No. 197PA20-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake County
	)	
JEREMY JOHNSON	)	

****

BRIEF OF AMICUS CURIAE
THE DECARCERATION PROJECT
IN SUPPORT OF MR. JEREMY JOHNSON

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Pursuant to N.C. R. App. P. 28(i), Amicus Curiae submit this brief in support of defendant Jeremy Johnson and adopt the statement of the case and facts as set forth by Mr. Johnson in his principal brief.

The Decarceration Project is a North Carolina nonprofit dedicated to mitigating the inhumane and inequitable effects of mass incarceration.[1] We accomplish our work through engaging in projects to alleviate systemic racial inequity, representing individuals in the criminal legal system, advocating for

[1] Johanna Jennings, one of undersigned counsel, is the founder and executive director of The Decarceration Project, which was founded in July of 2021. Ms. Jennings was the initial appointed appellate counsel for Defendant-Appellant Mr. Johnson. Her motion to withdraw due to taking an extended break from legal practice was allowed by the North Carolina Court of Appeals on February 18, 2020. Pursuant to N.C. R. App. P. 28(i)(2), Amicus states that, in addition to undersigned counsel, Richard Samulski, Duke Law J.D. candidate, 2022, contributed to the writing of this brief.

prosecutors to adopt policies to reduce mass incarceration, promoting alternatives to incarceration, and joining other projects related to decarceration, jury inclusivity, and prison reform.

INTRODUCTION

Racial profiling on American roads is dehumanizing, pervasive, unconstitutional, and famously difficult to challenge in court. *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) ("Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone."); *Commonwealth v. Long*, 485 Mass. 711, 721 (2020) ("The right of drivers to be free from racial profiling will remain illusory unless and until it is supported by a workable remedy.").

Traffic stops constitute more than half of all civilian-police interactions in the United States. *See* Christine Eith & Matthew R. Durose, U.S. Dep't of Justice, Bureau of Justice Statistics, *Contacts Between Police and the Public, 2008* 3 (2011).[2] "Very few drivers can traverse any appreciable distance without violating some traffic regulation." Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1853 (2004) (citations omitted). Since "most drivers violate the law and police have great discretion in whom to stop," the profiling of drivers based on racial or ethnic stereotypes has long been identified as a serious concern. FRANK R. BAUMGARTNER ET AL., SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US

[2] Available at: https://bjs.ojp.gov/content/pub/pdf/cpp08.pdf

ABOUT POLICING AND RACE 77 (2018) (hereinafter "SUSPECT CITIZENS"); David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 107 (2007) ("[V]iolations of the traffic laws are commonplace, [so] police have enormous discretion to effectuate stops of a very high number of cars. This discretion provides the opportunity for pretextual stops and searches" based on race, ethnicity, or national origin).

Historically, and still today, Black and Latino drivers are subjected to traffic stops and searches at consistently higher rates than their white counterparts. Recent Bureau of Justice Statistics data show that Black Americans are "more likely to be stopped by police than white or Hispanic residents, both in traffic and street stops," and following a stop, Black drivers are "far more likely to be searched and arrested" than their white counterparts. Alexei Jones, *Police Stops Are Still Marred by Racial Discrimination, Data Shows*, Prison Pol'y Initiative (Oct. 12, 2018);[3] The Sentencing Project, *Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance* 5 (2018).[4] A comprehensive analysis of North Carolina's robust traffic stop data concluded that "[t]he extent of the disparity is shocking[;] after eighteen years of data collection hav[ing] assembled over 20 million observations, we can report that a two-to-one disparity

[3] Available at: https://www.prisonpolicy.org/blog/2018/10/12/policing/
[4] Available at: https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf

[in search rates is]. . . the statewide average; many police agencies are much more disparate in their treatment of black motorists." SUSPECT CITIZENS at 215.

The harm caused by racial profiling is vast. In addition to violating drivers' constitutional rights and placing motorists in danger, race-based traffic law enforcement contributes to the lack of trust communities of color have in the criminal legal system.[5] That distrust undermines the ability of law enforcement to protect public safety.[6] Additionally, it is hard to overstate the psychological toll of racial profiling, which contributes to a sense that "you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged." *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (discussing harm caused by another unconstitutional law enforcement practice: searches following suspicionless stops).[7]

It is an open secret that the constitutional right to be free from racial profiling has proven impossible to invoke. *See United States v. Mason*, 774 F.3d 824,

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[5] *See, e.g.*, Emily Portner, North Carolina Commission on the Administration of Law and Justice, *Public Trust and Confidence in North Carolina State Courts* (Dec. 15, 2015), (reporting that confidence in North Carolina courts varied with race of person surveyed, "Black and Other race groups more critical of system fairness"), available at https://www.nccourts.gov/assets/inline-files/public-trust-12-15-15-PTC-Survey-Results.pdf.

[6] *See generally,* U.S. Dep't of Justice, *Police-Community Relations Toolkit: Importance of Police-Community Relationships and Resources for Further Reading*, https://www.justice.gov/file/1437336/download (last visited Feb. 2, 2022).

[7] *See also* Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE. J. CIVIL RTS. & SOC. JUST. 25, 27 n.7 (2011) (citing compilations of stories reflecting impact of racial profiling); MICHAEL L. BIRZER, RACIAL PROFILING: THEY STOPPED ME BECAUSE I'M ---------- 97–130 (2012) (discussing interviews exploring harm caused by racial profiling).

830 (4th Cir. 2014) (describing equal protection challenges to selective enforcement as "novel" and "long-shot contentions"). Despite statistical evidence reflecting disparate enforcement of North Carolina's traffic laws, no one has ever prevailed on an equal protection challenge to racial profiling in a North Carolina appellate court. *See State v. Johnson*, 275 N.C. App. 980, n.3 (2020) (noting absence of appellate opinions articulating legal framework governing selective enforcement claims in North Carolina). In fact, we are unaware of an equal protection challenge to selective enforcement in a criminal case that has ever succeeded, anywhere. Yet, the U.S. Supreme Court and North Carolina Supreme Court have both affirmed that equal protection is the sole constitutional doctrine protecting drivers from racial profiling:

> The U.S. Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

Whren v. United States, 517 U.S. 806, 813 (1996); *State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren* under state constitution). Something is amiss. This supposed protection is illusory.

