



Joint Standing Committee on Criminal Justice & Public Safety  
LD 1479, An Act to Make Certain Traffic Infractions Secondary Offenses – OTP  
Testimony of Mary L. Bonauto, for GLBTQ Legal Advocates & Defenders,  
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Chairpersons Senator Deschambault, Representative Warren, and Distinguished Member of the Criminal Justice and Public Safety Committee:

Good morning. My name is Mary Bonauto. I am a Portland resident and an attorney at GLBTQ Legal Advocates & Defenders, or GLAD. With our partners at, Equality Maine and MaineTransNet, we support the concept in LD 1479, An Act to Make Certain Traffic Infractions Secondary Offenses.

Not everything that is permissible is a good idea or good policy. Pretextual traffic stops are a case in point: the Supreme Court has held that such stops do not violate the Fourth Amendment of the U.S. Constitution<sup>1</sup>, but they have had broad and unintended consequences. Those consequences, as well as the enormous discretion to stop or not to stop particular drivers, and the sheer scale of drivers pulled over, with the questioning of individuals and searches that can follow, is leading legislatures to the kinds of traffic offenses that can justify a stop. LD 1479's concept lists offenses that would not justify a stop – such as littering, failing to register or display a registration, failing to display an inspection sticker, and more, as well as unspecified equipment issues from Title 29-A, chapter 17. In addition, more courts, acting under the guarantees made in their state constitutions, are engaging this issues in the form of motions to suppress evidence gained from such stops, seizures and searches. As detailed below, several state high courts will suppress evidence from such searches, and this is important for regulating the use of pretextual stops as well.

To set a baseline, traffic stops are the most common form of law enforcement interaction with the American public. Nationwide, police stop more than 50,000 motorists per day, or more than 20 million drivers per year, for various civil traffic infractions.<sup>2</sup> As the Massachusetts Supreme Judicial Court described it, “the plethora of potential traffic violations is such that most drivers are unable to avoid committing minor traffic violations on a routine basis, thereby affording officers wide discretion in the enforcement of traffic laws.” *Commonwealth v. Long*, 485 Mass. 711, 718 (2020).

At present, numerous studies demonstrate that this discretion referred to by the Massachusetts Supreme Judicial Court is exercised to pull over Black, Brown and Indigenous

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<sup>1</sup> *Whren v. U.S.*, 517 U.S. 810, 813 (1996).

<sup>2</sup> See Stanford Computational Policy Lab, *Stanford Open Policing Project*, <https://openpolicing.stanford.edu/findings/>; see also Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, *Nature Human Behavior*, July 2020, at 736.

drivers with minor violations far more than other populations who also commit minor violations. Among the many examples of these data –

- A team of researchers from Stanford University and New York University analyzed a dataset of approximately 95 million traffic stops across the country over nearly a decade. White drivers, they found, were searched 1.5 to 2 times *less* often than Black, but were *more* likely to have drugs, guns or other contraband when searched.<sup>3</sup>
- Massachusetts data demonstrates that officers disproportionately stop and cite Black drivers compared to white drivers. *See Commonwealth v. Long*, 485 Mass. at 731-34, fn. 17 & 18 (2020).
- Based on data from stops and searches in 16 states, Black drivers were more than 2.5 times more likely to be searched than their white counterparts.<sup>4</sup>

This stark fact calls for the Legislature to be proactive in ensuring that all of us come before our government as equals rather than as suspects.

The consequences of a stop can easily cascade for the driver and their passengers to reach matters far beyond the ostensible purpose of the stop. As this Committee knows, the Fourth Amendment of the U.S. Constitution (and many state constitutions, including Maine’s<sup>5</sup>) “protect individuals from unreasonable searches and seizures by police in areas where individuals have a reasonable expectation of privacy,” *Commonwealth v. Barr*, 2021 Pa. LEXIS 4375, at \*30 (2021); and searches without a warrant are generally presumed invalid. However, long experience shows searches regularly grow out of traffic stops. The officer gains proximity to the individuals, can question them, can view the interior of their vehicles, and may seek consent to search the vehicle and trunk. As the Delaware Supreme Court put it, this is using “marginally applicable traffic laws as a device to circumvent constitutional search and seizure requirements.” *Caldwell v. State*, 780 A.2d 1037, 1048 (Del. 2000).

