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April 5, 2021

The Honorable Tani G. Cantil-Sakauye, Chief Justice, and the Honorable
Associate Justices of the California Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

Letter of *Amicus Curiae* in Support of Petition for Review in *People v. Flores* (Case No. S267522)

To Chief Justice Cantil-Sakauye and Associate Justices:

The Office of the State Public Defender (OSPD) submits this amicus curiae letter in support of the petition for review in the above-referenced case. (See Cal. Rules of Court, rule 8.500(g).)

Interest of Amicus Curiae

OSPD represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases. The Legislature has directed OSPD to “engage in [] efforts for the purpose of improving the quality of indigent defense.” (Govt. Code, § 15420, subd. (b).) OSPD has a long-standing interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crime. OSPD frequently litigates issues related to the rights of its clients to be free from unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution. Moreover, in its role representing indigent clients throughout the State of California, OSPD has had the opportunity to observe and challenge the racial bias that persists in the administration of the criminal justice system in this state.

Reasons for Granting the Petition

What is “far too long a period of time,” for a Latino man to crouch down “apparently” tying his shoe when approached by police who shine a light on him at night?¹ According to the Court of Appeal and the Superior Court, *twenty-six seconds* is “far too long,” and thus suspicious.² According to the court below this is simply “common sense.”³ The trial court concluded, and the Court of Appeal apparently agreed, that after being so confronted by police “any normal human being would stand up” and ask the police why they are approaching.⁴ Yet this is exactly what the United States Supreme Court says a person need *not* do.⁵

This letter focuses on an issue raised by the dissenting justice below: that, “for some populations, to stand up from a bent position as the police approach would effectively be suicidal, as it would likely be interpreted as a threatening act.”⁶ Any discussion of “normal behavior” or “common sense” that does not consider the fraught, frightening, and sometimes fatal treatment some communities receive from police is divorced from reality and does not take into account the “totality of the circumstances,” as United States Supreme Court precedent requires.⁷ Because this issue affects proper

¹ Slip Op. at pp. 3, 11, 13; *People v. Flores* (2021) 60 Cal.App.5th 978, *review filed* (Mar. 9, 2021). For the court’s convenience citations to the decision of the Court of Appeal are to the slip opinion attached to Mr. Flores’s Petition for Review.

² *Id.* at pp. 7-8 (recounting body camera video showing Mr. Flores first crouched down at thirty-seven seconds and the police ordering him to stand at one minute and three seconds).

³ *Id.* at p. 14.

⁴ *Id.* at p. 10.

⁵ *Florida v. Royer* (1983) 460 U.S. 491, 497-498 (person approached by police is free to refuse to answer questions and can ignore the police and “go on his way”); *Florida v. Bostick* (1991) 501 U.S. 429, 437 (refusal to cooperate, without more, does not furnish the minimum level of objective justification needed for a detention or seizure).

⁶ Slip. Op. Dissent at p. 6.

⁷ *U.S. v. Cortez* (1981) 449 U.S. 411, 417.

application of the Fourth Amendment in a variety of contexts, this Court should grant review.

A Black or Latino person approached by Los Angeles Police Department officers at night lives in a country, state, and city in which Black and Latino individuals are more likely to be mistreated by police. Black and Latino people are disproportionately subject to arrest by police when compared to White people.⁸ Investigations, including by the Department of Justice, have repeatedly found that Black and Latino people are more likely to be targeted for stops, searches, citations, and other police contact.⁹

⁸ See, e.g., Lytle, *The Effects of Suspect Characteristics on Arrest: A Meta-Analysis* (2014) 42 J. of Crim. Justice 589, 595 (Black and Latino people significantly more likely to be arrested than White people); Kochel, Wilson, & Mastrofski, *The Effect of Suspect Race on Officers' Arrest Decisions* (2011) 49 Criminology 473, 490, 498 (non-White people more likely to be arrested than White people).

