COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No.: SJC-11481

COMMONWEALTH OF MASSACHUSETTS,
Appellant-Plaintiff,

v.

MATTHEW OVERMYER,
Appellee-Defendant.

ON THE COMMONWEALTH'S INTERLOCUTORY APPEAL AND SUA SPONTE TRANSFER, FROM A 2012 ALLOWANCE OF A MOTION TO SUPPRESS EVIDENCE (Connly, J.), ON A CRIMINAL COMPLAINT ISSUED BY THE CENTRAL BERKSHIRE DISTRICT COURT

BRIEF AND ADDENDUM OF AMICUS CURIAE, NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAW IN SUPPORT OF APPELLEE-OVERMYER

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Dated: February 14, 2014

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INTEREST OF AMICUS CURIAE

The National Organization for the Reform of Marijuana Laws, Inc. (NORML) is a nonprofit educational corporation organized in 1971 under the laws of the District of Columbia, with its primary office located in Washington, D.C. NORML has more than 13,000 dues paying members, 1.3 million internet-based supporters, and 154 state and local chapters from Hawaii to Maine, including the Massachusetts Cannabis Reform Coalition, Inc. (organized under Massachusetts law), its local state affiliate.

A consumers' advocacy organization, NORML participates in the national debate over the efficacy and reform of state and federal marijuana prohibition laws. NORML advocates regulated marijuana cultivation and commerce (legalization) will reduce: the violence associated with the black market; the cost of law enforcement; and youth access to marijuana. State and federal prohibition — of the adult use of this non-toxic mood-adjusting substance — is demonstrably far

more damaging to public health and safety, than abuse of the substance.*

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* The Substance Abuse and Mental Health Services Administration Office of Applied Studies 2011 National Survey on Drug Use and Health reports 18 million Americans (7%) over the age of 12 used marijuana within the last thirty days, http://www.samhsa.gov/NSDUH/2k11Results/NSDUHresults2011.htm#Ch8. An estimated 9.96% of Massachusetts residents used marijuana in the past month based upon 2010-2011 data. Http://www.samhsa.gov/data/NSDUH/2k11State/NSDUHsaeExcelTab3-2011.xlsx. Note: The survey identifies all marijuana use, regardless of frequency or impact on the user, as "abuse."

Use and access rates remain relatively unchanged despite more than 70 years of federal prohibition -- and more than a century of Massachusetts prohibition -- and despite national marijuana arrest rates of more than one person every minute of every day. FBI Uniform Crime Reports, Crime in the United States: 2012 (Washington, D.C.: U.S. Government Printing Office, 2013).

Opponents of the decriminalization initiative argued that "Marijuana decriminalization ... sends the wrong message to young people", The Official Massachusetts Information For Voters, Secretary of the Commonwealth, 2008 at 9. However, since the state decriminalized, "[u]se before age of 13 years has seen a statistically significant drop, while other adolescent data remains unchanged." 2011 Health and Risk Behaviors of Massachusetts Youth; http://www.mass.gov/eohhs/docs/dph/behavioral-risk/yrbs-2011.pdf.

This Court may take judicial notice of this information on appeal, as data "capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned." Mass. Guide to Evidence § 201(b)(2) and (c); *Maguire v. Director of the Office of Medicaid*, 82 Mass. App.Ct. 549, 551 n. 5 (2012), citing Mass. Guide to Evidence

REASONS WHY AN AMICUS BRIEF IS DESIRABLE

In July 2013, this Court issued a solicitation for amicus briefs on two questions related to this case:

> I. Whether a police officer was justified in questioning the defendant about possible marijuana in his vehicle based on the officer's perception of a strong odor of fresh (unburned) marijuana in the vicinity of the vehicle.
>
> II. Whether the officer had probable cause to search a backpack in the vehicle after the defendant, in response to the officer's questioning, produced a bag that may have contained more than an ounce of marijuana.

This amicus brief addresses the issues upon which this honorable Court solicited amicus briefs by presenting additional reasons not advanced by the Appellee Overmyer for affirming the trial court.

As NORML notes in its Amicus Brief submitted in the case of Commonwealth v. Craan, SJC-11436, also scheduled for argument in March 2014:

> Support for marijuana legalization has grown beyond majority levels in the nation and Commonwealth, shown by voter support for the 2008 decriminalization initiative, and the 2012 medical initiative.

