

No. 197PA20-2

TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

V.

JEREMY JOHNSON

From Wake County

**BRIEF OF *AMICUS CURIAE*
EMANCIPATE NC
IN SUPPORT OF MR. JEREMY JOHNSON**

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through personal experiences being stopped, arrested, and/or incarcerated, or through the vicarious impact of these experiences by family, neighbors, and friends. The JUSTICE LEAGUE hails from twelve North Carolina counties and is being actively equipped with skills and leadership development tools to create campaigns to transform the way North Carolina envisions “public safety” and “justice.”

Mr. Johnson’s experience being racially profiled by law enforcement is an experience shared by many Black residents in our State, including members of the JUSTICE LEAGUE. The issue before the Court is of interest to *amicus* EMANCIPATE NC because of the impact the case stands to have on the constitutional rights of the Justice League members, as well as other similarly-situated individuals that EMANCIPATE NC advocates on behalf of.

SUMMARY OF ARGUMENT

Black people are systematically over-policed by law enforcement officers. Law enforcement officers patrol our state’s streets, roads, and highways looking for “suspicious behavior” under the guise of public safety and traffic enforcement. Because of the legacy of racism and overt and implied racist narratives about Black criminality, Black people are systematically perceived as more “suspicious” by law enforcement, simply as they go about their daily

lives—sitting in cars, walking “hurriedly,” living and working in a “high crime area,” or acting “nervous” in the presence of police.

High police surveillance of Black people generates criminal convictions for drug offenses that simply do not occur for white people, even though white people engage in similar levels of illegal drug use. SAMHSA, 2020 NATIONAL SURVEY OF DRUG USE AND HEALTH (2020). These criminal convictions lead to collateral consequences and disparate outcomes in all areas of life for Black people, including access to jobs, housing, and education. They also uphold a false narrative of Black criminality that is insidious. It poisons our brains, including those of judges, prosecutors, and defense attorneys, all of whom are exposed to the deluge of Black men in our counties’ courthouses daily. Each criminal conviction and each sentence imposes trauma and pain on Black families and communities.

Facing this racial legacy requires, at the very least, a constitutional tool to attack selective enforcement by law enforcement. Selective enforcement occurs because the pliable “reasonable suspicion” standard permits officers to use boundless discretion. No rule of law defines how or when that discretion may be used. Instead, police are empowered to exercise their discretion based on their “experience” as a law enforcement officer. Unfortunately, elements of structural racism are often embedded in their “experiences” and their use of

discretion, which in turn results in racial disparities, over-policing of Black people, and the lack of accountability from police agencies.

ARGUMENT

I. Black People Are Over-Policed

The organization of modern-day police forces originated in the institution of slave patrols prior to the Civil War. *See, e.g.*, SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM (1977); P L Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. OF POLICE 57 (1988); Laurence Ralph, *The Logic of the Slave Patrol: The Fantasy of Black Predatory Violence and the Use of Force by the Police*, 5 PALGRAVE COMM. 1 (2019). In the U.S. South, law enforcement agencies also served an important role in enforcing Jim Crow laws. *See, e.g.*, Michael Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint From January 1, 2015, Through December 31, 2015*, 48 J. OF BLACK STUDIES 551 (2017); Connie Hassett-Walker, *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, THE CONVERSATION, June 2, 2020. Police are inextricably tied to the rise of mass incarceration since the 1980s. *See, e.g.*, S. REBECCA NEUSTETER et al, VERA INSTITUTE OF JUSTICE, GATEKEEPERS: THE ROLE OF POLICE IN ENDING MASS INCARCERATION (2019). In 1980, North Carolina had the nation’s highest imprisonment rate, which stood “more than 10 times

the prison rate of the state with the lowest rate (New Hampshire).” Kevin R. Reitz, “Questioning Parole Release Authority,” *in* THE FUTURE OF IMPRISONMENT 219 (Michael Tonry, ed., 2004) (citing FRANKLIN ZIMRING AND GORDON HAWKINS, THE SCALE OF IMPRISONMENT 137, 149 (1991)). Between 1980 and 2016, the state’s prison population more than doubled, with North Carolina’s Black population accounting for 52.9% of the prison population in 2016, but just 21.5% of the state’s adult population. ACLU of North Carolina, *Smart Justice North Carolina Report*, Sept. 5, 2018 (available online).

