UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1758

UNITED STATES, Appellee

v.

DAMON FAGAN, Defendant – Appellant

On appeal from the United States District Court for the District of Maine

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION, & AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC. IN SUPPORT OF APPELLANT

Zachary L. Heiden (First Cir. Bar No. 99242)
Carol J. Garvan (First Cir. Bar No. 1145471)
American Civil Liberties Union of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-6224
zheiden@aclumaine.org

Gilles R. Bissonnette (First Cir. Bar No. 123868)
American Civil Liberties Union of New Hampshire
18 Low Avenue, Concord, NH 03301
(603) 224.5591
gilles@aclu-nh.org

Matthew Warner (First Cir. Bar No. 1198880)
PRETI FLAHERTY
One City Center, P.O. Box 9546
Portland, Maine 04112-9546
(207) 791-3000

Attorneys for Amici Curiae

CONSENT TO FILE BRIEF OF AMICI CURIAE

All parties have consented to the filing of this brief by the American Civil Liberties Union of Maine Foundation ("ACLU of Maine"), the American Civil Liberties Union of New Hampshire Foundation ("ACLU of New Hampshire"), and the American Civil Liberties Union of Massachusetts, Inc. ("ACLU of Massachusetts").

DISCLOSURE STATEMENT

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE[1]

The ACLU of Maine is a nonprofit, nonpartisan organization founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers. The ACLU of Maine strives to ensure the protection of the rights guaranteed and secured by the Maine and United States Constitutions, including the right to equal protection of the laws and protection against race-based discrimination.

The ACLU of New Hampshire is the New Hampshire affiliate of the American Civil Liberties Union and includes over 9,000 New Hampshire members and supporters. The ACLU-NH engages in litigation to encourage the protection of individual rights guaranteed and secured by the New Hampshire and United States Constitutions. The ACLU-NH regularly participates before this Court through direct representation or as amicus curiae in cases involving police accountability and criminal justice

The ACLU of Massachusetts is the Massachusetts affiliate of the American Civil Liberties Union. It is dedicated to the principles of liberty and equality embodied in the constitution and the nation's civil-rights laws. The ACLU of Massachusetts regularly participates directly and

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Only *amici*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. (29)(c)(5).

as *amicus* in cases involving constitutional protections against unreasonable searches and seizures.

SUMMARY OF ARGUMENT

Racial profiling by police—including at traffic stops—is all too common. The practice has led to an overwhelming lack of confidence in law enforcement and our criminal justice system, especially among Black Americans. It is also unconstitutional.

Trooper Darcy, the arresting officer in this case, has a well-documented record of racial profiling. Given this record and his assumptions about Black drivers, assumptions he has made clear in publicly available recordings, the trial court erred when it credited his testimony that Mr. Fagan changed lanes so abruptly as to create probable cause of criminal wrongdoing. As part of its Fourth Amendment analysis, the court should have considered the trooper's experience targeting Black drivers on I-95 and his racist inferences.

The trial court did not consider Darcy's racial prejudices when analyzing his credibility because the court mistakenly read *Whren v. United* States, 517 U.S. 806 (1996) as preventing any such consideration. *Whren* says no such thing and the court's failure to consider Darcy's experience targeting Black drivers when analyzing his credibility was an error of law. By vacating the trial court's denial of Mr. Fagan's motion to suppress, the

Court will uphold the Fourth Amendment and will also send the clear message that racist police tactics are not tolerated, an important step towards establishing confidence in America's police.

ARGUMENT

The Maine State Police admit that "[t]he act of racial profiling by law enforcement is illegal,"[2] but their actions are not always consistent with their words. Recent experience in the District of Maine suggests that the Maine State Police and Trooper Darcy, the officer who stopped Mr. Fagan, routinely violate the Fourth and Fourteenth Amendment rights of Black drivers on Maine's highways. *See, e.g., United States v. Boyd*, 2021 WL 5304176, at *5 (D. Me. Nov. 15, 2021) (finding Darcy violated Fourth Amendment rights of Black motorist). As discussed below, this brand of racial profiling is commonplace in our country and has severely eroded trust in our criminal justice system.