Furthermore, an initiative for full-adult legalization in 2016 is expected – based on the results of initiatives for decriminalization in 2008 and medical

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§ 201(c).

legalization last year – as is a similar majority vote.

This brief argues that the Constitution of the Commonwealth, G. L. c. 94C, § 32L, inserted by St. 2008, c. 387, its legislative history as contained in "Information for Voters: 2008 Ballot Questions, Question 2: Law Proposed by Initiative Petition, Possession of Marijuana,"[‡] and particularly following enactment of Statutes 2012, c. 369, and its legislative history "Information for Voters: 2012 Ballot Questions, Question 3: Law Proposed by Initiative Petition, Medical Use of Marijuana"[**] at page 14 make it abundantly clear that the citizens of the Commonwealth do not want their police officers: questioning people about possible marijuana in their possession based solely on an officer's olfactory perception of unburned or burnt marijuana; nor, speculating as to the weight of a bag of marijuana when small, low cost scales are available for

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[‡] www.sec.state.ma.us/ele/ele08/ballot_questions_08/quest_2.htm (last viewed 01/20/2014).

[**] http://www.sec.state.ma.us/ele/elepdf/IFV-2012.pdf (last viewed 01/20/2014).

providing an objective weight at the scene. See Appendix.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Whether the officer had probable cause to search a backpack in the vehicle after the defendant, in response to the officer's questioning, produced a bag that may have contained more than an ounce of marijuana.

II. Whether a police officer was justified in questioning the defendant about possible marijuana in his vehicle based on the officer's perception of a strong odor of fresh (unburned) marijuana in the vicinity of the vehicle.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

NORML adopts the Statement of the Case contained in the appellee-defendant's brief.

SUMMARY OF ARGUMENT

Based on fundamental principles of the Massachusetts Constitution and on the Officers' lack of prudence and caution, the Officers did not have probable cause to search the backpack.

Based on fundamental constitutional principles, policy arguments and public opinion, the Officer was not justified in questioning the defendant.

ARGUMENT

I. Fundamental Constitutional principles enjoin servants of the people from acting as they did here.

"The constitution … is an original compact[.] On this compact is founded … the powers and duties of the magistrates and officers of government, as the substitutes and agents of the people." Opinion of the Justices, 3 Mass. 565 (1807). See also, Randy E. Barnett, Restoring the Lost Constitution, Princeton University Press (2004) at 11 – 52 on the legitimacy of the constitution. However, these powers and duties are limited, as we "live by a government of laws, not of men." Marbury v. Madison, 5 U.S. 137 (1803); Article 30 of the Declaration of Rights.

The Constitution is "construed so as to accomplish a reasonable result and to achieve its dominating purpose." Lincoln v. Secretary of the Commonwealth, 326 Mass. 313, 317 (1950). See also, Commonwealth v. Bergstrom, 402 Mass. 534, 541 (1988).

"It was written to be understood by the voters to whom it was submitted for approval. It is to be interpreted in the sense most obvious to the common intelligence. Its phrases are to be read and construed according to the familiar and approved usage

of the language." Yont v. Secretary of Commonwealth, 275 Mass. 365, 366 - 367 (1931) (Citations omitted).

Too often relegated to the addendum, and read in part, the provisions of the Commonwealth's 'Great Charter' are of paramount importance to a just resolution of the case before the trial and appellate Courts of the Commonwealth are here set forth.

> The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and *to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights*,[§§] and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

Preamble to the Declaration of Rights and Constitution of Massachusetts (Emphasis added);

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives[***] and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or

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[§§] See, Randy E. Barnett, Restoring the Lost Constitution, Princeton University Press (2004) at 53 - 86 (discussing the scope of natural rights.)

[***] But see Commonwealth v. Hutchins, 410 Mass. 726 (1991)(This Court rejected a marijuana medical necessity defense.)

> abridged because of sex, race, color, creed or national origin.

Article 1 of the Declaration of Rights;[‡‡‡]

> It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Article 2 of the Declaration of Rights;[****]

> The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America in Congress assembled.

Article 4 of the Declaration of Rights;

> All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

Article 5 of the Declaration of Rights;

[‡‡‡] As amended by art. 106 of the Amendments to the Massachusetts Constitution.

[****] No law shall be passed prohibiting the free exercise of religion. Section 1 of art. 46 of the Amendments to the Constitution, amending art. 18 of the Amendments. See Commonwealth v. Nissenbaum, 404 Mass. 575, 587-595 (1989), Liacos, J. dissenting.

> Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

Article 7 of the Declaration of Rights;

> No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.
>
> And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Article 12 of the Declaration of Rights;

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property,

be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Article 14 of the Declaration of Rights;

A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth.

Article 18[‡‡‡‡] of the Declaration to Rights;

The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

Article 19 of the Declaration of Rights;

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of

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[‡‡‡‡] Whether by serendipity or intent this article bears the number 18, which is the Hebrew word *chai* (חי), meaning "life." Judicial notice of the translation is appropriate. See, Massachusetts Evidence Guide, sec. 201 (b)(2).

> every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

Article 29 of the Declaration of Rights;

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Article 30 of the Declaration of Rights.

> The legislative power is the power
>
> to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; . . .; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth, . . . so as the same be not repugnant or contrary to this constitution …

Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth;

> Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws,

> enacted by the general court, to the people for their ratification or rejection.

Article 48, Section 1 of the Amendments to the Constitution.

The Declaration of Rights and Form of Government establish the imperative of the Constitution is to protect the liberties of the people and individuals from the fallibility of those acting for the people in the legislative, executive and judicial branches of government. This is confirmed by the inclusion of Article 18***** of the Declaration to Rights.

Its words are not hortatory. It is a rule of construction to follow when called upon to determine whether a legislative act is "wholesome and reasonable" and "not repugnant or contrary to th[e] constitution," Part 2, C. 1, §1, Art 4 of the Constitution, or an executive act violates rights secured by Articles 12 or 14 of the Declaration of Rights or exceeds the scope of their "duties, powers, and limits" established by statute. Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth.

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§§§§§ This Court may take judicial notice of the availability of inexpensive scales as a fact "capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned." Mass. Guide to Evidence § 201(b)(2) and (c).

Some call this rule of construction, "Presumption of Liberty." See, Randy E. Barnett, Restoring the Lost Constitution, Princeton University Press at 251 – 269 (2004) (discussing the concept of 'presumption of liberty').

The executive branch's power to detain, question and search persons is clearly defined and limited by the legislative and judicial branches generally, and explicitly in the application of G.L. c. 94C, § 32L to the facts of this case. Commonwealth v. Cruz, 459 Mass. 459, 472 (2011) (the new decriminalization law "implicates police conduct in the field").

The police officers' actions in this case, exceeded these limitations as they lacked reasonable suspicion of crime to question and lacked probable cause to search defendant.

II. Thrice this Court erred when reviewing the Constitutionality of the Legislative prohibition of the possession and distribution of plant matter.

Thrice this Court has declined to strike down the Legislative prohibition of the possession and distribution of plant matter. The first challenge to the General Court's prohibition of marijuana occurred in 1968. Commonwealth v. Leis, 355 Mass. 189 (1969).

The second in 1977. Marcoux *v.* Attorney General, 375 Mass. 63 (1978). The third in 2007. Commonwealth v. Cusick, 76 Mass.App.Ct. 1109 (2010) (Application for Direct Appellate Review denied in DAR-17711 and Further Appellate Review denied in FAR-18523, 456 Mass. 1104) (2010).

In Leis, this Court rejected defendants' claim that the prohibition was unconstitutional as "applied to the defendants, or either of them under the provisions of the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, part 1; Article IV, part 2; Article VII, part 1; Article XIV, part 1; and Article XXVI, part 1, of the Constitution of the Commonwealth of Massachusetts?'" Leis, supra at 190 – 191. The Marcoux court noting the constitutionality of any particular law must be judged as to its reasonableness on "a continuum of constitutional vulnerability determined at every point by the competing values involved." Marcoux, at 65, Fn 4. Concluding the right to use marijuana "merely recreational" though appellants' "interests surely have their place in the assortment of liberties protected by due process guaranties [] … they are

relatively weak [and] do not overcome those conventional reasons or justifications . … where judicial nullification of the proscriptive legislation appears unwarranted." Id. at 71. The Court closed by expressing its doubts about the wisdom of marijuana prohibition, but deemed it a legislative/political matter. Id. at 71 - 72.

This deference to the legislature and the political process is unwarranted by the reality that legislators do not always do their duty to "consider carefully, accurately, and in good faith the constitutional protections of liberty before infringing it." Restoring the Lost Constitution, supra at 260. See also, "The Essex Result, 1778," reprinted in The American Republic: Primary Sources, ed. Bruce Frohnen at 208 (Indianapolis: Liberty Fund, 2002) (http://oll.libertyfund.org/files/669/0082_LFek.pdf, last viewed January 30, 2014).