⁹ See, e.g., Pierson, et al., *A large-scale analysis of racial disparities in police stops across the United States* (July 2020) 4 Nature: Human Behavior 736, 738-740 <<https://www.nature.com/articles/s41562-020-0858-1.pdf>> (as of Apr. 5, 2021) (analyzing nearly 100 million traffic stops from around the United States and finding racial bias in the decisions to stop and search Black and Latino drivers); *Floyd v. City of New York* (S.D.N.Y. 2013) 959 F.Supp.2d 540, 560 (finding Black and Hispanic people disproportionately more likely to be stopped by police and more likely to be subject to the use of force when stopped); U.S. Dept. of Justice, Civil Rights Division, *Investigation of the Seattle Police Department, Findings Letter* (Dec. 16, 2011) pp. 2-4, 6 <https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf> (as of Apr. 5, 2021) (finding that community perceives that officers engage in discriminatory policing, and that more than half of all cases of unnecessary or excessive use of force were against “minorities”); U.S. Dept. of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2015) pp. 4-5, 62-78 <https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf> (as of Apr. 5, 2021) (Black residents disproportionately likely to be stopped, cited, and arrested); U.S. Dept. of Justice, Civil Rights Division, *Investigation of the New Orleans Police Dept.*

While data on the way Latino people are policed is more limited for a variety of reasons, there is ample basis to conclude that Latino people are overpoliced in the United States.¹⁰

Despite limited data what we *do* know is that:

Latinx are over-represented in the criminal justice system and disproportionately subjected to police intrusion and abuse. Latinx are more likely to be imprisoned than whites; less likely to be released on their own recognizance; and more likely to be incarcerated after being convicted of property or drug crimes than whites. They report being the subjects of police use of force more than twice the rate of whites and are searched at a higher rate than whites. In a few instances Latinx appear more compromised in the criminal justice system than African Americans, although in most respects disparities are more extreme for African Americans. In some contexts, Latinx are more likely to be the victims of deadly police violence than African Americans.¹¹

This pattern holds true in Los Angeles. A study by the American Civil Liberties Union found that Black and Latino residents are “over-stopped,

(Mar. 16, 2011) pp. 36, 39-40 <https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf> (as of Apr. 5, 2021) (Latino residents reporting harassment by police, and finding of deep disparities in arrest rates and police use of force against Black residents).

¹⁰ See Lopez, *The Reasonable Latinx: A Response to Professor Henning's the Reasonable Black Child: Race, Adolescence, and the Fourth Amendment* (2019) 68 Am. U. L. Rev. F. 55, 66.) Difficulties in data collection include that Latinos may be identified as either White or Black in statistics, the high rate of immigrants among Latinos, including undocumented immigrants, and Latino self-identity; those of Latino ancestry may or may not identify as Latino and may additionally, or solely, identify as Black or White. (*Id.* at pp. 67-68.)

¹¹ *Id.* at p. 73, footnotes and citations omitted.

over-frisked, over-searched, and over-arrested.”¹² After controlling for both violent and property crime rates in neighborhoods, the rate of police stops per 10,000 residents was more than 360 stops higher for Latino residents than for non-minority residents.¹³

Contacts with police are not merely more frequent for Black and Latino people, they are more likely to be intimidating and violent. Black and Latino people are more likely than whites to report police officers swearing at them or otherwise using verbally abusive language.¹⁴ Black and Latino people are also more likely to be subject to police use of force of all kinds.¹⁵

And, as both the proliferation of visually-documented police shootings in recent years and empirical data show, Black people, in particular, are disproportionately more likely to be killed by the police.¹⁶ While much of the

¹² Am. Civil Liberties Union of Southern Cal., *A Study of Racially Disparate Outcomes in the Los Angeles Police Dept.* (Oct. 2008) p. i.

¹³ *Id.* at pp. i, 5-6.

¹⁴ Ekins, Cato Institute, *Policing in America: Understanding Public Attitudes Toward the Police, Results from a National Survey* (2016) p. 30; see also Eberhardt, *Strategies for change: Research initiatives and recommendations to improve police community relations in Oakland, Calif.* Stanford University, SPARQ (2016) pp. 4-5 <<https://stanford.app.box.com/v/Strategies-for-Change>> (as of Apr. 1, 2021) (officers used more severe legal language and offered fewer explanations in stops of Black residents in Oakland).

¹⁵ See Davis, et al., *Contacts Between Police and the Public* (2015) DOJ Bureau of Justice Statistics at pp. 16-17 <<https://www.bjs.gov/content/pub/pdf/cpp15.pdf>> (as of Apr. 5, 2021) (reporting that “Blacks . . . and Hispanics . . . were more likely than whites . . . to experience the threat or use of force”).