This appeal is an opportunity to address this crisis in confidence. When a court relies on an officer's testimony to determine whether a traffic stop was supported by probable cause, that officer's credibility is central to the analysis. And as a matter of commonsense, an officer's credibility cannot be assessed if the officer's prejudices and patterns of racist policing

[2] *Maine State Trooper Faces Racial Profiling Allegations*, ASSOCIATED PRESS (Oct. 8, 2020).

are altogether ignored. There is nothing about *Whren* that says otherwise because even when an officer's subjective motivations for a stop are irrelevant, the officer's motivations for telling the truth (or not) should still be a factor in the analysis. This is where the District Court went wrong. By assessing Trooper Darcy's credibility without mention of his experience targeting Black drivers, even though this experience is detailed at length in the record, the Court committed an error of law.

I. The problem of racial profiling by law enforcement.

Racial profiling by police—including at traffic stops—is all too common. Black people in America are more likely to be pulled over by police while driving than white people. *See, e.g.*, Radley Balko, *There's overwhelming evidence that the criminal justice system is racist. Here's the proof,* The Washington Post (June 10, 2020) (citing numerous studies).[3] They are more likely to be stopped when not driving. After they

[3] One study, for example, considered 95 million traffic stops by 56 police agencies and "found evidence that the bar for searching black and Hispanic drivers was lower than that for searching white drivers." Pierson, et al., A large-scale analysis of racial disparities in police stops across the United States, Nature Human Behavior 4, 736-746 (2020), available at https://www.nature.com/articles/s41562-020-0858-1. These results "indicate[d] that police stops and search decisions suffer from persistent racial bias and point to the value of policy interventions to mitigate these disparities." *Id.* Another reported that Black motorists were 30 percent more likely to be pulled over than white motorists in Cincinnati. Editorial Board, *Racial disparities in police stops demand attention*, The Enquirer (Dec. 20, 2019), available at https://www.cincinnati.com/story/opinion/2019/12/20/editorial-racial-

are stopped, Black people are more likely to be searched,[4] and are more likely to be ticketed and arrested. *Id*. Statistics around drug-related arrests are particularly striking. Black and white Americans sell and use drugs at similar rates, but Black Americans are 2.7 times as likely to be arrested for drug-related offenses.[5] Sadly, and notoriously, race-based policing extends

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disparities-police-stops-demands-attention/2666685001/. Another reported that Black people in California were stopped at a rate 2.5 times higher than the per capita rate of whites. Don Thompson, Report: California Cops More Likely to Stop Black Drivers, U.S. News (Jan. 2, 2020), available at https://www.usnews.com/news/best-states/california/articles/2020-01-02/report-california-cops-more-likely-to-stop-black-drivers. The examples go on and on. *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 640 (2021) (examining Washington state police data of over 8 million stops after state court decision easing restrictions on pretextual stops, and concluding that the "decision is associated with a statistically significant increase in traffic stops of drivers of color relative to white drivers"; also explaining that "we find this increase in traffic stops of drivers of color is concentrated during daytime hours, when officers can more easily ascertain a driver's race through visual observation"); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev. 651, 666-67 (2002) (finding racial disparities in stops and searches based on three years of data from Maryland State Police).

[4] A report from North Carolina, for example, found that Blacks and Latinos were more likely to be searched than whites, even though searches of white motorists were more likely to turn up contraband *Id* (citing Camelia Simoiu, *et al.*, *The Problem of Infra-marginality in Outcome Tests for Discrimination* (June 20, 2017), available at https://arxiv.org/pdf/1607.05376.pdf).

[5] *Rates of drug use and sales, by race; rates of drug related criminal justice measure, by race*. The Hamilton Project (Oct. 21, 2016), available at https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

beyond stops, searches and arrests. *Id.* Black people are far more likely to be killed by police in America. *Id.*[6] Of the 1,127 people killed by police in this country last year, 28 percent were Black, even though only 13 percent of the population is Black.[7]

The trends in New England match those nationally. A 2019 report from Vermont, for example, found that Black drivers were six times more likely than white drivers to be searched by police after a traffic stop.[8] The New Hampshire State Police are becoming notorious for their practice of pretextual stops, with a New Hampshire court acknowledging the "de jure department policy of detaining citizens for purely pretextual reasons." *See State of New Hampshire v. Perez*, No. 218-2018-cr-334, at *2-3 (Rockingham Cty. Super. Ct. Oct. 4, 2019).[9]