In Cusick, the Appeals Court, relying on Leis and Marcoux, rejected Appellants' argument that their motion to dismiss should not have been denied without an evidentiary hearing at which the burden would be on the government to produce expert testimony passing the strictures announced in Commonwealth v. Lanigan, 419

Mass. 15 (1994) to support criminalizing marijuana use by adults.

In all three cases, the Court relied on the rational basis test in examining the constitutionality of cannabis prohibition. Commonwealth v. Leis, 355 Mass. 189, 192; Marcoux v. Attorney General, 375 Mass. 63, 64, Commonwealth v. Cusick, 76 Mass.App.Ct. 1109 ("we are constrained, like the trial judge, to follow the decisions of the Supreme Judicial Court.")

In the upholding of constitutionality in Leis and Marcoux, the Court applied an extremely deferential 'rational basis' test. The rational basis test has evolved to be less deferential to the legislature and more respectful of individual rights and liberties. As the rational basis test applied today is different the questionable constitutionality of prohibition must be kept in mind deciding this case.

The modern rational basis test was used in Goodridge v. Department of Public Health, 440 Mass. 309 (2003) and Lawrence v. Texas, 539 U.S. 558 (2003). To do otherwise would be repugnant to Art. 29 of the Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.

III. Today's rational basis test.

In Goodridge, this Court held a law denying marriage licenses for same-sex couples was not rationally related to the three purposes advanced in the laws defense: "(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the department defines as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources." 440 Mass. 309, 331.

The Goodridge Court put some muscle into the rational basis test pointing out that it is not "toothless". Id. at Fn. 20.

The Supreme Court in Lawrence refused to employ the traditional 'rational basis' test, opting for an examination of whether the individual was invoking a liberty or a license (a license being an action that affects another). If an action is determined to be a liberty, the government must justify encumbering it. For the first time in the Court's history the presumption of liberty appeared freeing the Court from the struggle of deciding whether a prohibited action is an unenumerated fundamental right. Instead, the focus of the inquiry is whether the prohibited action

is a liberty. The dissent by Scalia takes accurate note of this:

> Though there is discussion of "fundamental proposition[s]," … and "fundamental decisions," … nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a "fundamental right." Thus, while overruling the outcome of *Bowers*, the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce … a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." 478 U.S., at 191. Instead the Court simply describes petitioners' conduct as "an exercise of their liberty" — which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.

Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

The decisions in Leis and Marcoux forced the people to seek protection by "resort to the polls, not to the courts," Williamson v. Lee Optical, 348 U.S. 483, 488 (1956). The result being injustice until the politicians either comply with art. 18 of the Declaration of Rights, or the people invoke their power of the initiative to protect the marijuana user from the usurpation by the legislature and predations of law enforcement enforcing it, i.e., de-

criminalization of marijuana, as well as to effectively provide medical marijuana, see footnote 4, supra, and are likely by initiative to replace prohibition in 2016.

Prohibition of cannabis possession to adults is not rational. It is contrary to art. 18 to presume the legislature "acted rationally and reasonably." Cf Leis, supra at 192. See Barnett, Restoring the Lost Constitution, supra at 260. That way lies the tyranny of the majority of the legislature, which too often only represents a plurality of the people. Though Marcoux, recognized that the:

> wisdom of such legislation (and of correlative laws as to distribution) remains under active and even vehement debate. The menace to health and safety is clearly not as grave as was once supposed and, some would say, is minor compared to the dangers of a number of substances not controlled or banned. See J. Kaplan, Marijuana - The New Prohibition (1970). The enforcement problems and evils encountered under current law need not be dwelt on. Some countervailing benefits have been intimated above. These all sum up as matters for legislative deliberation and disposition [… .]

Marcoux, supra at 71. Yet by not applying the more stringent "rational basis" test and striking down the law in 1978 forcing the issue, the legislature never seriously investigated or deliberated repealing

prohibition. Rather following Leis it merely reduced the penalty, while for thirty years people were arrested, prosecuted and punished for possession. Among the people arrested were Rick Cusick and his co-defendant Keith Stroup. Commonwealth v. Cusick, 76 Mass.App.Ct. 1109 (2010) See supra at .