As this case demonstrates, courts consistently interpret the evidentiary standard in selective enforcement cases in a manner that renders it impossible to meet. This case presents an opportunity for the Court to give meaning to the guarantee of equal protection under law by articulating workable standards applicable to claims of selective enforcement. Anything less will confirm that

motorists subjected to racial profiling have no viable avenues for challenging violations of their right to equal protection of the law. This Court should rise to the challenge of ensuring a viable path for constitutional challenges to racial profiling, especially where, as in this case, statistical evidence reveals stark disparities in the enforcement of traffic laws.

ARGUMENT

I. This Court should articulate a legal framework for claims of selective enforcement that guarantees motorists subjected to racial profiling a meaningful opportunity to vindicate their constitutional rights.

Under any selective enforcement framework, Mr. Johnson's evidence was strong enough to constitute a prime facie case. Beyond the tenuous and highly discretionary basis for the encounter, uncontested evidence shows that 82% of Officer Kuchen's stops are of Black motorists; he stops Black drivers at over three times their rate in the population. *Johnson*, 275 N.C. App. at *2. It is nevertheless important for the court to articulate a clear legal framework actualizing North Carolina's constitutional guarantee of equal protection. Section I of this brief contains an overview of the imported, unworkable state of the current case law, and provides the Court with a proposed framework that would more justly address the harms caused by race-based selective enforcement. Section II expands upon the critique and provides the law and legal scholarship to support the proposed framework.

A. In North Carolina, the legal standard governing selective enforcement claims is unclear and unworkable.

Weaknesses, errors, and gaps in selective enforcement jurisprudence plague efforts to vindicate the constitutional right to be free from racial profiling. This court has never explained the evidentiary burden applicable to selective enforcement claims, leaving motorists subjected to racial profiling in the dark as to how to prevail on their claims in court. As we explain below, this court should reject the standard articulated by the Court of Appeals, which requires precise locations of traffic stops and population data reflecting a specific patrol area as "benchmarks" at the prima facie case stage of the case. This benchmarking standard will leave meritorious claims without a remedy, and conflicts with (1) governing equal protection jurisprudence clarifying that the prima facie case is not intended to be a high bar, (2) common practices for assessing claims of racial profiling, and (3) the legislative intent behind N.C. Gen. Stat. § 143B-903A. Additionally, in North Carolina as in other jurisdictions, courts improperly invoke selective prosecution jurisprudence when considering claims of selective enforcement, a mistake that is doctrinally flawed and creates insurmountable obstacles to enforcing the right. Given the infrequency with which challenges to selective enforcement reach this court, this case presents a unique opportunity to clarify and strengthen equal protection doctrine in North Carolina.

B. North Carolina should embrace a legal framework that incorporates developments in equal protection jurisprudence, addresses flaws recognized in other jurisdictions, and reflects this state's intolerance for racial discrimination.

North Carolina needs a selective enforcement framework that addresses the flaws described above and allows for meaningful substantive judicial review and a reasonable possibility of success on the merits. The framework we suggest includes several components, explored in greater detail in Section II. These holdings reflect the purpose of the equal protection guarantee and will provide protection and clarity to North Carolina drivers seeking redress following selective enforcement violations:

1. As with other equal protection claims, the prima facie case is a low hurdle intended to ensure that potentially meritorious claims proceed, thus providing courts with a well-developed record from which to assess the claim.
2. Circumstantial evidence, including statistical evidence, can suffice both to make out a prima facie case of selective enforcement and to prevail on the merits, and all evidence presented should be considered in the totality of the circumstances.
3. The benchmark of census population data are appropriately relied upon when assessing statistical data.
4. At the prima facie stage of the case, the movant need only raise an inference of discrimination to shift the burden to the state.

5. Even without other evidence, stark statistical evidence may be sufficient to prevail on a claim raised under the Fourteenth Amendment.
6. As traditionally understood, the "intent doctrine" undermines the purpose and effectiveness of the equal protection guarantee, and this Court should depart from it in its interpretation of art. I sec. 19 of the North Carolina Constitution.
7. In the alternative, this Court must recognize that discriminatory intent, like discriminatory effect, can be proven with circumstantial evidence, and that the intent standard requires the movant to show only that it is more likely than not that race was a substantial factor motivating the challenged action.
8. Finally, if the Court reaches the question, it should hold that the "similarly situated" requirement does not apply to selective enforcement challenges as the development of this requirement reflects concerns unique to the review of prosecutorial decision-making.

II. North Carolina should follow the lead of the Massachusetts Supreme Judicial Court and ensure that the constitutional protection against selective enforcement is supported by a robust, workable legal and evidentiary framework.

As described above, claims of selective enforcement and selective prosecution under the equal protection clause of the Fourteenth Amendment have a discouraging track record: since *United States v. Armstrong* was decided in 1996, "there has not been a single successful selective prosecution or selective law

enforcement claim on the merits." Alison Siegler and William Admussen, *Discovering Racial Discrimination by the Police,* 115 NW. U. L. REV. 987, 1002-03 (2021) (noting that, in fact, "the last successful selective prosecution claim at either the state or federal level was the very first one that reached the Court back in 1886[,]" referring to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *but see In re Register*, 84 N.C. App. 336, 341, 346 (1987) (successful selective prosecution claim that did not involve allegations of race discrimination).