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[6] Statistics on racial profiling by police in Maine are unavailable because "Maine law enforcement agencies lack the data needed to address racial disparities" in our state. Matt Byrne, *Maine Law Enforcement Agencies Lack the Data Needed to Address Racial Disparities*, PORTLAND PRESS HERALD (June 19, 2020). Unfortunately, there is no reason to think that the trends in Maine are any different than those nationally.

[7] *See* MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org (last accessed January 19, 2021); Fatal Force: 980 people have been shot and killed by police in the past year, WASHINGTON POST (Jan. 18, 2021) (227 Black people were shot and killed by police in 2020 alone).

[8] Balko, *supra at 4*, (citing Aidan Quigley, *Racial disparities, search rates decline in Burlington police traffic stops*, VT Digger, (July 20, 2019), available at https://vtdigger.org/2019/07/30/racial-disparities-search-rates-decline-in-burlington-police-traffic-stops/.

[9] There are many other examples. *See, e.g., United States v. Hernandez*, 470 F. Supp. 3d 114, 124 n.5 (D.N.H. July 9, 2019) (McCafferty, J.) (noting

It is not surprising that widespread discriminatory policing has led to an overwhelming lack of confidence in law enforcement and our criminal justice system, especially among Black Americans. A recent Gallup poll found that only 19 percent of Black respondents had a great deal of confidence in police, compared to 56 percent of white respondents. *See* Jeffrey M. Jones*, Black, White Adults' Confidence Diverges Most on Police*, GALLUP (Aug. 12, 2020). And cumulatively, "[f]or the first time in its 27 years of measuring attitudes toward the police, Gallup found that a majority of American adults do not trust law enforcement." Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds,* THE NEW YORK TIMES (Aug. 12, 2020).

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that the state's Mobile Enforcement Team trooper was parked near the tolls on I-95 on March 26, 2018 and decided to stop a vehicle that had a license plate registered to a car rental company—because he opined that rental cars are frequently used for drug trafficking—so he caught up with the vehicle and then noticed that it was speeding and travelling too close to the next vehicle, thereby providing the trooper with grounds to make the stop; holding that the trooper's scope of the stop exceeded its mission); *United States v. Garcia*, 53 F. Supp. 3d 502, 514 (D.N.H. 2014) (McAuliffe, J.) (a MET trooper, who was parked on I-95 on August 13, 2013, followed a vehicle on a "hunch," and stayed within the driver's blind spot for three miles, until the vehicle's tires partially transgressed the dotted lane line and then corrected by touching the white fog line, whereupon the trooper stopped the vehicle; holding that, "once Trooper Gacek gave the driver an appropriate sanction — a warning — 19 minutes into the stop, the purpose of the traffic stop was completed," and "[t]he defendants should have been released," but instead the trooper "impermissibly and measurably extended the traffic stop by approximately 17 more minutes, persisting in his earlier attempts to develop reasonable suspicion before he ran his drug dog").

Beyond the statistics, this crisis of confidence affects how people interact with police on a local level. In one opinion detailing and condemning the history of racist police practices in America, federal Judge Carlton Reeves of the Southern District of Mississippi notes that "Black male teens . . . report a fear of police and a serious concern for their personal safety and mortality in the presence of police officers." *See Jamison v. McLendon*, 2020 WL 4497723, at *22 (S.D. Miss. Aug. 4, 2020) (internal citations omitted). Chief Judge Gregory of the Fourth Circuit Court of Appeals has likewise explained that "aggressive" and "discriminatory" police tactics are counterproductive because "arrests and successful prosecutions are unlikely without cooperating witnesses." *United States v. Curry*, 965 F.3d 313, 333 (4th Cir. 2020) (Gregory, C.J., concurring) (internal citations omitted). Such "alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone." *Floyd*, 959 F. Supp. 2d at 557.