¹⁶ See Mapping Police Violence <<https://mappingpoliceviolence.org/>> (as of Mar. 29, 2021) (database of nationwide police violence showing that Black people are three times more likely to be killed by police than White people and 1.3 times more likely to be unarmed); Lambert, *Yale: Black people ‘disproportionately killed’ by police over last 5 years*, New Haven Register (Oct. 29, 2020) <<https://www.nhregister.com/news/article/Yale-Black-people->

recent discussion of police violence has focused on Black men,¹⁷ a study published by the National Academy of Sciences showed that Latino men were 1.3-1.4 times more likely to be killed by police than White men.¹⁸ California has also seen frequent police shootings of unarmed Latino men, including, for example, the killing of Sean Monterrosa, who was shot by a Vallejo police detective who claimed he thought he saw a gun that turned out to be a hammer.¹⁹

Given the differential likelihood of police scrutiny and violence Black and Latino people experience, what seems to be “common sense” or acting like a “normal human being” to some judges may not be common sense to every person approached by police officers in a dark alley.²⁰ “For many

[disproportionately-15682869.php](#)> (as of Apr. 5, 2021) (Yale study of police killings from 2015-2020 finding that Black people are disproportionately more likely to be killed by police and disproportionately more likely to be unarmed); Pérez-Peña, *Fatal Police Shootings: Accounts Since Ferguson*, N.Y. Times (Apr. 8, 2015) <<https://nyti.ms/2lCIRuY>> (as of Mar. 30, 2021) (“[I]n the year since an officer fatally shot Michael Brown . . . 1,000 or more people died at the hands of law enforcement officers”; review of deaths “reveals some expected patterns, like the disproportionate presence of African-Americans, people with mental illnesses, and young men among the dead”).

¹⁷ Kenya Downs, *Why Aren't More People Talking About Latinos Killed by Police?*, PBS Newshour (July 14, 2016) <<https://www.pbs.org/newshour/nation/black-men-werent-unarmed-people-killed-police-last-week>> (as of Mar. 29, 2021).

¹⁸ Edwards, Lee, and Esposito, *Risk of Being Killed by Police Use of Force in The United States by Age, Race–Ethnicity, and Sex* (2019) 116 Proc. Nat’l Acad. Sci. 116793, 116794.

¹⁹ See Arce, *It’s Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, Time Magazine (July 21, 2020) <<https://time.com/5869568/latinos-police-violence/>> (as of Mar. 26, 2021) (*It’s Long Past Time*) (describing police killings in California of Sean Monterrosa, Alex Nieto, Erik Salgado, and Andy Lopez).

²⁰ It is worth noting that awareness of police violence and discriminatory policing has increased among all Americans. (See Stafford & Fingerhut, *AP-NORC poll: Sweeping change in US views of police violence*,

members of minority communities . . . , the sight of an officer in uniform evokes a sense of fear and trepidation, rather than security.”²¹ It may thus instead be “common sense” to a person in Mr. Flores’s position that, were he to suddenly move his hands away from his shoes, he might be among the many unarmed men shot by police officers who later said they believed the victim was reaching for his waistband.²² It may equally be “common sense” to

AP News (Jun. 17, 2020) <<https://apnews.com/article/728b414b8742129329081f7092179d1f>> (as of Mar. 29, 2021) (48% of all adults consider police violence against the public to be an extremely or very serious problem, compared to only 32% in 2015); Pew Research Center: Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct (July 9, 2020) <<https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/>> (as of Mar. 29, 2021) (declining shares of Americans give police forces positive ratings for using force appropriately, treating racial groups equally, and holding officers accountable); Alemany, *Power Up: There’s been a dramatic shift in public opinion about police treatment of black Americans*, Washington Post (Jun. 9, 2020) <<https://www.washingtonpost.com/news/powerpost/paloma/powerup/2020/06/09/powerup-there-s-been-a-dramatic-shift-in-public-opinion-over-police-treatment-of-black-americans/5edef042602ff12947e87b23/>> (as of Mar. 29, 2021) (Americans overwhelmingly believe police killing of Black men represents a broader problem in how police treat Black people, a dramatic difference from similar polling in 2014.) The proportion of people from all communities hesitant to interact with police officers may therefore be higher than the trial court and Court of Appeal deemed likely in this case.

²¹ Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a “Reasonable Person”* (1993) 36 How. L.J. 239, 247.