Many of today’s segregated residential patterns reflect those that emerged through overt discrimination, including redlining, zoning laws, racially restrictive covenants, white flight, and urban “renewal.” *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); Tracy Hadden Loh et al., *The Great Real Estate Reset*, BROOKINGS, Dec. 16, 2020. These practices confined Black city residents to neighborhoods that were overlooked and underserved by local government, banks, and developers. *See, e.g.*, DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). Meanwhile, federal housing policy actively assisted white families to buy homes throughout the 20th century, and it excluded Black families from this assistance, contributing to the racial wealth gap that persists today. *See, e.g.*, Danyelle Solomon et al, *Systemic Inequality: Displacement, Exclusion, and*

Segregation, CENTER FOR AM. PROGRESS, Aug. 7, 2019; THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, *supra*; Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion, Separates Black and White America*, N.Y. TIMES, Aug. 14, 2019 (available online).

Evidence suggests that the way police approach their job can vary considerably depending on the demographics of the population with which they are engaging. When serving predominantly white populations, officers often act as service providers who respond promptly to calls for assistance. *See, e.g.*, Emily Ekins, *Policing in America: Understanding Public Attitudes toward the Police. Results from a National Survey*, CATO INST., Dec. 7, 2016 (available online). This translates into positive feelings among white individuals for law enforcement and creates a pervasive cultural understanding among white people that police are “helpers.” *See e.g.*, PBS Learning Media, “Police Officers are Helpers,” (last accessed Jan. 31, 2022) (available online).

When officers engage with Black people, however, they often focus on strategies to “stop” crime before it starts, including investigatory traffic stops and neighborhood surveillance patrols. *See, e.g.*, Lance Hannon, *An Exploratory Multilevel Analysis of Pedestrian Frisks in Philadelphia*, 10 RACE & JUST. 87 (2017); Ray Rivera et al, *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 11, 2010 (available online). Unsurprisingly, this creates a more

hostile climate and fuels negative feelings toward police, as Black people are regularly stopped, questioned, or at the least, watched and surveilled by law enforcement as they attempt to go about their daily lives.

North Carolina traffic stop data support the proposition that law enforcement approach Black people with greater proportional frequency than white people, as they patrol our state's streets, roads, and highways. Group-specific traffic stop rates are typically measured based on jurisdiction resident populations, and these measures demonstrate racial disparities. See Mike Dolan Fliss, PhD, MPS, MSW, OBSERVATIONS ON THE MEASUREMENT OF TRAFFIC STOP DISPARITIES IN NORTH CAROLINA (Feb. 1, 2022) (available online) at 3 [hereinafter "Fliss Report"]. However, due to unequal vehicle access and driving volume, and because people drive outside of their immediate home area, racial disparities in traffic stops are very likely under-counted in these models. *Id.* at 4.

Mike Dolan Fliss, PhD, MPS, MSW, a research scientist and epidemiologist at the University of North Carolina, has studied racial disparities in North Carolina since 2014. *Id.* at 2. Dr. Fliss's research demonstrates that accounting and adjusting for three driving factors (access to vehicles by race, driving volume by race, and travel between jurisdictions) causes racial disparity indices to increase 15% on average for North Carolina law enforcement agencies. *Id.* at 4. In other words, the data in this case that

reflects the officer stopped Black motorists at a highly disproportionate rate compared to their presence in the driving population very likely *underreports* the true racial disparity in his enforcement activities. Dr. Fliss’s research lends credibility to the notion that Black people in North Carolina are often pulled over for reasons that go beyond traffic enforcement and are subjected to roving criminal investigations based on officers’ “suspicion” of bad behavior.

Law enforcement agencies have both the authority and discretion to focus traffic stops more intentionally on core movement and safety violations, rather than focusing on investigatory stops or stops that seek to raise revenue for a jurisdiction through the assessment of fines. When the City of Fayetteville did this—by intentionally increasing the number and proportion of safety-related stops for moving violations and de-emphasizing regulatory and equipment-based stops—traffic crashes, injuries, and fatalities were all reduced, as were racial disparities in traffic stops overall. *Id.* at 12.

