in the cases of individual defendants of color—Dollree Mapp, Ernesto Miranda, John Terry, and others.[35]

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all over this country to use traffic violations, which everyone commits the minute you get into your car, as an excuse to stop and search people with dark skin.").

[34] Letter from the Seven Justices to Members of the Judiciary and Bar (June 3, 2020), https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and.

[35] Although *Mapp v. Ohio*, 367 U.S. 643 (1961), did not mention race explicitly, scholars note that a response to systemic racism in policing undeniably runs through the decision like an undercurrent. *See* Lewis R. Katz, Mapp *After Forty*

The Warren Court's criminal procedure doctrine applying the exclusionary rule against the states developed against a backdrop of police overreach and violence concentrated in communities of color. The need for a truly open

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Years: Its Impact on Race in America, 52 Case Western Reserve L. Rev. 471, 473 (1997) ("The illegal entry of Mapp's house by the police was nothing extraordinary; it was an everyday fact of life for blacks and other racial minorities. Police throughout America were part of the machinery of keeping blacks 'in their place,' ignoring constitutional guarantees against unreasonable arrests and searches and those that barred use of 'third-degree' tactics when questioning suspects.").

Subsequent cases grew more explicit. In *Miranda v. Arizona*, 384 U.S. 436 (1966), "an early draft of the Chief's *Miranda* opinion contained the following passage:

> In a series of cases decided by this Court long after [studies of the third degree and other interrogation abuses], Negro defendants were subject to physical brutality—beatings, hanging, whipping—employed to extort confessions. In 1947, the President's Committee on Civil Rights probed further into police violence upon minority groups. The files of the Justice Department, in the words of the Committee, abounded 'with evidence of illegal official action in southern states.'

However, in a memo to Warren, Justice Brennan questioned whether 'it is appropriate in this context to turn police brutality into a racial problem. If anything characterizes the group this opinion concerns it is poverty more than race.' Warren responded by deleting the reference to blacks and the South."

Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 Ohio St. J. Crim. L. 11, 25 (2005).

Two years later the opinion in *Terry v. Ohio*, 392 U.S. 1 (1968), included two explicit references to police maltreatment of Black people in discussing the merits of the exclusionary rule. *See, e.g.*, *id.* at 14 ("wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain"); *id.* at 14 n.11 ("field interrogations are a major source of friction between the police and minority groups").

proceeding is thus particularly strong for suppression hearings not only because they call into question the "conduct of police and prosecutor," *Waller v. Georgia*, 467 U.S. 39, 47 (1984), but more specifically because they invite public reckoning with the systemic racism harming communities of color. Suppression hearings are vital for building community knowledge of police abuses. Some of this Court's most significant decisions about the relationship between police and communities of color have been rendered on review of motions to suppress. *See, e.g.*, *Commonwealth v. Long*, 485 Mass. 711 (2020); *Commonwealth v. Evelyn*, 485 Mass. 691 (2020); *Commonwealth v. Warren*, 475 Mass. 530, 539 (2016); *Commonwealth v. Lora*, 451 Mass. 425 (2008). Suppression is a matter of significant public interest, demanding the opportunity for public engagement and particularly impacting people and communities of color.

B. Suppression hearings are most common in drug and weapons cases—cases in which Black and Hispanic people are starkly over-represented in the Commonwealth.

For decades, studies around the country have shown that motions to suppress are most commonly filed in drug and weapons cases—cases where physical evidence of contraband can be suppressed.[36] In a study of 7,500 cases in nine

[36] *See, e.g.*, Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 681–82 (1970) https://www.ncjrs.gov/pdffiles1/Digitization/203NCJRS.pdf (finding narcotics and weapons offenses comprised the majority of offenses in which motions to suppress were filed in Chicago and the District of Columbia between 1969 and 1970, even

counties across criminal courts in three states, "Motions to suppress physical evidence [were] filed in fewer than 5% of the cases, largely drug and weapons cases, while serious motions to suppress identifications and confessions [were] filed in 2% and 4% of the cases."[37] Further, motions to suppress are most likely to be outcome determinative in contraband-based cases. In a study conducted by the *Chicago Tribune*, "the exclusionary rule plays a significant role only in drug cases where violence is not involved. In 13% of such cases, evidence is excluded. The

