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To Hon. Justice of the Berkshire Superior Court:

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School authors this letter to support the motion for new trial prepared on behalf of Annette Stewart-Leitzsey. In particular, we write to offer additional backing for Ms. Stewart-Leitzsey's claim that the trial judge erred in failing to charge the jury on a reasonable provocation theory of manslaughter in her case.

Eight months ago, the seven Justices of the Supreme Judicial Court implored the legal community to "recognize and confront the inequity and injustice that is the legacy of slavery, of Jim Crow, and of the disproportionate incarceration of African-Americans, and challenge the untruths and unfair stereotypes about African-Americans that have been used to justify or rationalize their repression."[1] Ms. Stewart-Leitzsey's case offers an opportunity to reconsider how stereotypes about Black women have long led to both their victimization and criminalization—and how our law has long excused the behavior of men but failed to find remorse and empathy for Black women.

In 1991, Attorney Spina persuasively argued that if the jury were to find that Ms. Stewart-Leitzsey had committed the killing in this case, she should be entitled to an adequate provocation manslaughter instruction. He analogized the facts of her case to precedent holding that words communicated by a wife to her husband that she is having an affair are legally sufficient to mitigate his killing her in response.[2] *Commonwealth v. Schnopps*, 383 Mass. 178, 181–82 (1981). Attorney Spina argued that the racist, sexist attack hurled at Ms. Stewart-Leitzsey, a Black woman, by a white man—embedded with histories of trauma and violence—coupled with his threat to call the police on her should also be deemed sufficient provocation to mitigate her resulting act of killing him to manslaughter.

It is important to recognize that the adequate provocation defense is primarily an excuse defense, not a justification defense. As Professor Joshua Dressler explained in 1987, a justification defense negates or mitigates the social harm of an offense, but an excuse defense negates or mitigates the moral blameworthiness of the actor for causing the harm.[3] The difference, in other words, is that

[1] *Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar*, MASS.GOV (June 3, 2020), https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and.
[2] *See also Commonwealth v. LeClair*, 429 Mass. 313, 316–17 (1999).
[3] Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1161–63 (1987); *see also* Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1682 n.18 (2005) ("An

we deem *righteous* those who are justified, and we offer *mercy* to those who are excused. To say that someone was adequately provoked is not to say that what they did was good, but rather to recognize that harm was caused, that culpability exists, and *also* that context matters. Excuse defenses are therefore especially vulnerable vectors for codifying and enacting societal prejudices, because our moral judgment is easily inflamed by, and our empathy easily displaced by, the toxic comingling of racism, sexism, and fear.[4]

Statistical realities bear this out. Between 2005 and 2010, among cases nationwide where a woman killed an adult man, white women who killed Black men were most likely to be found justified, at 13.5% of the cases; by contrast, just 2.9% of cases in which Black women killed white men were found to be justified.[5] Among homicides overall (perpetrated by both men and women), 11.4% of killings of Black people committed by white people were found justified, compared to 1.2% of killings of white people committed by Black people.[6] Unfortunately, data showing how often Black people who killed white people were *excused* for killings—when murder charges are mitigated to manslaughter—are limited.[7]

The report released last fall by Harvard Law School's Criminal Justice Policy Program on racial disparities in sentencing in Massachusetts finds recent evidence that "Defendants of color are much more likely to be initially charged with murder than White defendants, with Black defendants facing murder charges at a rate over six times higher than their White counterparts."[8] However, "Black and Latinx defendants are much more likely to have their initial murder charges reduced to manslaughter or some other final charge in those cases where we are able to observe the final

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actor who satisfies the conditions of a full excuse is conventionally portrayed as one who has done something wrongful, but he has done so in or under circumstances rendering him blameless.").

[4] *See, e.g.*, Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on A Difficult Subject*, 86 MINN. L. REV. 959, 961 (2002) ("Heat-of-passion law has been the subject of ethical, and most especially, feminist attack. We are told that '[v]oluntary manslaughter [heat-of-passion doctrine] has never been a female-friendly doctrine' and, indeed, 'continues to perpetuate a violent form of male subordination of women.'" (citations omitted)); *see also generally* Aya Gruber, *A Provocative Defense*, 103 CAL. L. REV. 273, 322–32 (2015); Camille A. Nelson, *(En)raged or (En)gaged: The Implications of Racial Context to the Canadian Provocation Defence*, 35 U. RICH. L. REV. 1007, 1015 (2002) ("[C]alls for the wholesale abandonment of the provocation defence may produce the result of foreclosing from trial consideration a contextual assessment of the possible role of racism as a cause and mitigator of a murder.").