Recognizing the consequences of this crippling evidentiary burden, state and federal courts are beginning to reconsider legal standards applicable to claims of selective enforcement. *See Commonwealth v. Long*, 485 Mass. 711 (2020); *United States v. Sellers*, 906 F.3d 848, 852–56 (9th Cir. 2018); *United States v. Washington*, 869 F.3d 193, 214–21 (3d Cir. 2017); *United States v. Davis*, 793 F.3d 712, 719–23 (7th Cir. 2015) (en banc).[8]

The recent Massachusetts Supreme Judicial Court case of *Commonwealth v. Long* is particularly instructive. 485 Mass. 711 (2020). In that case, the court observed that "[w]hile the constitutional principle at stake in this case is exceedingly clear—police may not target drivers for traffic stops, citations, and further investigation because of their race—the evidentiary difficulties in

[8] *See also* Alison Siegler and William Admussen, *Discovering Racial Discrimination by the Police,* 115 NW. U. L. REV. 987 (2021) (documenting and arguing in favor of this development); California Racial Justice Act of 2020 Cal. Legis. Serv. Ch. 317 (A.B. 2542) (West) (2021) (observing that racial bias is especially difficult to litigate and lowering the burden in California).

identifying racially motivated traffic stops are profound." *Id.* at 718. The court further held that while in the past cases it had attempted to

> ease the [evidentiary] burden on defendants, we set the bar too high for defendants attempting to establish a reasonable inference of a discriminatory stop. In practice, providing statistical evidence sufficient to raise a reasonable inference that a motor vehicle stop was racially motivated, given the limitations of available police data, has proved infeasible for defendants. The judge's ruling well illustrates the concerns repeatedly raised about the difficulty of meeting the requirements [previously] set forth[.]

Id. at 712-13.

Following this recognition, the court announced a new framework applicable to claims of selective enforcement intended to allow greater opportunity for redress of racial profiling allegations. The court held that a prima facie case of selective enforcement should be considered in the totality of the circumstances surrounding the challenged traffic stop. Further, the court concluded that statistical evidence was only one type of evidence that could be used to raise a reasonable inference of selective enforcement; circumstantial evidence is also permissible. The *Long* court rejected the "similarly situated" requirement for claims of selective enforcement, holding that the defendant did not need to show a broader class of people not targeted with the enforcement action, nor that any failure to target a broader class with the enforcement action was deliberate or consistent. Finally, the court explained that the "reasonable inference" standard applicable to the prima facie case was a lower bar than Massachusetts courts had previously recognized. *Id.* at 721-726 (observing that "not only must the categories of permissible evidence be

altered; the way in which defendants may establish a reasonable inference of discrimination also requires modification").

North Carolina should follow suit by adopting the selective enforcement holdings announced in *Long*. Additionally, to ensure judicial review of meritorious claims of selective enforcement, this Court should clarify that, under art. I sec. 19, equal protection violations can be demonstrated without proving conscious discriminatory intent.

The intent doctrine has been criticized as reflecting an outdated understanding of the causes of racial disparities and inequities, and blocking redress for meritorious claims of discrimination.[9] To effectuate its promise that it "will not tolerate discriminatory application of the law based upon a citizen's race," this Court should reexamine the outdated federal intent doctrine and embrace a new understanding that accounts for the realities of implicit bias and structural racism. *State v. Ivey*, 360 N.C. 562, 564 (2006) (internal quotations omitted), *abrogated in part on other grounds by State v. Styles*, 362 N.C. 412 (2008).[10] This

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[9] *See, e.g.*, Jeffrey Bellin and Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075 (2011); Aziz Huq, *Judging Discriminatory Intent*, Public Law and Legal Theory Working Papers, 662 (2017) (explaining that discriminatory intent is virtually impossible to prove), available at https://chicagounbound.uchicago.edu/public_law_and_legal_theory/662/; Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U.L. Rev. 1779 (2012); *McCleskey v. Kemp*, 481 U.S. 279, 399 (1987) (Brennan, J., dissenting) (famously describing the majority's reliance on the intent doctrine to avoid reconsideration of "principles that underlie our entire criminal justice system" as suggesting "a fear of too much justice.").

[10] *See also S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660 (1971) (explaining that the North Carolina guarantee of equal protection was "inherent in the Constitution of this State" even before its express incorporation in article I, section 19).

approach was embraced by the *Long* court. *See* 485 Mass. at 734 (observing that "implicit bias may lead an officer to make race-based traffic stops without conscious awareness of having done so," and clarifying that stops motivated by implicit bias violate equal protection).[11] Whether or not this court explicitly holds that state action motivated by implicit bias violates art. I. sec. 19, at a minimum, this court must recognize that a "stark pattern [of statistical evidence] may be accepted as the sole proof of discriminatory intent[.]"[12] *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987); *see also Maryland State Conf. of NAACP Branches v. Maryland State Police,* 454 F. Supp. 2d 339, 349 (D. Md. 2006) (holding that "statistical evidence plus the arguable absence of any legitimate justification for the stop, is sufficient" to establish Fourteenth Amendment violation for summary judgment purposes).

It is this Court's duty to effectuate state constitutional guarantees, including the equal protection guarantee. North Carolinians need a workable legal standard to support the *Ivey* court's bold pronouncement; a standard informed by the state's

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[11] *See also* Ralph Richard Banks & Richard Thompson Ford*, (How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L. J. 1053, 1099 (2009) (arguing in the *Batson* context that peremptory challenges based on race violate the Equal Protection Clause whether the reliance was conscious or unconscious: "[t]here is no exemption [to equal protection] for strikes that are discriminatory, but not intentionally so.").

[12] *See State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) ("While defendants have the burden of proving the existence of purposeful discrimination, discriminatory intent may be inferred from statistical proof presenting a stark pattern or an even less extreme pattern in certain limited contexts. . . . [D]iscriminatory intent may be inferred from statistical proof in a traffic stop context probably because only uniform variables [violations of New Jersey motor vehicle statutes] are relevant to the challenged stops and the State has an opportunity to explain the statistical disparity.")

commitment to equal protection, the legislative intent of North Carolina's traffic stop data collection law, and by the lessons learned in other jurisdictions. Given the absence of North Carolina Supreme Court opinions reviewing claims of selective enforcement under the N.C. Constitution and the doctrinal uncertainty plaguing federal claims of selective enforcement, this is a body of case law that is ripe for clarification. *See, e.g.*, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1733 (2019) (Gorsuch, J., concurring) ("enough questions remain about *Armstrong's* potential application [to selective enforcement challenges to law enforcement conduct] that I hesitate to speak definitively about it today.").