We understand that police officers need discretion to do their jobs, but using stops in this fashion ill serves public safety and perceptions of police legitimacy, and also degrades a part of our population for no legitimate reason. As to the former, research shows that when drivers are pulled over for speeding and treated fairly in that process, people believed the stops were

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<sup>3</sup> Emma Pierson et al., *Human Behavior*, at 739 (finding a 5–10 percent drop in proportion of stopped motorists who are Black when comparing traffic stops right before and right after sunset); *see also* S. Rushin & G. Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 *Stan. L. Rev.* 637, 644 (2021) (confirming this finding with data set of over 8 million stops over 7 years in Washington State).

<sup>4</sup> Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes*, 9 *Duke F. for L. & Soc. Change* 21, 37 (2017). There are also numerous other observational studies, e.g. *State v. Soto*, 734 A.2d 350, 352, 353 (N.J. Super. 1996) (citing an observational study over four days on three-exit stretch of the New Jersey turnpike showing that 98.1 percent of 2,096 observed vehicles exceeded the speed limit, and that Black motorist was 4.85 times as likely as a similarly situated white motorist to be stopped along the Turnpike); *cf. Caldwell v. State*, 780 A.2d 1037, 1048 (Del. 2001), fn. 25 (“studies conducted on a stretch of Interstate 95 between Baltimore and Delaware revealed that 93 percent of all drivers committed some type of traffic violation”).

<sup>5</sup> Me Const., art. 1, § 5 provides: **Unreasonable searches prohibited.** The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, nor without probable cause—supported by oath or affirmation.

legitimate, no matter their race. However, when stops were for a minor issue and the officer then started “asking prying questions and requesting to search the vehicle”, sometimes while the driver was handcuffed or made to stand outside their vehicle for significant time, then the search “engendered hostility and resentment among all races but particularly among African Americans and Latinos – who were stopped much more often for investigatory purposes.”<sup>6</sup> As one expert explained, assigning police to neighborhoods with more Black and Brown people means that many people *not* engaged in any criminal activity will be pulled over simply because Black and Brown people are under suspicion.<sup>7</sup>

Significantly, this behavior does more than undermine relationships between police and communities; it is also ineffective for the reasons described above. When White drivers are searched searched in connection with a traffic stop, they are more likely to have drugs, guns and contraband that searched Black drivers.<sup>8</sup>

Second, but also of great importance, discriminatory enforcement of traffic laws “may be annoying or embarrassing” for a white driver but “humiliating and painful” to a driver of color. *Comonwealth. v. Long*, 485 Mass. at 718 (internal citation excluded). This practice compromises the lives and equal citizenship of Black Americans by denying them the protection of police, by instilling fear in an entire demographic group, and by subjecting them to invasions of their privacy and liberty as they go about their days. As that Court explained, this behavior “risk[s] treating members of our community as second-class citizens.” *Id.*

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To us, the incentives should be high to support LD 1479 and find a path that serves our common interests of safe communities and the liberty and privacy of all persons involved. We believe this bill represents what we hear from across the spectrum: that we can and must do better. Increasingly, states are not following the federal rule as a matter of state constitutional law that may be more protective of individual liberty than the federal standards, or are attempting to guide the scope of permissible stops.

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<sup>6</sup> Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case Western Res. L. Rev. 931, 934 (2016) (discussing findings from Kansas City Police Dept. discussing relationship between stops and perception of legitimacy of police actions), available at <https://www.cato.org/sites/cato.org/files/articles/blanks-cwrlr-v66n4.pdf>.