Last, and perhaps most important, discriminatory policing has a very human toll. Even when unjustified stops and searches do not result in an arrest, injury or death, and even though "any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience." *Id.* The overarching principal must be that no

person should be demeaned, humiliated, hurt or killed because of their race, and especially not by police.

II. Racial profiling is unconstitutional

Not only does racial profiling reduce faith in our criminal justice system, it is also unconstitutional. "Selective enforcement of motor vehicle laws on the basis of race is a violation of the Equal Protection Clause of the Fourteenth Amendment." *Flowers v. Fiore*, 359 F.3d 24, 34 (1st Cir. 2004) (citing *Chavez v. Ill. State Police*, 251 F.3d 612, 635 (7th Cir.2001); *see also Whren* 517 U.S. at 813). It is "exceedingly clear" that under the Fourteenth Amendment "police may not target drivers for traffic stops, citations, and further investigation because of their race." *Commonwealth v. Long*, 485 Mass. 711 (2020); *see also Floyd*, 959 F. Supp. 2d at 570 (New York City's stop and frisk practices unconstitutional because the Fourteenth Amendment "prohibits intentional discrimination on the basis of race") (citation omitted). The Ninth Circuit has explained that race is not an "appropriate factor" for police to consider because:

> police 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. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection—

> that they are in effect assumed to be potential criminals first and individuals second.

United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000). Because the practice violates fundamental rights of its victims, courts have an obligation, at a minimum, to "take[ ] seriously an allegation of racial profiling." *See Floyd*, 959 F. Supp. 2d at 660 (*quoting* United *States v. Davis*, 11 F. App'x 16, 18 (2d Cir. 2001)).

In addition to violating the constitutional right to equal protection, the practice of racial profiling[10] often leads, as it did here, to stops and searches that violate the Fourth Amendment. In a decision reprimanding the City of New York for its stop-and-frisk practices, the U.S. District Court for the Southern District of New York acknowledged that police stops based on race violate both the Fourth and Fourteenth Amendment requirements

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[10] In one consent decree, the U.S. Department of Justice Special Litigation Division defined "racial profiling" as follows:

> [T]he consideration by an officer, in any fashion or to any degree, of the race or ethnicity of any civilian in deciding whether to surveil, stop, detain, interrogate, request consent to search, or search any civilian; except when officers are seeking to detain, apprehend or otherwise be on the lookout for a specific suspect sought in connection with a specific crime who has been identified or described, in part, by race or ethnicity and the officer relies, in part, on race or ethnicity in determining whether reasonable suspicion exists that a given individual is the person being sought.

Consent Decree, *Ledford v. City of Highland Park*, No. 00-c-4212 (N.D. Ill. Aug. 6, 2015).

that, respectively, "all stops be based on 'reasonable suspicion' as defined by the Supreme Court of the United States," and "second, that stops be conducted in a racially neutral manner." *Floyd*, 959 F. Supp. 2d at 556. A similar challenge concerning the City of Milwaukee's stop-and-frisk program under the Fourth and Fourteenth Amendments resulted in a consent decree mandating, as the Constitution requires, that all stops be based on reasonable suspicion and prohibiting officers "from relying to any degree on an individual's race" or other protected characteristics. *See* Order and Settlement Agreement at 6-7, *Collins v. City of Milwaukee*, Docket No. 17-cv-234-JPS, ECF No. 135 (July 23, 2018).

The U.S. Department of Justice (DOJ) has also, in cases that are not this one, called out police departments for racial profiling. The DOJ has used its powers under 42 U.S.C. § 14141 (concerning unlawful conduct of law enforcement agencies), for example, to investigate the New Orleans Police Department, finding "a pattern or practice of," *inter alia*, "unlawful stops, searches, and arrests" and "discrimination on the basis of race."[11]

[11] The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present at 45 (Jan. 2007) available at https://www.justice.gov/crt/file/922421/download. *See also id.* (stating that "[i]n Ferguson, Missouri, for example, the Division revealed that African-Americans were 26% less likely to be found with contraband after a search, even though that group was twice as likely as others to be searched during a traffic stop" and that DOJ "conducted similar analyses in Baltimore and other cases").