Interpretations of the Equal Protection Clause by federal courts, while persuasive, do not control the North Carolina Supreme Court's construction of rights guaranteed by the N.C. Constitution's Equal Protection Clause. *See McNeill v. Harnett County*, 327 N.C. 552, 563 (1990). Where there is no settled federal interpretation of a constitutional right and a chorus of concerns regarding common interpretations, a deferential approach to federal case law is inappropriate. *See* Alison Siegler and William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 1036-41 (2021).[13] There is, in a sense, nothing to defer to here, other than a legal doctrine that migrated without justification from selective prosecution to selective enforcement and has never received the imprimatur of the United States Supreme Court.

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[13] *See also* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1139-41 (2000); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 606 (1998).

The same concerns that have animated this Court's previous departures from interpretations of parallel federal constitution rights are present in this context, where the court is tasked with addressing claims of racial profiling. *See* Molly S. Petrey and Christopher A. Brook, State v. Carter *and the North Carolina Exclusionary Rule*, 100 N.C. L. REV. F. 1, 11 (2021) (North Carolina's approach to interpreting parallel constitutional rights "preserves flexibility for independent judicial judgment."). This court has been especially committed to ensuring that our state constitution preserves judicial integrity by rejecting and addressing unlawful conduct by officers of the state. *Id.* at 13. In *State v. Carter*, this court explained that our constitution allows no good faith exception to the exclusionary rule because "the courts cannot condone or participate in the protection of those who violate the constitutional rights of others." 322 N.C. 709, 723 (1988). In *State v. Cofield*, this court interpreted article I, section 26 of the N.C. Constitution as follows:

> "The people of North Carolina . . . have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly. Racial discrimination in the selection of grand and petit jurors deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice. Such discrimination thereby undermines the judicial process.

320 N.C. 297, 302 (1987) (emphasis in original).

Both the perception and the reality that motorists subjected to racial profiling have no legal means to assert their rights threatens the perception of evenhandedness and "undermines the judicial process." *Id.* Faced with uncertainty

over the standards applicable to claims of selective enforcement and the cautionary tale of its general unenforceability, North Carolina should chart a new course forward that avoids condoning unconstitutional behavior, preserves judicial integrity, and allows for meaningful redress of racial profiling claims.

A. Where, as here, reliable statistical evidence raises an inference of "stark" discrimination, the burden must shift to the State to explain the racially disparate pattern of enforcement.

The Court of Appeals erred in holding that Mr. Johnson did not present a prima facie case of selective enforcement because the statistical data he introduced into evidence did not include reliable benchmarks for comparison. *Johnson*, 275 N.C. App. at *8. This court should hold that benchmarking requirements must reflect the availability and limitations of the traffic stop data collected by law enforcement agencies by law, and that, at step one of an equal protection challenge, "stark" evidence of disparate enforcement is sufficient to shift the burden to the State to explain the disparities.

Establishing an appropriate point of comparison for demographic traffic stop data—otherwise known as "benchmarking"—has been a persistent challenge for efforts to address racial profiling. *See* SUSPECT CITIZENS at 65 ("a number of issues plague these comparisons, [which] can all be summed up by one question; what is the proper baseline for comparison?"). Some efforts to establish evidence of selective enforcement have involved labor and resource intensive efforts to conduct observational studies of motorists on a particular stretch of a highway, or to drive alongside drivers to determine the population of motorists driving at a speed that

exceeds the speed limit. These Herculean efforts cannot be expected of all motorists attempting to vindicate their right to be free from racial profiling, especially since even such efforts have been rejected by courts as insufficient and less instructive than simpler comparisons of officer stops to department patterns and census data. *See United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1156-57 (D. Kan. 2004) (finding the comparison of officer's stops to that of the State Highway Patrol more reliable than an extensive observational study conducted by an experienced researcher).

The court below rejected Mr. Johnson's prima facie case of racial profiling, holding than an appropriate benchmark would include population data reflecting the southeast police district of Raleigh and information reflecting the location and cause of each of Officer Kuchen's reported traffic stops. *Johnson*, 275 N.C. App. at *8. The court's proposed benchmarks are flawed: the former is not necessarily any more instructive than general population data for the City of Raleigh, and the latter is neither collected nor possible to reconstruct. For the reasons below, the statistical data included in this record reflects reasonable and reliable benchmarks to use when assessing a prima facie case of selective enforcement.[14] Given the starkness of

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[14] *See,* Alison Siegler and William Admussen*, Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 1016 (2021) (noting that, after the Third Circuit Court of Appeals clarified that the discovery standard applicable to claims of selective enforcement were less demanding than those applicable to claims of selective prosecution and remanded a case for further proceedings, the defendant prevailed in meeting the discovery standard by comparing census data to the group of arrestees at issue); Frank Baumgartner, *Benchmarking Traffic Stop Data: Examining Patterns in North Carolina and the City of Raleigh,* available at

the disparities presented in Mr. Johnson's uncontested evidence, the burden should have shifted to Officer Kuchen to explain the apparent selective enforcement.