<sup>7</sup> Blanks, at 939, fn. 5 and also noting the double bind where drivers of color who live in predominantly white neighborhoods are also pulled over more with questions like “where are you going?” and “what are you doing here?” that suggest they do not belong there), *see also* S. Rushin & G. Edwards, An Empirical Assessment of Pretextual Stops and Racial Profiling, 73 Stan. L. Rev., 637, 644 (2021); *id.* at 664-697 (discussing data, analysis and findings). This multifactor study is based on Washington State data from 2008 to 2015 – from when its courts forbade pretextual stops to when the court permitted pretextual stops in limited circumstances, and found a “statistically significant increase in traffic stops and searches of nonwhite drivers relative to white drivers.” *Id.* at 644.

<sup>8</sup> See above, fn. 3. There is also older data supporting this same conclusion. *See* Jeff Guo, Police are searching black drivers more often, but finding more illegal stuff with white drivers, Washington Post (Oct. 27, 2015), available at: <https://www.washingtonpost.com/news/wonk/wp/2015/10/27/police-are-searching-black-drivers-more-often-but-finding-more-illegal-stuff-with-white-drivers-2/>

**State and Local Legislative Efforts.** LD 1479 approaches the issue by prohibiting traffic stops for an enumerated list of equipment violations and traffic infractions that are not related to public safety. Virginia passed a bill in 2020 that is very similar in prohibiting traffic stops for low-level infractions.<sup>9</sup> All evidence resulting from such searches must be suppressed. The Legislature summarized the most relevant provisions as follows:

No law-enforcement officer may lawfully stop a motor vehicle for operating (i) without a light illuminating a license plate, (ii) with defective and unsafe equipment, (iii) without brake lights or a high mount stop light, (iv) without an exhaust system that prevents excessive or unusual levels of noise, (v) with certain sun-shading materials and tinting films, and (vi) with certain objects suspended in the vehicle. No evidence discovered or obtained as a result of such unlawful stop shall be admissible in any trial, hearing, or other proceeding.

No law-enforcement officer may lawfully stop, search, or seize any person, place, or thing solely on the basis of the odor of marijuana, and no evidence discovered or obtained as a result of such unlawful search or seizure shall be admissible in any trial, hearing, or other proceeding.

No local ordinance shall establish a primary offense when the corresponding provision in the Code of Virginia is a secondary offense.

No local ordinance relating to the ownership or maintenance of a motor vehicle may be considered cause to stop or arrest a driver of a motor vehicle unless such violation is a jailable offense.

Law-enforcement officer may not stop a pedestrian for jaywalking or entering a highway where the pedestrian cannot be seen.

Law-enforcement officers are not permitted to stop a motor vehicle for an expired safety inspection or registration sticker until the first day of the fourth month after the original expiration date.

No evidence discovered or obtained due to an impermissible stop, including evidence obtained with the person's consent, is admissible in any trial, hearing, or other proceeding.”<sup>10</sup>

Several large cities have also instituted guideposts for an officer's discretion to make traffic stops: Philadelphia, Pennsylvania (a blanket ban on traffic stops for low-level infractions<sup>11</sup>); Portland, Oregon (police officers directed to no longer stop drivers for low-level

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<sup>9</sup> H.B. 5850, Chaptered Law 45, Special Session 2020 (Nov. 9, 2020). Available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?202+ful+CHAP0045>

<sup>10</sup> *Id.*

<sup>11</sup> Philadelphia, Pennsylvania: <https://phila.legistar.com/LegislationDetail.aspx?ID=5007830&GUID=065348E0-F4F6-4B6A-A088-DF5358E73CD&Options=ID|Text|&Search=210636>

traffic violations<sup>12</sup>); Minneapolis, Minnesota (police no longer able to pull cars over for low-level violations like expired license plates and air fresheners hanging from rearview mirrors<sup>13</sup>); and Berkeley, California (same).<sup>14</sup>

**State Courts Limits on Pretextual Stops Under State Constitutions.** State courts, interpreting their state constitutions, are also providing guidance in this area as they determine when and why pretext stops violate their state constitutions and thus, when evidence gained from such a stop and/or search requires suppression of the evidence obtained during criminal proceedings.