Disproportionate investigatory traffic stops invariably lead to Black people being disproportionately charged with criminal behavior, often drug offenses that are encountered incidental to the stop, like those for which Mr. Johnson was convicted. In Wake County, where he was arrested, the UNC School of Government reports that Black people account for 59.7% of non-violent drug felonies, but 20.4% of the population. UNC School of Government, Crime Justice Innovation Lab, “Measuring Justice Dashboard: Wake County”

(last accessed Jan. 31, 2022). Given the fact that white and Black people use illegal drugs at similar rates, *see, e.g.*, SAMHSA, 2020 NATIONAL SURVEY OF DRUG USE AND HEALTH (2020), this disproportionality in charges is largely explained by a disproportionately high number of encounters with law enforcement.

II. Our Culture Deems Black Bodies to be “Suspicious”

There are an enormous number of potential traffic violations and criminal laws that exist within North Carolina’s general statute books. It would not be possible for police, given limits on time and personnel, to investigate every car parked in an apartment complex near a “No Trespassing” sign, or to pull over every driver with an expired license plate or a burned-out headlamp. This is where insidious cultural stereotypes about what constitutes “suspicious behavior” enter the picture, as police go about their daily business, deciding how to expend their finite resources.

Our culture’s narrative fabric is filled with stories that teach us that Black bodies are “suspicious” and that Blackness is more associated with criminality. These stories originated and metastasized in response to white fears of Black rebellion and freedom during slavery and the Reconstruction era. Especially after slavery was abolished, whites’ fears of Black people’s potential political power and of Black people as competition in the labor force led to a narrative about Black individuals that characterized them as

uncontrolled “savages” and “brutes.” *See, e.g., Calvin John Smiley & David Fakunle, From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. OF HUM. BEHAV. IN THE SOC. ENVIRONMENT 350 (2016).

In no realm of society is this more apparent than the media. America’s first feature-length motion picture and the first to be screened in the White House, *THE CLANSMAN* (1915), later renamed *THE BIRTH OF A NATION*, was considered by “mainstream” critics to be one of the greatest movies ever made. The film portrays the Ku Klux Klan and their lynching of Black people as heroically preserving American values and protecting white women from dangerous, violent, lazy, hypersexual, unintelligent, and morally degenerate Black people—many of whom were white actors in blackface—who had gained rights in the Reconstruction Era. This narrative was perpetuated in popular modern television series, such as *COPS*, the longest-running television series in American history, where predominantly Black people are depicted as criminals, pursued, and treated violently by predominantly white police officers. *See, e.g., JOY COLLECTIVE, 2020 BIAS AGAINST BLACK MEN STUDY* (2020). In the news media, Black men are overrepresented as criminal suspects yet underrepresented as victims. *See, e.g., Travis Dixon & Daniel Linz, Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News*, 50 J. OF COMM. 131 (2000); Travis Dixon &

Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 COMM. RES. 547 (2000).

These story-lines pervade individuals' brains subconsciously, producing "cultivation" and "priming" effects, whereby consumption of media stories and images cultivates and shapes perceptions of Black people and influences individuals to view criminal activity as a Black activity. *See, e.g.*, Leonard Berkowitz & Karen Heimer Rogers, *A Priming Effect Analysis of Media Influences*, in PERSPECTIVES ON MEDIA EFFECTS 57, 58 (Jennings Bryant & Dolf Zillmann eds., 1986); George Gerbner & Larry Gross, *A System of Cultural Indicators*, 38 PUB. OPINION. Q. 460 (1974); Travis L. Dixon & Cristina L. Azocar, *Priming Crime and Activating Blackness: Understanding the Psychological Impact of the Overrepresentation of Blacks as Lawbreakers on Television News*, 57 J. OF COMM. 229 (2007); Bryan Adamson, *"Thugs," "Crooks," and "Rebellious Negroes": Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189 (2016).

The narratives contribute to police interpreting normal human behaviors as more "suspicious" when encountered in the context of a Black person. *See, e.g.*, *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011) ("We . . . note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity."). For instance, Office Kuchen reported that the reason for

approaching Mr. Johnson was that he saw Mr. Johnson “slide under the steering wheel” while parked five feet away from an unlit “no trespassing” sign in an apartment complex. Psychology teaches that humans see what they are looking for. One manifestation of this is through confirmation bias—the tendency to search for information that supports one’s beliefs and to ignore or distort data that contradicts them. *See, e.g.,* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. OF GENERAL PSYCHOL. 175 (1998). As previously noted, surveys of drug use demonstrate that Blacks and whites use illicit drugs at similar rates. *See, e.g.,* SAMHSA, 2020 NATIONAL SURVEY OF DRUG USE AND HEALTH (2020). Yet, Black people are arrested at a significantly higher level, because they are found to be acting “suspicious” so much more frequently, and are therefore stopped and searched.