Mr. Johnson presented evidence from the US Census Bureau's 2016 American Community Survey that estimated that 28% of Raleigh's population is Black; that 46% of the drivers stopped by Raleigh Police Department officers between 2002-2018 were Black; that 82% of the 299 recorded stops made by Officer Kuchen were of Black motorists; and that 81.4% of the 205 arrests made by Officer Kuchen were of Black people. *Id. at* *2. The Court of Appeals, while finding these statistics "'stark' at first glance," faulted Mr. Johnson for failing to introduce evidence reflecting the demographics of southeast Raleigh. *Id.* at *8. However, Officer Kuchen testified that his patrol at times had included the northwest district of Raleigh, and that the southeast district of Raleigh that he patrolled includes major arteries traversed by motorists who do not reside in southeast Raleigh, but in fact live in whiter areas. (Tpp 19-22)[15] Given these facts, narrowing the aperture for examining population data to focus only on the southeast Raleigh patrol district would not make the population comparison more accurate.

The second fault found by the Court of Appeals in Mr. Johnson's benchmarking evidence was the failure to identify "where these [299 recorded] encounters occurred and whether they represent traffic stops, calls for service, or something else." 275 N.C. App. at *8. However, such data is not collected by law

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http://fbaum.unc.edu/TrafficStops/Baumgartner-benchmarking.pdf (last visited Feb. 2. 2022).

[15] The transcript cite refers to the September 5, 2018 suppression hearing.

enforcement officers under N.C. Gen. Stat. § 143B-903A. Without a law requiring the collection of such data, and since many stops produce no additional records, it is not possible for motorists to obtain complete location data reflecting any officer's stops. Mr. Johnson should not be penalized by the lack of specificity in the traffic stop data collection law where, as here, the available data are sufficient to raise an inference of selective enforcement.

Census population data and departmental averages have been treated as an instructive, albeit imperfect, baseline for comparison when considering racial profiling concerns. *See* Frank Baumgartner, *Benchmarking Traffic Stop Data: Examining Patterns in North Carolina and the City of Raleigh*, 4-7, available at http://fbaum.unc.edu/TrafficStops/Baumgartner-benchmarking.pdf. "[W]here the relevant roadways are urban residential roads, as opposed to an interstate highway, we have much greater confidence in the accuracy of residential demographics from United States Census data as representative of those making use of the residential roads." *Long*, 485 Mass. at 733. In both Illinois and Missouri, traffic stop data is compiled and reported in comparison to census population data, suggesting that the government agencies producing such reports find the comparison meaningful.[16] As explained in Suspect Citizens, despite the limitations of population data, "it is a

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[16] *See* The-Mountain-Whisper-Light: Statistics & Data Science, *Illinois Traffic and Pedestrian Stop Study* (2020), https://idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2020/FINAL--Part%20I%20Executive%20Summary%202020%20Traffic%20Stops--6-24-21.pdf; Office of the Missouri Attorney General, *2019 Vehicle Stops Executive Summary* (2019), https://www.ago.mo.gov/home/vehicle-stops-report/2019-executive-summary.

commonly used benchmark, it is intuitive to use the population as a baseline," and, given that white people are overrepresented among car drivers and drive more miles per year than their Black and Latino counterparts, census data is widely understood as understating rather than overstating measured disparities. SUSPECT CITIZENS at 76.[17]

As recognized by the Massachusetts Supreme Judicial Court, the evidentiary burden faced by victims of racial profiling should be calibrated to the availability of relevant evidence. The previous standard articulated in Massachusetts reflected the court's "belie[f] that data regarding the traffic stops made by individual police officers throughout the Commonwealth, and the demographics of the individuals stopped, would be readily available to defendants[,]" but "[u]nfortunately, that assumption [w]as not [] borne out in practice." 485 Mass. at 720. Because data availability expectations were unrealized, the court determined it was time to address the "practical shortcomings" of the previous standard. *Id.* at 721. This court should adopt this approach and tie the evidentiary standard applicable to selective enforcement claims to available traffic stop data collected under N.C. Gen. Stat. § 143B-903A.

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[17] *See also Long*, 485 Mass. at 733 (rejecting "the categorical rule that census data is never an appropriate proxy for the actual population of motorists"); *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1159 (D. Kan. 2004) (concluding that comparing the officer's "incidence of stops with the incidence of stops by Kansas Highway Patrol still constitutes a strong showing of discriminatory effect").

B. The legislative intent motivating the passage of N.C. Gen. Stat. § 143B-903A supports a finding that Mr. Johnson's evidence raised a reasonable inference of selective enforcement.

In 1999, North Carolina became the first state in the nation to pass a law requiring law enforcement officers to record demographic data associated with traffic stops and all enforcement actions taken in the course of a stop. The legislative history behind the passage of N.C. Gen. Stat. § 143B-903A reflects a clear intent to allow motorists to identify and address instances of racial profiling or, in legal terms, selective enforcement. North Carolina lawmakers believed that the data collected would be sufficient to provide preliminary answers to questions about unlawful racial profiling; at the prima facie stage of a selective enforcement challenge, this sort of inference is all that is required. *See* SUSPECT CITIZENS, 35-49 ("clearly, legislators expected that the law would either absolve [law enforcement agencies] from accusations of profiling, or provide clear evidence that it was happening") (quotation at 39); *see also* Frank Baumgartner, *Benchmarking Traffic Stop Data: Examining Patterns in North Carolina and the City of Raleigh*, available at http://fbaum.unc.edu/TrafficStops/Baumgartner-benchmarking.pdf.

Section 143B-903A began as part of a series of laws requiring the collection and maintenance of data related to the administration of justice. An Act to Require the Division of Criminal Statistics to Collect and Maintain Statistics on Traffic Law Enforcement, vol. 1, No. 1999-26, 1999 N.C. Sess. Laws 27 (2000). Legislators on both sides of the aisle were concerned about allegations that motorists were targeted for "driving while black," and set out to require the collection of data

sufficient to substantiate or refute such claims. *See* SUSPECT CITIZENS, 35-49. At the time, the expectation was that law enforcement agencies would take corrective action to address any concerning patterns reflected in the collected data. *See id.* Initially, these laws were primarily intended to mandate the collection of data for internal use. *See, e.g. Id.* at 28 (stating that information collected "shall be made available only to those whose duties, relating to the administration of justice, require such information"). Indeed, in the context of traffic stop enforcement, the legislature took extra steps to ensure the identity of officers making traffic stops was not a matter of public record. Current Operations and Capital Improvements Appropriations Act of 2000, vol. 3, No. 2000-67, § 17.2(a), 1999 N.C. Sess. Laws 197, 382 (2000).