Over 20 years ago, Washington’s Supreme Court recognized the “essence of . . . every pretextual traffic stop” as a situation in which “police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.”

Turning to the legal standards for a stop, the Court acknowledged that “the reasonable articulable suspicion that a traffic infraction has occurred” may justify an exception to the warrant requirement for an ordinary traffic stop, but the authority for the stop does not also “justify a stop for criminal investigation. As a general rule, warrantless searches and seizures are per se unreasonable.” *State v. Ladson*, 979 P.2d 833, 837-38 (internal quotations omitted). Since the “true reason for the warrant”, that is, to conduct a search, is not exempt from the warrant requirement, it was impermissible under the State Constitution, art. I, section 7, to dispense with a warrant for when a warrant would otherwise be required.<sup>15</sup> More specifically, such pretextual traffic stops violate the state constitution insofar as they are “seizures absent the ‘authority of law’” that a warrant would bring. *Id.* at 842.

More recently, Oregon’s Supreme Court came to the same conclusion: “investigative activities, including investigative queries, conducted during a traffic stop, are part of an ongoing seizure . . . [and so must be] reasonably related to the purpose of the traffic stop or that have an independent constitutional justification. . . . “[T]his is as the constitution requires.” *State v. Arreola-Botello*, 451 P.3d 939, 949 (Or. 2019).

Delaware, like Oregon and Washington, requires an independent justification for a police search after a vehicle is stopped to comply in order to comply with its state constitution and will

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<sup>12</sup> Portland, Oregon: <https://www.kgw.com/article/news/local/portland-mayor-police-chief-news-conference-policing-changes/283-7c4e2427-d844-440e-acad-ed0e46e68a8d>.

<sup>13</sup> Minneapolis, Minnesota: (<https://www.nbcnews.com/news/us-news/minneapolis-limit-police-traffic-stops-minor-violations-n1276839>)

<sup>14</sup> Berkeley, California: <https://www.berkeleyside.org/wp-content/uploads/2021/02/Motion-Item-1-Fair-and-Impartial-Policing.pdf>

<sup>15</sup> Washington, Const., art. 1, section 7, provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The Court further explained “When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” *Id.*, at 842-43. The Court distinguished *Ladson* in a case where a search was motivated by an anonymous tip and a traffic violation, allowing such “mixed motive stops” in some circumstances, in *State v. Arreola*, 290 P.3d 983 986 (Wash. 2012) (en banc).



suppress evidence when not lawfully obtained.<sup>16</sup> In *Caldwell v. State*, 780 A.2d 1037, 1046 (Del. 2000), the Delaware Supreme Court held the same and that the length and carrying out of the stop must be tied to the actual purpose of the stop. As it explained, “[t]he duration and execution of a traffic stop is limited by the initial purpose of the stop.... [A]ny investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop constitute a separate seizure that must be supported by independent facts sufficient to justify the additional instruction.” More recently, that court emphasized that any investigation arising from a traffic stop cannot be “unreasonably attenuated from the initial purpose of the stop.” *Juliano v. State*, 254 A. 3d 369, 389 (Del. 2019). Such standards, in the Court’s view, “respect[] the State’s interest in investigating suspicious conduct during a valid traffic stop while restricting officers’ authority to employ marginally applicable traffic laws as a device to circumvent search and seizure requirements.” *Id.* (internal citation omitted).

The New Mexico Supreme Court also does not follow the federal rule. In *State v. Ochoa*, 206 P.3d 143, 157 (N.M. 2008), the Court granted a motion to suppress evidence gathered in a pretextual traffic stop because pretextual stops are impermissible in that State. At the same time, recognizing officer discretion – as opposed to “hunches” – the Court acknowledged that “[p]olice officers may enforce any and all traffic laws, so long as it is done with reasonable suspicion and in good faith *for that purpose*” as opposed to a fishing expedition.<sup>17</sup> To determine “whether a stop is a pretextual subterfuge, courts should consider the totality of the circumstances, judge the credibility of witnesses, weigh the evidence, make a decision, and exclude the evidence if the stop was unreasonable at its inception. The totality of the circumstances includes considerations of the objective reasonableness of an officer's actions and the subjective intent of the officer-the real reason for the stop.” *Id.* at 155.<sup>18</sup>

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<sup>16</sup> Delaware Const., Art. I, section 6, provides: “The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.”