III. Over-Policing Harms Individuals, Families, and Communities

The collateral consequences of an arrest and an incarceration have ripple effects in an individual’s life, as well as in the lives of their family, friends, and communities. *See, e.g.,* Elizabeth J. Gifford, *How Incarceration Affects the Health of Communities and Families*, 80 NC MEDICAL J. 372 (Nov. 4, 2019) (available online); Robert H. DeFina & Lance Hannon, *The Impact of Adult Incarceration on Child Poverty: A County-level Analysis, 1995-2007*, 90 THE

PRISON J. 377 (2010) (available online). Once a person is arrested and potentially detained in jail on a pre-trial basis and bail is set, they immediately face huge financial challenges. In fact, the prohibitively expensive cost of bail fuels the growing pretrial population: nearly two-thirds (64%) of the 740,000 people held in jails throughout the United States have not been sentenced for committing any crime. Most simply cannot afford the cost of bail. *See, e.g.,* LEON DIGARD & ELIZABETH SWAVOLA, VERA INSTITUTE OF JUSTICE, JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION (Apr. 2019) (available online); Nick Pinto, *The Bail Trap*, N.Y. TIMES, Aug. 13, 2015 (available online). A study of Philadelphia and Miami jails showed that more than half of defendants jailed pre-trial were unable to post \$5,000 bail or less, and a similar study of New York jails showed that 46% of defendants were unable to meet bail of \$1,000 or less. *See, e.g.,* Will Dobbie et al, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 2 American Economic Review 201 (February 2018) (available online).

Black residents are especially ill-equipped to meet these unexpected financial challenges due to the legacy of underinvestment and poverty in so many of the communities in which they live, the effects of which have been amplified by COVID-19. Today, only 27% of Black adults have emergency savings for an unexpected medical expense, compared to 53% of white adults.

See, e.g., KIM PARKER ET AL, PEW RESEARCH CENTER, ABOUT HALF OF LOWER-INCOME AMERICANS REPORT HOUSEHOLD JOB OR WAGE LOSS DUE TO COVID-19 (May 5, 2020). The financial and health impacts of COVID-19 have varied widely by race and ethnicity, disproportionately burdening Black families. Even before the pandemic, Black people made up nearly half (43%) of people jailed pre-trial, although they represented just 14.2% of the U.S. population. *See, e.g.,* Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, PRISON POL’Y INITIATIVE, Oct. 9, 2019 (available online).

Raising funds for bail or a private attorney stretches the financial means of families and communities. SANETA DE VUONO-POWELL ET AL, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (Sept. 2015). It often requires people to raise and pool cash from relatives and friends, most of whom are also likely to be living in relative financial precarity. The median wealth of Black American families is \$24,100, less than 15% that of white American families, whose median family wealth is \$188,200. In other words, for every dollar of wealth held by white families, Black families have about a dime. *See, e.g.,* Neil Bhutta et al, Board of Governors of the Federal Reserve System, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS NOTES, Sept. 28, 2020 (available online); MEIZHU LUI ET AL, THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE (June 2006). Thus, the majority of Black residents are not financially positioned to absorb thousands of dollars in

bail bondsman fees and attorneys' fees. Paying these fees decimates familial wealth, leading to less of a cushion in the event of job loss or sickness, and setting them behind white peers as they seek higher education opportunities or seek to start a business.

The Black-white wealth disparity must also be contextualized in the reality of American history. Natalie Spievack & Cameron Okeke, *How We Should Talk About Racial Disparities*, Urban Wire, Feb. 26, 2020 (available online). It is the direct and proximate result of generations of grossly uneven racial opportunity: for remunerated, as opposed to enslaved, labor; for access to quality educational opportunities; for opportunities to join high-paid professions and to gain promotion; and for access to bank lending that enables long-term homeownership and land ownership, the single greatest driver of family wealth in the United States of America. See, e.g., Donald Hays & Briana Sullivan, United States Census, *2017 Data Show Homeowners Nearly 89 Times Wealthier Than Renters*, AM. COUNTS: STORIES BEHIND THE NUMBERS, NOV. 16, 2020 (available online); Thomas Shapiro et al, Institute on Assets and Social Policy, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, RES. AND POL'Y BRIEF, Feb. 2013 (available online).