By objective measures of use the prohibition of marijuana, like that of alcohol, is a failure. It is the most commonly used illicit substance. Supra. Fn. 1. Ever since Portugal stopped criminalizing drug possession, the amount of usage has significantly decreased. (See news article in Appendix). The forbidden fruit is a tale as old as time.

The most effective 'war' on a truly dangerous habit in modern history is likely that on tobacco. The significant decrease in use of tobacco was effectuated by education efforts based on science that passes the Lanigan test, not morality aimed at encouraging voluntary actions by citizens.

With the passage usage Statutes 2012, c. 369 which provides immunity to qualified patients this Court's decision on the issues addressed has great ramifications for patients traveling home from licensed treatment centers with their medicine. If

the mere odor permits delayed release by police following a traffic stop or attendance as here for providing assistance at an accident scene where no investigation of criminal motor vehicle laws is involved the intent of the voters in passing both initiatives will be defeated.

IV. Without a scale to obtain an objective weight, the discovery of a bag of cannabis which an officer believes may be over an ounce is not probative enough of a crime.

Inexpensive scales capable of weighing up to 4 ounces are readily available. Purchased in lots of 30 they cost less than $1.00.[§§§§§] See Appendix. Such a scale should be standard issue equipment to officers or cruisers. Such a piece of equipment like the measure used by natural resources officer to measure suspected "short" lobsters is consistent with the line drawn by the people in adopting Question 2. See Commonwealth v. Zdanowicz, 12 Mass App. Ct. 231 (1981). See Commonwealth v. DiGiambattista, 442 Mass. 423, 444 Fn. 21 (2004), where it is noted: "The issue

[§§§§§] This Court may take judicial notice of the availability of inexpensive scales as a fact "capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned." Mass. Guide to Evidence § 201(b)(2) and (c).

of financial cost … has not been identified as a significant obstacle to recording interrogations … . the cost of the equipment is minimal, and that cost is dwarfed by comparison to the costs of having officers spend countless hours testifying at hearings and trials … .” Or in this case spending hours testifying at motions to suppress and trials.

Alternatively, principles of proportionality required police to issue a citation and if upon returning to the station the weight turned out to be more than an ounce notify the defendant that they intended to seek a criminal complaint application and were voiding the citation. See Commonwealth v. Borges, 395 Mass. 482 (1985) (“The degree of intrusiveness on a citizen’s personal security, including considerations of time, space, and force, must be proportional to the degree of suspicion that prompted the intrusion.”) (Citation omitted). Passage of Question 2 was supposed to free possessors of an ounce or less of marijuana from having their persons seized and their persons and effects searched. Despite this Court’s past decisions, some officers continue to invade the rights of citizens based upon observations that while they may be probative of the commission of

the civil offense are not probative of the commission of a crime. Such unlawful police actions are unlikely to come before the Courts of the Commonwealth unless the police, acting only on suspicion, do uncover evidence of a crime and arrest or seek a complaint against the citizens. See Commonwealth v. Humberto, 466 Mass. 562 (2013).

Further, Officer Klink's belief that the bag weighed "probably over an ounce" and a strong smell of raw cannabis does not satisfy the requirements post decriminalization and Art. 14 to search the rest of the vehicle.

In order to justify a search under art. 14 of the Declaration of Rights probable cause of crime is required. Commonwealth v. Stoute, 422 Mass 782, 789 (1996). Cruz, 475-476.

The Commonwealth cites Gullick, Welch, Alessio, and Drew in support of the contention that Officer Klink's belief that bag weighed "probably over an ounce" (Tr. 11 /16), even though he "could not be sure" [R.A. 11]. Commonwealth v. Gullick, 386 Mass. 278, 283 (1982); Commonwealth v. Welch, 420 Mass. 646, 650 (1995); Commonwealth v. Alessio, 377 Mass . 76, 82

(1979); Commonwealth v. Drew, 4 Mass. App. Ct. 30, 32 (1976). This is a contention for speculation.

Ultimately, each case, except for Drew, is the progeny of Brinegar v. U.S., 338 U.S. 160 (1949), and ultimately, Carroll v. U.S., 267 U.S. 132 (1925).

Brinegar speaks of a man of caution, Carroll "a man of prudence and caution." 267 U.S. at page 161, 45 S.Ct. at page 288, 69 L.Ed. 543, 39 A.L.R. 790. Prudence is defined as "circumspect or judicious in ones dealings." Circumspect is defined as "wary and unwilling to take risks." All suggest that before depriving a person of any portion of their liberty consideration of what if one is wrong in their hunch.