²² See Balko, *When Unarmed Men Reach For Their Waistbands*, Washington Post (Aug. 29, 2014) <<https://www.washingtonpost.com/news/the-watch/wp/2014/08/29/when-unarmed-men-reach-for-their-waistbands/>> (as of Mar. 29, 2021) (collecting cases of police shootings of unarmed men who allegedly reached for their waistbands, including Caesar Cruz who was shot by Anaheim police in a parking lot); see also Dowd, *The Deadly Consequences of Carrying a Cell Phone While Black*, Vice News (Mar.

a person approached by police officers in a dark alley that, were he to stand quickly and attempt to engage officers in conversation, he might be another unarmed man shot when they turned or walked toward officers.²³ As the dissent below noted, “some even might instruct their children remaining still is a prudent course of action.”²⁴

In light of this reality, courts in other jurisdictions have held that the effect of racism and police violence cannot be ignored in determining whether evasive behavior creates reasonable suspicion—even in cases in which a defendant, unlike Mr. Flores, actually flees from the police.

In *Commonwealth v. Warren*,²⁵ the Massachusetts Supreme Judicial Court noted recent reports from the Boston Police Department and the American Civil Liberties Union of Massachusetts “document[ing] a pattern of racial profiling of black males in the city of Boston” in holding that police did not have reasonable suspicion to stop a young Black man who had run from police.²⁶ It found that evidence “that black males in Boston are disproportionately and repeatedly targeted for [police] encounters suggests a reason for flight totally unrelated to consciousness of guilt.”²⁷ “Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by

4, 2021) <<https://www.vice.com/en/article/5dp87a/cops-keep-shooting-black-men-with-cell-phones-assuming-theyre-guns>> (as of Apr. 4, 2021) (collecting cases in which unarmed Black men were shot and killed by police who later claimed they believed the victims’ cell phones were guns, including Stephon Clark who was shot to death in his grandmother’s backyard in Sacramento).

²³ See, e.g., Arce, *It’s Long Past Time*, *supra* (describing shooting of Sean Monterrosa in Vallejo, who police later claimed “abruptly turned toward the officers”).

²⁴ Slip. Op. Dissent at 6; see also *Utah v. Strieff* (2016) ___ U.S. ___, 136 S.Ct. 2056, 2070 (Sotomayor, J, dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street”)

²⁵ *Commonwealth v. Warren* (2016) 475 Mass. 530, 533-534.

²⁶ *Id.* at p. 539.

²⁷ *Id.* at p. 540.

the desire to hide criminal activity.”²⁸ The court held that lower courts should take “this reality for [B]lack males in the city of Boston” into account in analyzing the significance of flight from police.²⁹

Similarly, in *Miles v. United States*,³⁰ the high court for the District of Columbia took note of Black Americans’ often legitimate fears of police brutality and held the defendant’s flight in response to police presence was not “unprovoked.”³¹ In fact, “the experience of being followed by a police officer on foot, blocked by a police cruiser, and then told to ‘stop’ would be startling and possibly frightening to many reasonable people.”³² “There was thus a reason other than consciousness of guilt for [defendant] to have fled.”³³

The Ninth Circuit recently reached a similar conclusion in *United States v. Brown*,³⁴ another case involving a Black man who ran away from an attempted police stop. The court said that: “In evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race.”³⁵ The court made clear that it is appropriate for racial disparities in policing to “inform the inferences to be drawn from an individual who decides to step away, run, or flee from police.”³⁶ “[R]acial dynamics in our society” may “offer an ‘innocent’ explanation of flight.”³⁷

²⁸ *Id.* at p. 540.

²⁹ *Ibid.*

³⁰ *Miles v. United States* (D.C. 2018) 181 A.3d 633.

³¹ *Id.* at pp. 641-644, & fn. 14.

³² *Id.* at p. 644.

³³ *Ibid.*

³⁴ *United States v. Brown* (9th Cir. 2019) 925 F.3d 1150 (*Brown*).

³⁵ *Id.* at p. 1156.

³⁶ *Ibid.*

³⁷ *Id.* at p. 1157; see also *United States v. Jones* (ND. Cal. 2020) 438 F.Supp.3d 1039, 1057 (citing *Brown* and holding that “evasive” driving by young Black defendants “without anything more specific . . . does not provide a particularized and objective basis to permit the officers to prolong a traffic stop by investigating criminal conduct unrelated to the traffic stop”).