[5] Irin Carmon, *Can Women Stand Their Ground? Depends on the Target*, MSNBC (Mar. 17, 2014), https://www.msnbc.com/msnbc/can-women-stand-their-ground-msna288011.

[6] John Roman, Urb. Inst., Written Testimony Submitted for the Record before the Senate Committee on Judiciary Subcommittee on Constitution, Civil Rights and Human Rights, 'Stand Your Ground' Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force, (Oct. 29, 2013), https://www.urban.org/sites/default/files/publication/24476/904607--Stand-Your-Ground-Laws-Civil-Rights-and-Public-Safety-Implications-of-the-Expanded-Use-of-Deadly-Force.PDF.

[7] *See* Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 174–75 (2014) ("If favored defendants historically have been able to use provocation to avoid murder charges, just as whites who killed blacks were able to avoid the noose, one fairly could expect history to be replete with instances of disfavored defendants or those who kill favored victims (i.e. black men who killed white men or women) being barred ex ante from invoking provocation. But we do not talk about those defendants. In fact, we do not know about those defendants. Statistics on the global effects of restricting the provocation defense are extremely difficult to unearth.").

[8] ELIZABETH TSAI BISHOP ET AL., CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM 61 (2020), http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf.

charge of conviction."[9] These data mostly speak to the over-charging and up-charging experienced by defendants of color;[10] the report does not offer any insight into patterns of disparate state mercy for cross-racial killings, especially those which may have been provoked.

In the instant case, the prosecutor's theory of motive at trial was that Earl Lewis called Ms. Stewart-Leitzsey a "black bitch" and threatened to call the police to have her arrested, provoking her to stab him to death. This racist and sexist slur delivered with "inflammatory information," *LeClair*, 429 Mass. at 316–17, should have been sufficient to warrant a manslaughter instruction.[11] The threshold for a manslaughter instruction is not onerous. Longstanding precedent counsels that "If any view of the evidence . . . would permit a verdict of manslaughter rather than murder, a manslaughter charge should be given." *Commonwealth v. Brooks*, 422 Mass. 574, 578 (1996). Even if the "question whether to give a manslaughter instruction is at all close . . . , prudence favors giving the instruction." *Commonwealth v. Felix*, 476 Mass. 750, 757 (2017).

The particular facts of Mr. Lewis's verbal assault against Ms. Stewart-Leitzsey amount to more than "words alone"—indeed, it is exactly the type of conduct that would produce "passion, anger, fear, fright, or nervous excitement in a reasonable [Black woman]," as the reasonable provocation standard requires. As scholar Camille A. Nelson has written, "Racial epithets, or the weaponry of words, are a quintessential example of calculated attacks intentionally meant to inflame or wound the person at whom they are directed."[12] Indeed, Professor Nelson identifies the particular phrase at issue here—"Black bitch"—as a specifically abusive epithet implicating both the race and sex of the person to whom it is directed, which as of more than 15 years ago had appeared in more than 200 reported cases of various contexts.[13]

Racist and sexist epithets like this by their nature demean someone on the basis of immutable characteristics and are weaponized in the context of disparate structural and institutional power and oppression; in this way, unlike other insults, they are calculated to bring about an impassioned response and leveraged in order to cause a particular dignitary harm that is different in kind, not merely degree, from other common jibes.[14] The combined force of the threat of arrest and the use of this notoriously sexist and racist phrase make Mr. Lewis's conduct much more like an

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[9] *Id.*

[10] *See, e.g.*, Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587 (1985).

[11] *Cf.* Jonathan Witmer-Rich, *The Heat of Passion and Blameworthy Reasons to Be Angry*, 55 Am. Crim. L. Rev. 409, 436 (2018) ("[T]he jury should be educated on the history of discrimination—and the role of the "N-word"—in denigrating black persons in America. It makes no sense to consider this insult from the perspective of a white person, as this insult does not denigrate white persons. 'Even if jurors were to do more than simply switch the races of the parties, such as replacing the N word with the word "honky," race-switching might still be inappropriate' because whites do not have the same history of racism, and racial slurs, as blacks." (quoting CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 224–25 (2003))).

[12] Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77, 114 (2003).

[13] *Id.* at 114–15 ("Bohanon utilizes the epithet '[B]lack bitch,' which implicated both the race and sex of the victim. A simple electronic search reveals that this particular slur was used in over 200 reported cases to abuse Black women. The reported cases no doubt comprise only the tip of the iceberg. The searches referenced in this Article reveal that words are indeed frequently and intentionally deployed in abusive ways.").