<sup>17</sup> Article II, section 10 of the New Mexico Constitution provides: “The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or to seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.” The case law clarifies that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable, subject only to well-delineated exceptions *State v. Rowell*, 2008 NMSC 41, Para. 10, 188 P.3d 95 (2008) (internal quotation marks and citation omitted).

<sup>18</sup> To identify an unreasonable, pretextual stop, the court provided standards. First, the trial court must determine whether there was reasonable suspicion or probable cause the stop. “[T]he State has the burden of proof to justify the stop under an exception to the warrant requirement. If the stop can be justified objectively on its face and the defendant argues that the seizure was nevertheless unreasonable because it was pretextual under the New Mexico Constitution, then the district court must decide whether the officer's “motive for [the stop] was unrelated to the objective existence of reasonable suspicion or probable cause.” The defendant has the burden of proof to show pretext based on the totality of the circumstances. If the defendant has not placed substantial facts in dispute indicating pretext, then the seizure is not pretextual. If the defendant shows sufficient facts indicating the officer had an unrelated motive that was not supported by reasonable suspicion or probable cause, then there is a rebuttable presumption that the stop was pretextual. The burden shifts to the state to establish that, based on the totality of the circumstances, even without that unrelated motive, the officer would have stopped the defendant.

In *Commonwealth v. Long*, 485 Mass. 711, 152 N.E.3d 725 (2020), the the Massachusetts high court addressed discriminatory traffic stops as a matter of equal protection under the State Constitution rather than under search and seizure protections. The Court’s result is consistent with those discussed and now allows an individual charged with a crime arising from a pretextual stop and concomitant search, may raise an issue of racial profiling through a motion to suppress based on totality of circumstances. Then, the Commonwealth bears burden to rebut inference. When examining the totality of the circumstances, judges should consider factors such as (1) patterns in enforcement actions by the particular police officer; (2) the regular duties of the officer involved in the stop; (3) the sequence of events prior to the stop; (4) the manner of the stop; (5) the safety interests in enforcing the motor vehicle violation; and (6) the specific police department's policies and procedures regarding traffic stops. These factors are not exhaustive; any relevant facts may be raised for the judge's consideration.” *Id.* at 715; *id.* at 724-30 (discussing application of the test).

In sum, pretextual stops and the searches that often follow are a nationwide issue. Legislatures are guiding officer discretion as a matter of policy. Courts are disciplining the process by limiting the stop to its apparent purpose, or examining the objective and subjective purposes for the stop (and search), and suppressing evidence that is obtained outside of constitutional bounds. LD 1479 is engaging this important issue here in Maine, and we urge this Committee to vote ought to pass. Thank you very much.

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Facts relevant to the totality of the circumstances may include the following: whether the defendant was arrested for and charged with a crime unrelated to the stop; the officer's compliance or non-compliance with standard police practices; whether the officer was in an unmarked car or was not in uniform; whether patrolling or enforcement of the traffic code were among the officer's typical employment duties; whether the officer had information, which did not rise to the level of reasonable suspicion or probable cause, relating to another offense; the manner of the stop, including how long the officer trailed the defendant before performing the stop, how long after the alleged suspicion arose or violation was committed the stop was made, how many officers were present for the stop; the conduct, demeanor, and statements of the officer during the stop; the relevant characteristics of the defendant; whether the objective reason articulated for the stop was necessary for the protection of traffic safety; and the officer's testimony as to the reason for the stop. This is not an exhaustive list of pretext indicators, but some guiding factors relevant to the inquiry. Where there is a factual finding of pretext, that the officer had a constitutionally invalid purpose for the stop which is not exempt from the warrant requirement, the stop violates the New Mexico Constitution, and the evidentiary fruits of the stop are inadmissible.