There is nothing in the record from which to reasonably infer the officers acted with caution or prudence. Caution required further investigating as to weight. No pious and just man of prudence, a man wary and unwilling to take risks, would interfere with the liberty of a fellow human and conduct a search given the expressed doubt as to weight.

Aggressively pursuing small marijuana violations is not supported by the people of Massachusetts or the nation at large. The federal government no longer make the prosecution of marijuana crimes a priority. See,

U.S. Department of Justice Guidance Regarding Marijuana Enforcement, published August 29, 2013 appended to NORML's Amicus Brief submitted in the case of Commonwealth v. Craan, SJC-11436.

'I Know It When I See It' standard is not enough to justify search of defendants backpack.

V. The People have spoken.

Over the 30 years following the Marcoux decision, citizens of the Commonwealth urged the Legislature to reform the law and ultimately the people adopted Question 2 at the November 2008 State Election.

Thirty-three years to the day following Marcoux[‡‡‡‡‡‡] this honorable Court published its decision in Commonwealth v. Cruz, 459 Mass. 459 (2011) in its first decision articulating the people's intent when passing Question 2 with 65% of the vote. In Cruz this Court noted:

> The standard used to determine the validity of a warrantless search is the same as that used by a magistrate considering the application for a search warrant. (Citations omitted). (Footnote omitted) In Massachusetts, search warrants are issued by magistrates "authorized to issue [them] in criminal cases." G. L. c. 276, § 2B. (Footnote

[‡‡‡‡‡‡] April 19, Patriots' Day.

omitted) Moreover, this court concluded more than 150 years ago:

Search warrants were … confined to cases of public prosecutions, *instituted and pursued for the suppression of crime or the detection and punishment of criminals*… . The principles upon which the legality of such warrants could be defended, and the use and purpose to which, by the common law, they were restricted, were well known to the framers of our constitution. . . . Having this knowledge, it cannot be doubted that by the adoption of the 14th article of the Declaration of Rights it was intended strictly and carefully to limit, restrain and regulate the granting and issuing of warrants of that character to the general class of cases, in and to the furtherance of the objects of which they had before been recognized and allowed as justifiable and lawful processes, and certainly not so to vary, extend and enlarge the purposes for and occasions on which they might be used . . . ." (Emphasis added.)(Citation Omitted). Here, no facts were articulated to support probable cause to believe that a criminal amount of contraband was present in the car. We conclude, therefore, that in this set of circumstances a magistrate would not, and could not, issue a search warrant. Footnote omitted) (citation omitted). Because the standard for obtaining a search warrant to search the car could not be met, we conclude that it was unreasonable for the police to order the defendant out of the car in order to facilitate a warrantless search of the car for criminal contraband under the automobile exception. (Citation omitted).

Our conclusion is in accord with our oft-repeated principle of proportionality. (Citation omitted). In these circumstances, without probable cause that a crime is being committed, we cannot condone such an intrusive measure as a warrantless search. (Citation omitted). It also is supported by the intent of the ballot initiative, which was, in part, to free up the police for more serious

> criminal pursuits than the civil infraction of low-quantity marijuana possession. See Information for Voters: 2008 Ballot Questions, Question 2: Law Proposed by Initiative Petition, Possession of Marijuana. It is unreasonable for the police to spend time conducting warrantless searches for contraband when no specific facts suggest criminality.

VI. The police responding to a traffic accident had no cause to begin a criminal investigation as the odor of marijuana is not probative of ANY CRIME.

It appears from the record that the reason for the police presence had resolved when the 'investigation' of the odor of marijuana commenced. When the police began focusing attention on the odor of marijuana Overmyer was seized. "The interrogation … could not, as the judge appears to have recognized, be upheld on the line of cases that permit police examination of a person … that is consensual in nature." Commonwealth v. Torres, 424 Mass. 153, 159 (1997).

Overmyer, clearly did "not feel free to walk away while the [officer] persisted in questioning [him]" Id. (Citations Omitted). The odor of fresh marijuana provided police with a justification for issuing a civil citation as proof by a preponderance of the evidence of the presence of marijuana. It did not, as the trial Court concludes justify an inquiry as to the

source of the odor.‡‡‡‡‡‡‡ It does not provide probable cause to believe more than an ounce, a criminal amount is present, nor reasonable suspicion of a crime justifying a Terry type stop and inquiry. Terry, like Art. 14 is limited to the investigation of crimes.