The Department has likewise sued (along with a number of individual plaintiffs) Maricopa County, Arizona for widespread racial profiling, resulting in an injunction to stop the unconstitutional police practice and an order creating a victim compensation fund. *See Melendres v. Maricopa Cty.*, 897 F.3d 1217 (9th Cir. 2018). While the DOJ's efforts to combat racial profiling are helpful, too many individual victims of race-based policing are on the wrong end of DOJ's proverbial spear, required to navigate a criminal justice system that has not historically protected victims of racial profiling.[12] Damon Fagan is one such victim.

III. The District Court failed to consider Trooper Darcy's history of racist policing or his well-documented prejudices when assessing his credibility. This was legal error.

The record, which includes evidence of Trooper Darcy's pattern of racist policing, demonstrates that Mr. Fagan was stopped without probable cause and for the simple and unconstitutional reason that he is Black. Yet, in crediting Trooper Darcy's testimony that Mr. Fagan had in fact committed a traffic infraction, the District Court expressly refused to

[12] As the Black Lives Matter movement heightens our national awareness of racial injustice, courts seem to be rethinking stale doctrines like qualified immunity. *See* Anya Bidwell & Patrick Jaicomo, *Lower courts take notice: the Supreme Court is rethinking qualified immunity*, USA TODAY (Mar. 2, 2021); *see also Stamps v. Town of Framingham*, 813 F.3d 27 (1st Cir. 2016) (no sovereign immunity because Fourth Amendment protects against reckless, though accidental, police killing). This is a welcome trend, but one that needs to accelerate if the American legal system is to overtake the seemingly intractable problem of unconstitutional police practices.

consider Trooper Darcy's well-documented practice of racist policing. Even after "assume[ing] for purposes of this decision" that Trooper Darcy "did use racial criteria," (Blue Br. at 85) the District Court proceeded as though racial profiling cannot be relevant when determining whether an officer had probable cause to conduct a traffic stop. That is not so.

Mr. Fagan is correct that the Court must look at the "totality of the circumstances" using a "commonsense, case-by-case" analysis to decide whether Trooper Darcy had reasonable suspicion to stop his car. (Blue Br. at 19, *citing United States v. Jones*, 700 F.3d 615, 621 (1st Cir. 2012) & *United States v. Monteiro*, 447 F.3d 39, 43 (1st Cir. 2006).) This strand of Fourth Amendment law requires an objective analysis, viewing the totality of the circumstances "through the lens of a reasonable police officer." *United States v. Dapolito*, 713 F.3d 141, 148 (1st Cir. 2013). Although the Court has been instructed that the "actual motivations" of Trooper Darcy are irrelevant when evaluating the reasonableness of his decision to stop Mr. Fagan (*Whren*, 517 U.S. at 813), *Whren* does not require a court to ignore an officer's history of racist policing when analyzing that officer's credibility. Doing so is, after all, consistent with this Court's acknowledgment that "the inferences made by police officers are" relevant to Fourth Amendment analysis. *Wright*, 582 F.3d at 207.

Though courts have traditionally treated an officer's experience,[13] training and heat-of-the-moment inferences as factors supporting the lawfulness of a stop, there is no reason these factors cannot also lead to a decision that the officer's suspicions in a particular case were unreasonable. Courts will consider an officer's inferences because they presume that the officer's training and experience allow him to reach conclusions based on discrete information that an ordinary person would not reach. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996). But if, rather than leading an officer to suspect that a loose panel in a car contains contraband, for example (*id.*), this training and experience instead leads an officer to suspect someone is engaged in criminal activity because of his race, this is equally material to the reasonableness of the officer's suspicions.

Trooper Darcy suspected Mr. Fagan was engaged in criminal activity for the simple reason that Mr. Fagan is Black. *See Wright,* 582 F.3d 199, 205 (review of reasonable suspicion analysis based on "historical fact, as

[13] The reasonable-suspicion standard requires "that weight must be given to the police officers' training and experience." *United States v. Ramos*, 629 F.3d 60, 65-66 (1st Cir. 2010). *See also United States v. Wright*, 582 F.3d 199, 207 (1st Cir. 2009) ("We agree that the proper focus is an objective one, but we disagree that the inferences made by police officers are irrelevant in all instances"). This standard is fact-specific and "less circumscribed by precedent than otherwise" because the Supreme Court intends it to be useful for "guiding officers in the field." *United States v. Arvizu*, 534 U.S. 266, 275-6 (2002).