For instance, Black veterans, who accounted for one out of every 13 returning World War II veterans, were excluded from the benefits of President Roosevelt's Servicemen's Readjustment Act of 1944, known as the "GI Bill,"

which provided a pathway to the middle class for white returning veterans through free college tuition, job training and placement, unemployment benefits, and low-interest, no money down loans for homes and businesses. While the bill purported to be race-neutral, the practice of redlining allowed the Federal Housing Administration and other lenders to refuse loans to Blacks, thereby denying them the opportunity for homeownership. *See, e.g.,* CYD MCKENNA, THE HOMEOWNERSHIP GAP: HOW THE POST-WORLD WAR II GI BILL SHAPED MODERN DAY HOMEOWNERSHIP PATTERNS FOR BLACK AND WHITE AMERICANS (1996). Not only did this contribute to racial disparities in homeownership rates today (73% for whites compared to 45% for Blacks), but it also contributed to the disparity in the number of years of homeownership, which drives 27% of the growing racial wealth gap. *See, e.g.,* AMY TRAUB ET AL, THE RACIAL WEALTH GAP: WHY POLICY MATTERS (2015) (available online); Shapiro et al, *supra*. These generational disadvantages continue to have a profound impact on life outcomes in material ways.

If an individual cannot pay bail to be freed from pretrial detention, they will suffer in harsh and isolative conditions that do real damage to the heart, mind, and body. In jails, people are denied contact with family and friends, access to medical care, and nutritious food while being forced to endure extreme heat and cold. People incarcerated in jails have less access to healthcare—not only because jails are under-resourced, but also because jail

staff frequently deny requested care. See Steve Coll, *The Jail Health-Care Crisis*, THE NEW YORKER, Feb. 25, 2019 (available online); Sarah Maslin Nir, *'I'm Going to Die Here,' She Told the Guards. They Didn't Listen*, N.Y. TIMES, Jan. 30, 2019 (available online).

The impact of incarceration on health endures post-release. Formerly incarcerated people have a greater risk of premature death from chronic disease, infectious disease, drug use, and suicide. See, e.g., Sandhya Kajeepeta et al, *Association Between County Jail Incarceration and Cause-specific County Mortality in the USA, 1987–2017: a Retrospective, Longitudinal Study*, 6 LANCET P. HEALTH e240 (Feb. 23, 2021) (available online). Importantly, people who spend any period of time in solitary confinement are 24% more likely to die in the first year after their release, 78% more likely to die from suicide, 54% more likely to die from homicide, and 127% more likely to die of opioid overdose. See, e.g., Lauren Brinkley-Rubinstein et al, *Association of Restrictive Housing During Incarceration With Mortality After Release*, 2 JAMA NETWORK OPEN 1 (Oct. 4, 2019).

The person's family suffers simultaneously. While the individual cannot go to their job to earn their paycheck or take care of their children, their families must pick up the slack, creating ripples of impact in terms of the investment of time, energy, and money to keep the tasks of daily life going. The individual may lose their housing if they cannot continue to pay rent and lose

their car if they cannot continue to make monthly car payments. In one study, nearly one in four jailed people were evicted from their apartments and two-thirds lost their jobs or feared losing their jobs. See Ralph A. Weisheit & John M. Klofas, *Impact of Jail: Collateral Costs and Affective Response*, 14 J. OF OFFENDER COUNSELING, SERVICES AND REHABILITATION 51 (1989). A person may lose all of their personal belongings, including sentimental objects, upon involuntary eviction. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016). Their children may be displaced to another caregiver, another home, or another school setting—all traumatic experiences that interrupt stability. See, e.g., Lisa Berg & Lars Brannstrom, *Evicted Children and Subsequent Placement in Out-of-Home Care: A Cohort Study*, 13 PLoS ONE (2018) (available online).