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though these crimes accounted for a comparatively small proportion of the total number of persons prosecuted); U.S. General Accounting Office, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (1979), https://www.gao.gov/assets/130/126585.pdf (noting suppression motions most common in narcotics, firearm, and immigration cases); W. Robert Burkhart et al., U.S. Dep't of Justice, Nat'l Inst. of Justice, The Effects of the Exclusionary Rule: A Study in California (1982), https://www.ncjrs.gov/pdffiles1/digitization/87888ncjrs.pdf ("The greatest impact of the exclusionary rule is on drug cases, and for those cases the effect on case attrition is substantial."); Research and Planning Bureau, Montana Board of Crime Control, The Impact of the Exclusionary Rule Upon the Montana Criminal Justice System (1984), https://www.bjs.gov/content/pub/pdf/ierumcjs.pdf (drug offenses representing charge type with greatest plurality of cases in which suppression was sought); Craig D. Uchida & Timothy S. Bynum, Search Warrants, Motions to Suppress and Lost Cases: The Effects of the Exclusionary Rule in Seven Jurisdictions, 81 J. Crim. L. & Criminology 1034, 1060 (1990-1991) (motions filed most often in drug offenses in six of the seven cities).

[37] Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 Am. Bar Foundation Res. J. 585 (1983).

rule has little impact on other kinds of cases; the dismissal rate for property crimes is even less than that for violent offenses."[38]

The fact that motions to suppress are most commonly filed in drug and weapons cases means the decision to require virtual suppression hearings will most often affect defendants charged with drug and weapons offenses. Research published this fall by Harvard Law School's Criminal Justice Policy Program, commissioned by the late Chief Justice Ralph Gants, found that drug and weapons offenses are disparately charged against Black and Latinx people in Massachusetts, and these categories of offenses drive racial disparities in sentencing throughout the Commonwealth.[39] Black and Latinx people charged with drug offenses and weapons offenses are more likely to be incarcerated and receive longer incarceration sentences than white people charged with similar offenses, even after controlling for charge severity and additional factors. Further eroding these defendants' rights and prospects of success through a virtual suppression hearing risks exacerbating existing disparities. This research builds on findings of the Massachusetts Sentencing Commission in 2016 that drug and weapons cases

[38] Joseph R. Tybor & Mark Eissman, *Illegal Evidence Destroys Few Cases*, Chi. Trib. (Jan. 5, 1986), https://www.chicagotribune.com/news/ct-xpm-1986-01-05-8601010797-story.html.

[39] Elizabeth Tsai Bishop et al., Criminal Justice Policy Program, Harvard Law School, Racial Disparities in the Massachusetts Criminal System (2020), http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf.

involving mandatory minimums have the starkest racial disparities in the Commonwealth.[40]

People facing mandatory minimums are especially likely to seek suppression, with the most to gain from a potential win and the most to lose from declining to move to suppress given the trial penalty in mandatory minimum cases. In a study of one year of federal drug prosecutions, defendants who went to trial received far longer sentences, averaging 192 months, as compared to 64 months for those who pled.[41] A drug defendant facing a mandatory minimum would receive an average of *11 extra years* for going to trial.[42] Other extensive research also supports a significant trial penalty for defendants who take their cases to trial rather than plead.[43] Given the trial penalty, a defendant may exert substantial power to change the dynamics of plea negotiations through litigating a motion to

[40] Mass. Sentencing Comm'n, Selected Race Statistics (2016), https://www.mass.gov/doc/selected-race-statistics/download.
[41] *See* Human Rights Watch, An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty at 2 (2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead.
[42] *Id.* at 7.
[43] *See, e.g.*, Jeffrey T. Ulmer et al., *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 Just. Q. 550, 563–64 (2010); Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences after Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 Colum. L. Rev. 959 (2005).

suppress. Indeed, since the vast majority of criminal cases plead out, motion hearings functionally take the place of a trial in many cases.[44]

III. Should a defendant wish to consent to a virtual suppression hearing, additional procedural protections are necessary.

Amici appreciate that, notwithstanding the serious concerns described above, defendants other than Mr. Vazquez Diaz may wish to consent to a virtual hearing and waive the various constitutional rights implicated in a suppression hearing. In such scenarios, courts must ensure consent and waiver are given entirely free from coercion and uncertainty. We encourage the court to promulgate special rules[45] on waiver for any virtual evidentiary hearing where a defendant's constitutional rights are at stake.