[14] *See generally* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (collecting research on the harms of racial epithets).

immediate threat of violence than a mere insult. There is a long history (and urgent present) of white people using the threat of state violence against Black people to intimidate, harass, and cause harm. Further, the Commonwealth's courts have long recognized the harms of the disparate policing of Black people.[15] In the criminal legal system, Black women experience intersecting systematized discrimination on the basis of both race and gender.[16] The experience of this specific racial epithet coupled with the threat of calling the police together provided reasonable provocation, warranting a manslaughter instruction.[17]

Finally, we also note that a "heat of passion" defense has likely long been denied to Black women in circumstances similar to Ms. Stewart-Leitzsey given pervasive stereotypes about Black women as being angry, incensed, irrational, or emotional—the "Angry Black Woman."[18] Prosecutors, judges, and juries enacting implicit bias may be less willing or able to see Black women as acting from the heat of passion if, based on intersecting racial and gender stereotypes, they are prone to see Black women as in a perpetual state of rage. This provides ever more reason why our courts should combat "the unfair stereotypes about African-Americans that have been used to justify or rationalize their repression," as the Justices of the Supreme Judicial Court implore us, by conscientiously opening the defense of adequate provocation to circumstances involving weaponized sexist and racist slurs, especially where paired with the threat of unwanted police contact. As Professor Aya Gruber insightfully explains, "It is not leniency that creates racialized

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[15] *Commonwealth v. Long*, 485 Mass. 711, 717–18 (2020) ("This court has identified the discriminatory enforcement of traffic laws as particularly toxic. . . . The discriminatory enforcement of traffic laws is not a minor annoyance to those who are racially profiled. To the contrary, these discriminatory practices cause great harm."); *Commonwealth v. Evelyn*, 485 Mass. 691, 708 (2020) ("[T]his pattern of racial profiling has been confirmed by more recent FIO reports."); *Commonwealth v. Williams*, 481 Mass. 443, 451 n.6 (2019) (collecting studies showing "ample empirical evidence" to support a conclusion that "African-American males receive disparate treatment in the criminal justice system"); *Commonwealth v. Buckley*, 478 Mass. 861, 876–77 (2018) (Budd, J., concurring) ("Years of data bear out what many have long known from experience: police stop drivers of color disproportionately more often than Caucasian drivers for insignificant violations (or provide no reason at all)."); *Commonwealth v. Warren*, 475 Mass. 530, 539–40 (2016) ("[B]lack men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. Black men were also disproportionally targeted for repeat police encounters."); *Commonwealth v. Lora*, 451 Mass. 425 (2008); *Commonwealth v. Feyenord*, 445 Mass. 72, 88 (2005), *cert. denied*, 546 U.S. 1187 (2006) (Greaney, J., concurring) (discussing "humiliating, painful, and unlawful" nature of some police encounters targeting African-American and Hispanic individuals); *Commonwealth v. Gonsalves*, 429 Mass. 658, 670 (1999) (Ireland, J., concurring) (collecting studies on disparate policing of Black and Hispanic people in traffic stops); *Commonwealth v. Phillips*, 413 Mass. 50, 53 (1992) (describing informal Boston Police "search on sight" policy which enacted "martial law" for young Black people in Roxbury).

[16] *See, e.g.*, Kali Nicole Gross, *African American Women, Mass Incarceration, and the Politics of Protection*, 102 J. AM. HIST. 25 (2015); Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39 (2017).

[17] *See* Camille A. Nelson, *(En)raged or (En)gaged: The Implications of Racial Context to the Canadian Provocation Defence*, 35 U. RICH. L. REV. 1007, 1018 (2002) ("[I]nsults and acts which effectively further oppress persons from equality-seeking communities based upon protected grounds . . . should be sufficient to ground the defence. . . . Acts or insults which are provocative due to the accused bearing the burden of racism, or other systemically oppressive forces . . . may properly be seen as provocative.").

[18] *See, e.g.*, J. Celeste Walley-Jean, *Debunking the Myth of the "Angry Black Woman": An Exploration of Anger in Young African American Women*, 3 BLACK WOMEN, GENDER + FAMILIES 68 (2009); Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017 (2016-2017).

visions of criminality."[19] Broadening the law to find mercy for and offer leniency to the victims of racist and sexist verbal attacks would be a step toward equity.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The **Charles Hamilton Houston Institute for Race and Justice** (CHHIRJ) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed.

[19] Gruber, *supra* note 4, at 329.