In 2009, the North Carolina Legislature passed An Act to Amend the Law Requiring the Collection of Traffic Law Enforcement Statistics in Order to Prevent Racial Profiling and to Provide for the Care of Minor Children When Present at the Arrest of Certain Adults, No. 2009-544, 2009 N.C. Sess. Laws 1480 (2010) (The 2009 Act). The title of the act alone demonstrates the legislature's intent that this data be used to identify and challenge selective enforcement; its substance confirms that intent. The 2009 Act affirmatively stated that officers making stops "shall be assigned an anonymous identifying number . . . [which] *shall be a matter of public record* and shall be . . . correlated along with the [traffic stop data]." *Id.* at 1481 (emphasis added). This change allowed the public access to data that could link particular officers to racially motivated stops.

In light of the nearly impossible burden placed on plaintiffs to prove an equal protection violation, the 2009 Act should be read as reflecting an intention to enable victims of discriminatory traffic stops to investigate and substantiate concerns about racial profiling. To hold that use of data collected pursuant to § 143B-903A—data explicitly intended to enable identification and correction of this type of discriminatory behavior—is not capable of raising even a reasonable inference of an equal protection violation would defeat the purpose of § 143B-903A, rendering the statute ineffective.

C. If it reaches the question, this Court should hold that the "similarly situated" requirement does not apply to claims of selective enforcement.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the N.C. Constitution both prohibit selective enforcement of the law based on improper considerations such as race. *State v. Ivey*, 360 N.C. at 564 (internal quotations omitted). Court have generally held that defendants challenging selective enforcement of the law must show, by a preponderance of the evidence, that the challenged police action was motivated by a discriminatory purpose and produced a discriminatory effect on a racial group to which the defendant belongs. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); s*ee also S. S. Kresge Co. v. Davis*, 277 N.C. 654, 661 (1971).

For decades, the Equal Protection clause of the Fourteenth Amendment has been interpreted as requiring defendants challenging selective *prosecution* to

identify "similarly situated individuals of a different race were not prosecuted" in order to demonstrate that the challenged action produced a discriminatory effect. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). This Court has never determined whether litigants challenging selective *enforcement* of traffic laws under the Fourteenth Amendment to the US Constitution and article I section 19 of the North Carolina Constitution must identify similarly situated members of another race who were not targeted with the enforcement action. This is an open question in North Carolina, and courts in other jurisdictions have split on the question. *Johnson*, 275 N.C. App. n.3 (declining to reach the issue but "not[ing] that selective enforcement claims present unique concerns that might make the gathering of such evidence difficult, if not impossible, in some cases").

The Court of Appeals discussed but declined to decide the question, finding it unnecessary to its determination that Mr. Johnson had not presented sufficient evidence of discriminatory effect and discriminatory purpose to sustain a prima facie case of selective enforcement. If this court finds it necessary to establish whether litigants challenging selective enforcement must present such evidence, it should hold that this burden does not apply to selective enforcement claims, but only to claims of selective prosecution.

Selective prosecution claims invite judicial scrutiny of a core exercise of executive discretion: the decision of whether to prosecute. For this reason, the Second Circuit Court of Appeals has held that only when defendants are challenging selective prosecution is it necessary to "show a better treated, similarly

situated group of individuals of a different race in order to establish a claim of denial of equal protection." *Pyke v. Cuomo*, 258 F.3d 107, 109–10 (2d Cir. 2001); *but see Chavez v. Illinois State Police*, 251 F.3d 612, 638 (7th Cir. 2001) (applying similarly situated requirement to claims of selective enforcement).

Claims of discriminatory prosecution raise different concerns than claims of selective enforcement by law enforcement officers, and "salient differences between police and prosecutors that counsel[] in favor of a different standard." Alison Siegler and William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 1010 (2021). The *Armstrong* court emphasized the significance of deference to prosecutorial discretion, describing the evidentiary burden as a "demanding one," since the claim "asks a court to exercise judicial power over a 'special province' of the Executive." 517 U.S. at 464-65.

The discretion exercised by police officers is of necessity more constrained than that of prosecutors. Claims alleging racial profiling by law enforcement officers do not face the presumption of prosecutorial correctness. *United States v. Davis*, 793 F.3d 712, 720 (7th Cir. 2015) (en banc) ("*Armstrong* was about prosecutorial discretion . . . [by contrast, law enforcement officers] are not protected by a powerful privilege or covered by a presumption of constitutional behavior."). It is common for citizens to challenge and courts to review the actions of police officers in the context of, for example, challenges to coerced confessions or to the voluntariness of consent, or challenges to laws that risk inviting discriminatory enforcement. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (ordinance was void for vagueness when

it permitted police to break up loitering "criminal street gang members" in public places, in part because the ordinance encouraged arbitrary, discriminatory enforcement). Ultimately, separation of powers concerns simply are less pronounced when challenging the decision-making of police officers.

North Carolina appellate courts, on several occasions, have rejected criminal defendants' equal protection challenges to selective prosecution, noting the defendant's inability to identify similarly situated individuals of other races who received preferential treatment. *See, e.g., State v. Spicer*, 299 N.C. 309, 314 (1980); *State v. Howard*, 78 N.C. App. 262, 267-68 (1985), *State v. Garner*, 340 N.C. 573, 588-89 (1995). However, this court has never weighed the considerations that caution against application of this requirement to claims of selective enforcement. *See* Alison Siegler and William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987 (2021).