well as inferences drawn from those facts"). This is consistent with the trooper's considerable experience singling out Black drivers, especially Black drivers with dreadlocks such as Mr. Fagan, who pass his stakeout at the York County tollbooth on I-95. *See, e.g., United States v. Boyd*, 2021 WL 5304176, at *5 (D. Me. Nov. 15, 2021) (summarizing Darcy's practice of staking out the tollbooth and following drivers who look like "thugs"). The record and totality of the circumstances show that Trooper Darcy followed Mr. Fagan for several minutes because Mr. Fagan is Black, a practice that is again consistent with the Trooper's broader training and experience as part of the Maine State Police, Proactive Criminal Enforcement Team. It was not until Mr. Fagan passed a tractor trailer by leaving his lane of traffic, driving past the truck, and then changing back to his original lane (i.e. the normal steps required to pass someone on the highway) that Trooper Darcy acted on his suspicions and stopped Mr. Fagan. *See* Blue Br. at 5, 31. The District Court erred in refusing to consider the evidence of racial profiling as part of its totality analysis of Trooper Darcy's credibility.

Trooper Darcy's record of racist policing, his well-documented practice of following Black drivers until he can manufacture a reason to stop them, and his recorded statements confirming his inferences that Black motorists, with dreadlocks, wearing white "wife-beaters" (his words) are "thugs", provide further support for the conclusion that he lied about

the reason for the stop. Trooper Darcy's inferences about Mr. Fagan, who is himself a Black man with dreadlocks and was wearing a "wife-beater" at the time of the stop (Blue Br. at 21),[14] must be part of the equation when determining whether the trooper's testimony was credible and, in turn, whether his suspicions were reasonable.

The District Court erred in determining that a reasonable officer could believe that there was probable cause for this traffic stop. This is because the video evidence was inconclusive and so the court largely relied on Darcy's testimony. Yet the court failed to consider the trooper's prejudices and his practice of race-based policing when analyzing his credibility. This was reversible error.

The District Court further erred in explicitly assuming that even if Trooper Darcy stopped Mr. Fagan because of his race, the stop would have been constitutional under the Fourth Amendment. (Blue Br. at 85-87.) With dash cam footage that is inconclusive and, at most, "does not

[14] Trooper Darcy is apparently capable of identifying the race and hairstyle of drivers at night, given that his prior diatribe about "thugs" and dreadlocks occurred at approximately 9 PM in a pursuit and traffic stop of a driver meeting that description. *See* Megan Gray, *State lawmaker files complaint about award for trooper accused of racial profiling*, PORTLAND PRESS HERALD (Feb. 11, 2021), available at https://www.pressherald.com/2021/02/11/state-legislator-files-complaint-against-trooper-accused-of-racial-profiling/ (embedding the dashcam video with Trooper Darcy's comments).

contradict the trooper,"(Blue Br. at 86) Darcy's credibility is everything in this case. *Ornelas*, 517 U.S. at 700 (part of Fourth Amendment analysis includes determining whether the officer is credible). To analyze this credibility, the court should have gone beyond whether the trooper had a story and was sticking to it. *Id*.

When evaluating Darcy's credibility at the time of the stop, and in particular his statement that Mr. Fagan changed lanes unsafely, the court should have given weight to the trooper's experience pulling over Black drivers without probable cause (*Ramos*, 629 F.3d at 65-66) and his well-documented racist inferences. *Wright*, 582 F.3d at 207. Given the trooper's track record of tailing Black drivers on I-95 and the findings by other courts that his stated reasons for pulling over Black drivers are "more than inartful; [they are] untrue," (*Boyd*, 2021 WL 5304176, at *4 n. 10), the District Court should not have credited his testimony without first grappling with this troubling track record. Specifically, before crediting the trooper's testimony, the District Court needed to make specific findings that addressed Darcy's practice of racist policing. This did not occur and, when analyzing his credibility, the court made no reference to Darcy's prejudices or lack of candor. (Blue Br. at 86.) *See Monteiro*, 447 F.3d at 43 ("The government bears the burden of showing…a particularized and objective basis for suspecting legal wrongdoing"). Failing to consider

Darcy's prejudices and his extensive record of racial profiling when analyzing his credibility was reversible error and grounds for vacating the order below.