From a policy perspective, allowing police to question anyone about the smell of cannabis after the reason for the encounter has ended and in this case after they benevolently called the police to report an accident would deter citizens from calling the police in situations like a minor traffic accident. Citizens would be scared that they would be subject to questioning like the defendant. Our law embraces the idea of incentives, e.g., offers to settle are not admissible, and such an incentive should be embraced here. If not, some other form of protection must be embraced, otherwise every accident scene an officer can question persons on the scene about suspicions of un-related matters. Another protection might be that a

‡‡‡‡‡‡‡As Defendant has not cross appealed as to the lawfulness of the inquiry about and seizure of the "fat" bag. This is not before the Court, but Amicus urges this Court announce a rule on such inquiries following olfactory observation to protect marijuana consumers from any more curtailment of their liberty than necessary to effectuate issuance of a civil citation.

notice of rights, like Miranda, should be provide in situations like these to protect the common good.

More generally, as the Appellee argues in his brief at pages 25 – 29 human olfactory observations are unreliable. They invite racial and age profiling as argued at pages 27 – 28 of Amicus Curiae Committee for Public Counsel Services.

Permitting olfactory observation without more to justify police questioning or to establish probable cause invites perjury as did the permitting of spectral evidence at the unfortunate trials in Salem. It invites intrusive discovery into the medical records of the accusing officer to discover if they had on date in question a reported olfactory impairment. It makes the atmospheric conditions relevant and a part of the Commonwealth's case in order to establish that the officer could make any observation of odor.

CONCLUSION - RELIEF REQUESTED

For the foregoing reasons, this Court should affirm the suppression order, deny the appeal, and rule that a police officer may not question a person about possible marijuana in his possession or control

based only on the officer's olfactory perception of the odor of unburned or burned marijuana; and, that absent objectively reasonable evidence derived from weighing a bag of marijuana suspected of weighing over an ounce police lack probable cause to search a person or their possessions.

Respectfully Submitted,

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APPENDIX

http://www.bonanza.com/listings/lot-of-30-pocket-postal-scale-keychains-100-grams-4-oz/111321135?gpid=21297750541&gpkwd=&goog_pla=1&gclid=CN2Fqea4qLwCFZNj7AodhgoAbA (Last viewed January 31, 2014)

"Portugal drug law show results ten years on, experts say" by AFP – Jul 1, 2011 – found at http://www.google.com/hostednews/afp/article/ALeqM5g9C6x99EnFVdFuXw_B8pvDRzLqcA?docId=CNG.e740b6d0077ba8c28f6d1dd931c6f679.5e1 (last visited February 12, 2014)

> LISBON — Health experts in Portugal said Friday that Portugal's decision 10 years ago to decriminalise drug use and treat addicts rather than punishing them is an experiment that has worked.
>
> "There is no doubt that the phenomenon of addiction is in decline in Portugal," said Joao Goulao, President of the Institute of Drugs and Drugs Addiction, a press conference to mark the 10th anniversary of the law.
>
> The number of addicts considered "problematic" -- those who repeatedly use "hard" drugs and intravenous users -- had fallen by half since the early 1990s, when the figure was estimated at around 100,000 people, Goulao said.
>
> Other factors had also played their part however, Goulao, a medical doctor added.
>
> "This development can not only be attributed to decriminalisation but to a confluence of treatment and risk reduction policies."
>
> Portugal's holistic approach had also led to a "spectacular" reduction in the number of infections among intravenous users and a significant drop in drug-related crimes, he added.
>
> A law that became active on July 1, 2001 did not legalise drug use, but forced users caught with banned substances to appear in front of special addiction panels rather than in a criminal court.
>
> The panels composed of psychologists, judges and social workers recommended action based on the specifics of each case.
>
> Since then, government panels have recommended a response based largely on whether the individual is an occasional drug user or an addict.
>
> Of the nearly 40,000 people currently being treated, "the vast majority of problematic users are today supported by a system that does not treat them as delinquents but as sick people," Goulao said.
>
> In a report published last week, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) said Portugal had dealt with this issue "in a pragmatic and innovative way."

> Drug use statistics in Portugal are generally "below the European average and much lower than its only European neighbour, Spain," the report also said.

"The changes that were made in Portugal provide an interesting before-and-after study on the possible effects of decriminalisation," EMCDDA said.