IV. North Carolina Needs a Tool to Address the Problem of “Selective Enforcement”

Selective enforcement of the law based on race violates the North Carolina Constitution. “No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.” N.C. CONST. ART. 1 SEC. 19. However, a right without an accessible remedy is an impoverished right.

The panel below concluded that Mr. Johnson failed to prove his case of selective enforcement because there was no adequate population “benchmark” from which to assess the racial composition of individuals and motorists faced by Officer Kuchen. Slip. op. at 20-21. In other words, the panel wanted Mr. Johnson to present more and better data before asking the State of North Carolina to present any evidence at all about the behavior of a police officer who has been entrusted to enforce its laws.

Dr. Fliss points out, however, that it is North Carolina that has access to the best data to this effect. He observes that in no other public health setting, other than traffic stops, has a sector refused to create reasonable estimations of appropriate disparity measures:

I have worked with dozens of administrative datasets in NC, including data on births; death certificates; overdoses; violent crime and death; motor vehicle crashes; emergency department visits; in-patient hospital discharges; risky behavior of adults and youth; census data; health insurance data; tobacco and alcohol outlet locations; historical redlining; income inequality; school population, test, and free and reduced lunch records; homeless shelter data; administrative office of the courts (AOC) records, infectious disease data; water well records; concentrated animal feed operations; hurricane and weather data; and more. In no other setting, other than comparing traffic stops (and crash) outcomes by race ethnicity to assess disparities, have I come across a public health related event where a sector has refused to create reasonable estimations of appropriate disparity measures. As our traffic stop dataset is over 20 years old, this refusal has spanned at least decades in North Carolina. . . . It is my professional opinion that the law enforcement and traffic safety communities have effectively conspired to shirk their duty to produce reasonable driving-based benchmarks. . . . The absence of a benchmark at this

stage in data collection is not normal, nor something I have ever seen in any other setting where accountability and disparity tracking matter.

Fliss Report, *supra*, at 8-10. North Carolina's traffic stop dataset, from which Officer Kuchen's data was drawn, has been maintained by the state for over 20 years. To the extent that there remains imprecision in quantifying the degree of racial disparities in traffic stops, it is because law enforcement agencies have refused to use basic data analytics tools to assist the public in making sense of what is happening in the name of public safety. Despite this inability to measure disparities with precision, Dr. Fliss observes that there are strong reasons to believe that the available residential-based metrics, which the Court of Appeals said "certainly appear[ed] 'stark,' at first glance," *see slip op.* at 21, "still underestimate true disparities accounting for [racial] driving differences." Fliss Report, *supra*, at 4-5 & 17 (emphasis added).

The methods of analysis that Dr. Fliss has developed in his research are beyond the capacity of a typical driver, like Mr. Johnson, to access in defending himself against a criminal charge levied against him by the State of North Carolina. *See generally* Fliss Report. But they are not beyond the capacity of the State or public health researchers. Nevertheless, the panel below expected Mr. Johnson, a private individual, to produce even more detailed data than he did about traffic stops and the appropriate "benchmarks" for comparisons

before the burden shifted to the State of North Carolina to produce any evidence at all.

If police or prosecutors wanted people to have access to high-quality data about racial disparities in traffic stops, any number of agencies could have approached the Department of Transportation two decades ago (or last year) to seek a benchmark for a reasonable estimation of the racial composition of the driving population. *Id.* at 11. Public health experts like Dr. Fliss, who have studied the issue, find it “incriminating” that law enforcement has had twenty years to develop reasonable estimates of vehicle miles traveled by race by jurisdiction, and they have not done so. *Id.* at 11. The absence of precision benchmarks should not prove fatal in this case, however, given the stark nature of the data and the compelling reasons to believe that the numbers presented, if anything, undercounted the true rate of racial disparity.

CONCLUSION

Many negative social and personal consequences result from a police department’s or officer’s decision to aggressively police Black people, affirmatively searching for criminal activity and manufacturing criminal convictions, while permitting white people to live and drive unbothered, until and unless they make a call for service. To begin to remedy this grave harm, and to give meaning to the promise of equal protection of the laws, this Court

must provide defendants an accessible means to litigate the issue of racial profiling and the selective enforcement of our state's criminal laws.

Respectfully submitted, this the 2nd day of February, 2022.

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CERTIFICATE OF SERVICE

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