In other jurisdictions, courts have recognized that requiring defendants claiming selective enforcement to show similarly situated members of another race receiving preferential treatment effectively leaves motorists with a right without a remedy. As one court explained, "In the context of a challenged traffic stop, however, imposing the similarly situated requirement makes the selective enforcement claim impossible to prove." *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1154-1155 (D. Kan. 2004) ("imposing such a requirement on this defendant or any defendant who challenges a traffic stop as selective enforcement, effectively denies them any ability to discover or prove such a claim[;] the defendant

challenging a traffic stop for selective enforcement, must be allowed to show discriminatory effect in some other way").[18]

Recently, three federal circuit courts of appeals have distinguished selective enforcement from selective prosecution and held that the strict standards articulated in *Armstrong* do not apply to the former.[19] These appellate courts recognized that law enforcement "agents occupy a different space and role in our system than prosecutors; they are not charged with the same constitutional functions, and their decisions are more often scrutinized by— and in—courts." *Sellers*, 906 F.3d at 855 ("Today we join the Third and Seventh Circuits and hold that Armstrong's rigorous discovery standard for selective prosecution cases does not apply strictly to discovery requests in selective enforcement claims like Sellers's."). Writing for a majority of the Seventh Circuit sitting en banc, Judge Easterbrook explained that:

> Unlike prosecutors, [law enforcement] agents regularly testify in criminal cases, and their credibility may be relentlessly attacked by defense counsel. They also may have to testify in pretrial proceedings, such as hearings on motions to suppress evidence, and again their honesty is open to challenge. Statements that agents make in affidavits for search or arrest warrants may be contested, and the court may need their testimony to decide whether if

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[18] *See also Nanticoke Lenni-Lenape Tribal Nation v. Lougy*, No. 1:15-CV-05645, 2016 U.S. Dist. LEXIS 148919, *47 (D.N.J. Oct. 27, 2016) (rejecting application of similarly situated requirement to claims of selective enforcement where "any alternative holding strikes this Court as eviscerating equal protection."); *Giron v. City of Alexander*, No. 4:07-CV-00568 GTE, 2009 U.S. Dist. LEXIS 83083, *23, *25-26 (E.D. Ark. Sept. 11, 2009) (rejecting similarly situated requirement in challenge alleging selective enforcement); *Reyes v. Clarke*, No. 3:18CV611, 2019 U.S. Dist. LEXIS 146237, *67-79 (E.D. Va. Sept 4, 2019) (accord).

[19] *United States v. Sellers*, 906 F.3d 848, 852–56 (9th Cir. 2018); *United States v. Washington*, 869 F.3d 193, 214–21 (3d Cir. 2017); *United States v. Davis*, 793 F.3d 712, 719–23 (7th Cir. 2015) (en banc).

> shorn of untruthful statements the affidavits would have established probable cause. Agents may be personally liable for withholding evidence from prosecutors and thus causing violations of the constitutional requirement that defendants have access to material, exculpatory evidence. Before holding hearings (or civil trials) district judges regularly, and properly, allow discovery into nonprivileged aspects of what agents have said or done.

Davis, 793 F.3d at 720-21. Analyzing the developments in these three cases, one article concludes that, "First, the doctrines that underlie *Armstrong*'s selective prosecution holding do not apply in the law enforcement context. Second, requiring a similarly situated showing to establish discriminatory effect is especially unworkable in the law enforcement context. Third, a lower discovery standard is necessary to enable criminal defendants to litigate selective law enforcement challenges on the merits." Alison Siegler and William Admussen, *Discovering Racial Discrimination by the Police,* 115 Nw. U. L. Rev. 987, 994 (2021). If this court finds it necessary to reach the question, these considerations weigh in favor of rejecting the importation of the "similarly situated" requirement from the selective prosecution to the selective enforcement context.

D. As it recently did in the *Batson* context, the Court should clarify and strengthen North Carolina's selective enforcement jurisprudence to ensure that the right to equal protection in North Carolina is not illusory.

The difficulties and pitfalls associated with litigating selective enforcement claims resemble those of another legal doctrine grounded in the state and federal guarantees of equal protection: *Batson* claims of jury discrimination. *See Batson v. Kentucky*, 476 U.S. 79 (1986). The comparison is instructive. As in the *Batson* context, North Carolinians seeking reassurance that their right to be free from

racial profiling cannot point to a single case where an appellate court has affirmed a complaint of selective enforcement. Daniel R. Pollitt and Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957, 1959 (2016). This record is partially explained by the failure to abide by established jurisprudence holding that step one of any equal protection challenge—the prima facie case—"is not intended to be a high hurdle for defendants to cross." *State v. Hobbs*, 374 N.C. 345, 350 (2020) (internal quotations omitted). This is not new law, and yet, one study found that in fifty cases where North Carolina appellate courts reviewed *Batson* claims at the prima facie stage, the court found the burden met in only five of the cases. Kimberly M. Cornella, *Is State v. Hobbs Too Little Too Late? Building on* Batson *Thirty Five Years Later*, 100 N.C. L. REV. F. 47, 51 (2021).

As in the *Batson* context, this court should reinforce that some evidence—including the stark statistical disparities presented by Mr. Johnson, the lack of public safety concerns raised by his observed behavior in a parked car, and the other facts as laid out the appellant's brief—is sufficient to make out a prima facie case. Recently, this court in *State v. Hobbs* explained as follows:

> a defendant makes a prima facie case of discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose . . . the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge. So long as a defendant provides evidence from which the court can infer discriminatory purpose, a defendant has established a prima facie case and has thereby transferred the burden of production to the State.

374 N.C. at 350 (clarifying that, at step one, the burden is one of production rather than persuasion); *see also Johnson v. California*, 545 U.S. 162, 170 (2005), (explaining that meeting Batson's first step only requires "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.").