ADDENDUM

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G.L. c. 94C, sec. 32L

> Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense, subjecting an offender who is eighteen years of age or older to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of criminal or civil punishment or disqualification. An offender under the age of eighteen shall be subject to the same forfeiture and civil penalty provisions, provided he or she completes a drug awareness program which meets the criteria set forth in Section 32M of this Chapter. The parents or legal guardian of any offender under the age of eighteen shall be notified in accordance with Section 32N of this Chapter of the offense and the availability of a drug awareness program and community service option. If an offender under the age of eighteen fails within one year of the offense to complete both a drug awareness program and the required community service, the civil penalty may be increased pursuant to Section 32N of this Chapter to one thousand dollars and the offender and his or her parents shall be jointly and severally liable to pay that amount.
>
> Except as specifically provided in "An Act Establishing A Sensible State Marihuana Policy," neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance including unemployment benefits, to deny the right to operate a motor vehicle or to disqualify an offender from serving as a foster parent or adoptive parent. Information concerning the offense of possession of one ounce or less of marihuana shall not be deemed "criminal offender record information," "evaluative information," or "intelligence information" as those terms are defined in Section 167 of Chapter 6 of the

General Laws and shall not be recorded in the Criminal Offender Record Information system.

As used herein, "possession of one ounce or less of marihuana" includes possession of one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannibinoid metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body. Nothing contained herein shall be construed to repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marihuana or tetrahydrocannabinol, laws concerning the unlawful possession of prescription forms of marihuana or tetrahydrocannabinol such as Marinol, possession of more than one ounce of marihuana or tetrahydrocannabinol, or selling, manufacturing or trafficking in marihuana or tetrahydrocannabinol. Nothing contained herein shall prohibit a political subdivision of the Commonwealth from enacting ordinances or bylaws regulating or prohibiting the consumption of marihuana or tetrahydrocannabinol in public places and providing for additional penalties for the public use of marihuana or tetrahydrocannabinol.

G.L. c. 94C, sec. 34

No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. Except as provided in Section 32L of this Chapter or as hereinafter provided, any person who violates this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment. Any person who violates this section by possessing heroin shall for the first offense be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both, and for a second or subsequent offense shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years or by a fine of not more than five thousand dollars and imprisonment in a jail or house of correction for not more than two and one-half years. Any person who violates this section by possession of more than one ounce of marihuana or a controlled substance in Class E of section thirty-one shall be punished by imprisonment in a house of correction for not more than six months or a fine of five hundred dollars, or both. Except for an offense involving a controlled substance in Class E of section thirty-one, whoever violates the provisions of this section after one or more convictions of a violation of this section or of a

felony under any other provisions of this chapter, or of a corresponding provision of earlier law relating to the sale or manufacture of a narcotic drug as defined in said earlier law, shall be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both. [snip]

Massachusetts Evidence Guide, sec. 201

Judicial Notice of Adjudicative Facts

(a) Scope. This section governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either

(1) generally known within the territorial jurisdiction of the trial court or

(2) capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned.

(c) When Taken. A court may take judicial notice at any stage of the proceeding, whether requested or not, except a court shall not take judicial notice in a criminal trial of any element of an alleged offense.

(d) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(e) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that they may, but are not required to, accept as conclusive any fact which the court has judicially noticed.

CERTIFICATION OF COUNSEL

Mass. R.App.P. 16(k) CERTIFICATION: I hereby certify that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6) ("Any written or oral findings or memorandum of decision by the court pertinent to an issue on appeal included as an addendum to the brief"); Rule 16(e) (references to the record); Rule 16(f) ("If determination of the issues presented requires consideration of constitutional provisions, statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end"); Rule 16(h) (length of briefs); Rule 18 (appendix to the briefs); and Rule 20 (form of briefs, appendices, and other papers).

CERTIFICATE OF SERVICE: I hereby certify under the penalties of perjury, and pursuant to Mass. R.App.P. 13 and 19, that on this date I delivered to a delivery service: Two copies of this brief, for delivery to appellant's counsel, John P. Bossé; to appellee's counsel, Janet H. Pumphrey; one copy to Esther J. Horwich, Amicus Curiae CPCS' counsel and to this Court, this date being within the time fixed for filing, "no later than two weeks before the first day of the sitting in which the case is scheduled for argument".

Dated: February 14, 2014

Steven S. Epstein