The conclusion of these courts is consistent with the U.S. Supreme Court’s and other courts’ recognition that race is relevant to “totality of the circumstances” determinations in a variety of contexts under the Fourth Amendment.³⁸

The decision of the court below is not just out-of-step with the U.S. Supreme Court and other jurisdictions: other Courts of Appeal have acknowledged the reality that racially disparate policing affects how people respond to the police. In *People v. Rubio*,³⁹ the Court of Appeal relied in part on the Ninth Circuit’s reasoning in *Brown* in determining whether police were justified in entering the defendant’s home without a warrant:

We do not condone the hostility that defendant . . . exhibited toward the police. But nor can we ignore that “as a practical matter neither society nor our enforcement of the laws is yet color-blind,” and the resulting “uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement.” (*Brown, supra*, 925 F.3d at p. 1156.) That defendant lived in a high crime neighborhood, that a shooting had just occurred outside his home, and that he chose initially to exercise his constitutional right to be left alone in his own apartment do not entitle the police to break down his door.

³⁸ *U.S. v. Mendenhall* (1980) 446 U.S. 544, 558 (race was not “irrelevant” in totality of circumstances determination as to whether defendant was “seized”); see also *U.S. v. Smith* (7th Cir. 2015) 794 F.3d 681, 687-88 (recognizing “relevance of race in everyday police encounters with citizens in Milwaukee and around the country . . . [and] empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system” in determining whether a seizure had occurred); *U.S. v. Washington* (9th Cir. 2007) 490 F.3d 765, 768 (recognizing that “Recent relations between police and the African–American community in Portland are also pertinent to our analysis” of whether a search was consensual”).

³⁹ *People v. Rubio* (2019) 43 Cal.App.5th 342, 353.

In another recent case, *In re Edgerrin J.*,⁴⁰ a Court of Appeal Justice took the unusual step of writing a concurrence to his own decision to urge that, “[a]s our broader cultural views on racial justice evolve,” courts must “acknowledge and confront the problem.”⁴¹ In *Edgerrin J.*, the Court of Appeal determined that officers did not have reasonable suspicion to detain defendants on the basis of a tip that three Black teenagers sitting in a legally parked Mercedes were acting “shady.”⁴² The concurring Justice observed that bias may affect what “passersby perceive as a threat,” as well as “how officers on the receiving end of a vague, subjective tip might interpret the information they obtain.”⁴³ Moreover, citing the Massachusetts high court’s reasoning in *Warren*, the concurrence encouraged judges to be aware that “racial dynamics can affect how officers’ actions are perceived by someone in defendants’ shoes.”⁴⁴

By contrast, the court below failed to consider how someone in Mr. Flores’s shoes might reasonably perceive being approached by two police officers in a dark alley.

Although Fourth Amendment issues are frequently circumscribed by their facts, the issue of how a “reasonable” or “normal” person would respond to police transcends the facts of any one case. Here, in the words of the dissent, “the majority’s overbroad view of what sort of conduct can be deemed suggestive of wrongdoing ignores applicable law and the realities of twenty-first century America. In the case of a person wary of police interaction, the majority’s approach leaves virtually no room for that person’s conduct to be deemed ‘normal’ and hence not suspicious.”⁴⁵ This Court should grant review in this case to make clear that what constitutes “suspicious” or “abnormal”

⁴⁰ *In re Edgerrin J.* (2020) 57 Cal.App.5th 752.

⁴¹ *Id.* at p. 770 (Dato, J., concurring).

⁴² *Id.* at p. 765.

⁴³ *Id.* at p. 771 (Dato, J., concurring).

⁴⁴ *Ibid.*

⁴⁵ Slip. Op. Dissent at p. 1.

behavior for Fourth Amendment purposes must take into account the realities of racism and police violence experienced by communities of color.

Dated: April 5, 2021

Respectfully submitted,

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Declaration of Service

Case Name: *People v. Flores*

Case Number: Cal. Supreme Court Case No. S267522

I, **Lauren Emerson**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county of Oakland. My business address is 1111 Broadway, Suite 1000, Oakland, CA 94607. I served a true copy of the following document:

LETTER OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REVIEW IN *PEOPLE V. FLORES* (CASE NO. S267522)

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **April 5, 2021**:

Richard L. Fitzer Law Offices of Richard Fitzer 6285 East Spring Street, No. 276N Long Beach, CA 90808	Attorney General Los Angeles Office 300 South Spring Street, Suite 5000 Los Angeles, CA 90013
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **April 5, 2021**, at San Joaquin County, CA.

/s/ Lauren Emerson

Lauren Emerson