In the *Batson* context, where the State responds to the defendant's evidence before the court rules on the prima facie case but fails to offer evidence rebutting the defendant's prima facie case, the prima facie case is moot, the prima facie evidence deemed unrebutted, and the conviction should be reversed. *See State v. Ruth*, No. COA20-657, 2022 WL 30135, ¶ 18 (N.C. App. 2022); ("whether Defendant made a *prima facie* showing is moot, and our review is limited to whether the State provided a race-neutral reason for challenging each African American juror"); *see also State v. Wright*, 189 N.C. App. 346, 352 (2008) (reversing for failure to identify race-neutral reasons for striking jurors). Here, where the trial court permitted the inquiry to proceed and the officer to testify in response to the defendant's allegations, the prima facie case should be deemed moot, and the case should be decided on the basis of the State's failure to proffer evidence rebutting it.

Another way in which doctrinal problems from the *Batson* context should be avoided in cases alleging selective enforcement relates to the tendency of judges to offer their own possible explanations for the challenged state action. As explained in a study of North Carolina *Batson* opinions:

> In determining whether a defendant has established a prima facie case under *Batson*, the North Carolina appellate courts consistently conjure race-neutral reasons for strikes gleaned from juror voir dire responses and then impute those imagined reasons to the prosecutor or judge who never

> articulated them. In *Miller-El v. Dretke* . . . the United States Supreme Court condemned this practice, stating that "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis" for a strike [. . .] In at least seventeen of its thirty-two cases finding no prima facie case, the Supreme Court of North Carolina has relied on a reason it itself had conjured from the voir dire to end the *Batson* inquiry at step one. In eight of its fourteen cases finding no prima facie case, the North Carolina Court of Appeals has done the same. This practice is error according to the framework provided by the United States Supreme Court.

Daniel R. Pollitt and Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957, 1967-68 (2016).

In this case, the State was permitted to testify and respond to the defendant's selective enforcement challenge but presented none of its own evidence to rebut the prima facie case: no explanation of the disparities that the Court of Appeals found "certainly appear stark at first glance." 275 N.C. App. at *8. When given the opportunity to present a more appropriate benchmark for assessing Officer Kuchen's stop patterns, the State chose not to present any evidence at all. However, this did not stop the Court of Appeals from offering possible explanations for the statistical evidence as a substitute for explanations from the State. The Court of Appeals observed that the statistics could misstate the demographics of the areas patrolled by Officer Kuchen. *Id.* at *8. As in the *Batson* context, the court should reject the improper substitution of judicial explanations for inferences of discrimination evident in the defendant's prima facie case.

Like in the *Batson* context, selective enforcement claims raise questions about the officer's intent. We urge this Court to hold that equal protection violations

may be proven without determination of the officer's discriminatory intent. The requirement of proving intent has proven a death knell to claims of racial discrimination even where, as here, the statistics and other circumstances overwhelmingly bear out discriminatory effect. *See, e.g.*, Order In re the Proposed New Rule General Rule 37—Jury Selection, No. 25700-A-1221 (Wash. Apr. 5, 2018) (adopting WASH. CT. GEN. R. 37) (wherein the Washington Supreme Court rejected the intentional discrimination prong of *Batson* in order to address the unfair exclusion of jurors of color due to implicit, explicit, and structural racism). Moreover, social science research has shown that our prior conception of bias—one based entirely on intent—is outdated as discrimination occurs as a result of explicit *and* implicit bias, as well as structural racism. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 151-52 (2010). All forms of racial bias are relevant to whether drivers of color are being treated in a discriminatory manner. The requirement of discriminatory intent is outdated, unsupported by science, and underinclusive. If this Court does find it necessary to prove intent, this Court should adopt the position it has taken in the *Batson* context and hold that the movant need only show, by a preponderance of the evidence, that race was a substantial factor in the officer's application of the law. *Hobbs*, 374 N.C. at 351, 371 (holding that defendant need only show it was more likely than not that the State was motivated in substantial part by discriminatory intent).

Despite the many similarities, one way in which statistical evidence of selective enforcement differs from that typically available in the *Batson* context is that, when we are able to observe an officer's behavior in nearly 300 traffic stops, the numbers are more statistically significant than those typically reviewed by courts reflecting the strikes of often just a very small number of jurors. Nevertheless, this court has found even very small patterns of disparate treatment sufficient to sustain a prima facie case. *See State v. Bennett*, 374 N.C. 579, 599 (2020).

More broadly, as the Massachusetts Supreme Judicial Court recognized in *Long*, the development of the *Batson* framework provides an example of the necessity of abandoning legal standards that have proven impossible to meet. 485 Mass. at 721-22 ("In light of the persistent difficulties attendant to using statistical data to meet a claim . . . we now must develop more fully the other ways in which defendants may show that a stop was based on an impermissible classification" citing *Batson* and observing that "previous decisions that required comprehensive statistics showing prior discriminatory action amounted to 'crippling burden of proof' on defendants attempting to vindicate rights to equal protection.").

As recent cases considering equal protection challenges have observed, modern research into implicit bias and structural racism caution against preoccupation with uncovering proof positive of discriminatory intent. If the equal protection doctrine rests on such a quest, it will almost always let us down. Instead, the equal protection standard "is not designed to elicit a definitive finding of deceit

or racism" but instead "defines a level of risk that courts cannot tolerate," because "brand[ing] the prosecutor a liar or a bigot . . . obscure[s] the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve." *People v. Gutierrez*, 2 Cal. 5th 1150, 1182-83 (2017) (Liu, J., concurring).

In the recent cases of *State v. Bennett* and *State v. Hobbs,* this court rearticulated the *Batson* standard to ensure that it is not impossible to meet. This Court should do that here in the selective enforcement context as well.

CONCLUSION

This case presents a rare opportunity to clarify and strengthen legal and evidentiary standards applicable to claims of selective enforcement of the traffic laws. Our courts should not reject stark evidence of discriminatory policing without, at a minimum, requiring the State to refute the reasonable inference that race was a substantial factor in the application of the law. In recognition of the longstanding inability of motorists to invoke their right to be free from racial profiling on North Carolina roads, this Court should join Massachusetts both in declaring that the evidentiary bar for raising an inference of racial profiling has been set too high and in fashioning a workable remedy.

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

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