IV. By requiring that an officer's track record of racist policing be part of any credibility determination, the Court can steer police away from this illegal practice.

In evaluating whether Trooper Darcy's suspicions were reasonable given the facts of this case, one of the Court's mandates is to "provid[e] law enforcement officers with a defined set of rules" for conducting traffic stops and searches. *Ornelas* 517 U.S. at 697.

Because the Court's analysis will be used to "guid[e] officers in the field" (*Arvizu*, 534 U.S. at 275), the Court must not ignore Trooper Darcy's history of racist policing. To the contrary, when deciding whether to believe Darcy's testimony, the court was obligated to explicitly consider this history. Whatever "set of rules" is currently guiding Trooper Darcy and his Proactive Criminal Enforcement Team, it is obviously incomplete, missing the fundamental requirement that police may not tail and then stop a motorist because he looks like a "thug" (Blue Br. at 82) or because he is Black. *See e.g. United States v. Avery*, 137 F.3d 343, 354 (6th Cir. 1997) ("The Fourteenth Amendment…prohibits agents from engaging in investigative surveillance of an individual based solely on impermissible factors such as race"); *Montero Camargo*, 208 F.3d at 1134 n. 22 ("persons

of a particular racial or ethnic group may not be stopped and questioned because of [their] appearance, unless there are other individualized or particularized factors which, together with the racial or ethnic appearance identified, rise to the level of reasonable suspicion"). It is the Court's job to fix this omission and "guide the officers in the field" (*Arvizu*, 534 U.S. at 275) – i.e. the Maine State Police – away from racist policing practices that are both unconstitutional and ineffective. This is best accomplished by clarifying that an officer's history of racist policing will necessarily be a factor in determining that officer's credibility each and every time the officer testifies in court.

The Court's decision on this appeal will have an impact beyond Mr. Fagan's case; it will also serve to remind officers operating throughout this circuit that racist policing is unconstitutional, and that honesty is paramount to the public's trust in the police. By emphasizing the need for officers to be truthful and by explicitly recognizing the racist bent to Trooper Darcy's training, experience and inferences, the Court can rewrite the rulebook that is currently in circulation, at least among certain factions of the Maine State Police. The Court should enforce the commonsense principle that Trooper Darcy's track record of racist policing must necessarily be part of any effort to determine his credibility.

CONCLUSION

For these reasons, the order below denying Mr. Fagan's motion to suppress should be vacated, and the case should be remanded.

March 21, 2022

/s/ Zachary L. Heiden
Zachary L. Heiden (First Cir. Bar No. 99242)
/s/ Carol J. Garvan
Carol J. Garvan (First Cir. Bar No. 1145471)
American Civil Liberties Union of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-6224
zheiden@aclumaine.org

/s/ Matthew Warner
Matthew Warner
First Circuit Bar No. 1198880
Preti Flaherty Beliveau & Pachios LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
207.791.3000
mwarner@preti.com

/s/ Gilles R. Bissonnette
Gilles R. Bissonnette (First Cir. Bar No. 123868)
American Civil Liberties Union of New Hampshire
18 Low Avenue, Concord, NH 03301
(603) 224.5591
gilles@aclu-nh.org

Attorneys for Amici Curie

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2022, I electronically filed the Brief of Amicus Curiae with the Clerk of Court using the CM/ECF system, which will send notifications of such filings to all counsel of record.

/s/ Matthew Warner
Matthew Warner
First Circuit Bar No. 1198880
Preti Flaherty Beliveau & Pachios LLP
Attorney for American Civil Liberties of Maine Foundation

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the documents exempted by Fed. R. App. P. 32(f), this document contains 4,805 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style of requirements of Fed. R. App. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word, Georgia, 14 point.

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/s/ Matthew Warner
Matthew Warner
First Circuit Bar No. 1198880
Preti Flaherty Beliveau & Pachios LLP
Attorney for American Civil Liberties of Maine Foundation