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[44] While the pandemic is ongoing—with uncontained community spread in nearly every state—and its endpoint uncertain, for the first time we can now see a distant horizon. Initial results from vaccine trials are quite promising, and they promise some future end date to this crisis in a manner that no other public health or medical intervention has been able to offer to date. Although governing pandemic regulations will remain in force for an indeterminate period, with this news we can be sure an end approaches. This counsels in favor of robustly honoring the rights at stake here; our courts should bear the cost of delay in the limited subset of cases in which defendants object to virtual suppression hearings for the sake of vindicating fundamental constitutional rights.

[45] The Boston Municipal Court Standing Order 10-20 similarly outlined supplemental waiver and consent protocols for virtual guilty pleas. *See* Boston Municipal Court Standing Order 10-20: Further expanding in-person court proceedings and access to virtual hearings during the COVID-19 pandemic (Oct. 5, 2020), https://www.mass.gov/boston-municipal-court-standing-orders/boston-municipal-court-standing-order-10-20-further#f-virtual-guilty-pleas-admissions-and-probation-violation-stipulations.

While personal waiver by the defendant is usually not required to waive the right of confrontation, *Commonwealth v. Amirault*, 424 Mass. 618, 651 n.23 (1997), the unusual circumstances of the pandemic place in jeopardy a multitude of constitutional rights amidst an especially high risk of coercion. As such, additional precautions are required to ensure any waiver is a truly "voluntary . . . knowing, [and] intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

A list of recommended guidelines on waiver and consent is included in the addendum.

CONCLUSION

This Court is committed to rooting out systemic racism from our criminal legal system. Requiring defendants to undergo virtual suppression hearings will effectively apply a lacquer atop existing entrenched systemic racism, disproportionately prejudicing Black and Latinx defendants, like Mr. Vazquez Diaz. Although the pandemic's duration remains uncertain, the light at the end of the tunnel counsels against adopting policy in the interest of judicial efficiency that will so significantly burden the rights of disparately poor defendants, defendants of color, and their communities for such little gain in expediency.

Respectfully submitted,

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MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including Mass. R. App. P. 16, 17, and 20. It is typewritten in 14-point, Times New Roman font, and complies with the length limit of 20(a)(2)(c) because it was produced with a proportionally spaced font and does not contain more than 7,500 non-excluded words. This document contains 6,218 non-excluded words as counted by the word-processing system used to prepare it.

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CERTIFICATE OF SERVICE

On November 20, 2020, I served a copy of this brief on all parties by e-mail.

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ADDENDUM

Amici propose the following guidelines as minimum requirements for effective waiver of the panoply of rights implicated by a virtual suppression hearing.

- Require written waiver in advance of a hearing:
    - Signed by defense counsel and, where practicable, the defendant;[46]
        - Describing the list of remote parameters being consented to (e.g., all parties will attend via Zoom, some parties will be in the courtroom, witness will stand with hands visible at a distance from the camera, etc.);
        - Noting that the defendant and defense counsel had adequate time in advance of the hearing to discuss the rights being waived by consenting to a virtual hearing;
- Require oral consent at the time of the hearing:
    - From the defendant and defense counsel;
        - Noting that the technologic parameters of the hearing are as anticipated and agreed-to in the written consent;

[46] Where it is not safely practicable to obtain the defendant's ink signature, this portion should be signed by the judge presiding over the hearing at the time of the hearing, verifying that the judge has obtained the defendant's oral understanding and acknowledgment of their consent and waiver.

        - Noting that the technologic parameters of the hearing are adequate to provide privileged discussion between counsel and the defendant;
        - Noting the mechanism agreed-upon by the parties to signal a request to pause the proceeding due to technical difficulties.
    - If an interpreter is required, oral consent from the interpreter that the technologic parameters are adequate to perform their interpretive duties throughout the hearing, and oral consent from the defendant that they are able to understand the proceedings.
- Provide an opportunity for consent to be withdrawn orally at any time if the parameters set at the outset of the hearing begin to infringe on confrontational rights (or other implicated constitutional rights) in an unexpected way or in a way that was not consented to by the defendant.