# [INSERT IN YOUR OMNIBUS MOTION AS A BASIS FOR DISMISSAL, ALONG WITH ANY OTHER GROUNDS FOR DISMISSAL]

**[These template allegations are only meant to assist you in formulating your own motion to dismiss on grounds of selective enforcement. Conform to the facts of your case, consider carefully and admissions you make on your client’s behalf, and include any other challenges to the indictment].**

**MOTION TO DISMISS ON THE GROUND OF SELECTIVE PROSECUTION.**

x. This affirmation is made in support of my client’s motion to dismiss the indictment on the ground that s/he was the victim of selective enforcement of the laws, in violation of his/her right to equal protection under the state and federal constitutions, because law enforcement’s stop of his/her car was motivated in part or in full by my client’s race rather than the traffic infraction he/she was alleged to have committed. U.S. Const., amend. XIV; N.Y Const., art. I, § 11. Unquestionably, the police may not stop a motorist based on race or any other invidious classification.

x. My client is **[race/ethnicity]**.

x. The sources of my information and belief **include [e.g., court records, public records, conversations had with my client and with various Assistant district Attorneys, data provided through discovery, etc]**.

x. My client stands charged with **[charges]**. These charges are subject to dismissal

as the direct fruit of the constitutional violation my client suffered at the hands of the police. See

U.S. Const., amend. XIV; N.Y Const., art. I, § 11; Wong Sun v. United States, 371 U.S. 471, 477-78 (1963).

x. On information and belief, my client was stopped by officers **[provide circumstances of the stop - include any relevant circumstance showing that your client was singled out and that it was a pretext. For example, if the stop was supposedly for speeding, were there other cars that passed your client’s car immediately before the stop that weren’t stopped? Can you allege that those drivers were white?]**

x. Selective enforcement rules protect citizens where the government acts “with an

unequal hand” and “an evil eye” in the enforcement of its laws. 303 West 42nd Street Corp. v.

Klein, 46 N.Y.2d 686, 693 (1979) (“Klein”). It is a constitutional argument grounded in equal

protection. Id. The principle has been recognized in cases involving the enforcement of the

criminal laws. Id. The Court of Appeals has held that claims of selective enforcement should be

brought by a pretrial motion to dismiss on constitutional grounds. See People v. Goodman, 31

N.Y. 2d 262 (1972). On a motion to dismiss, the court must conduct a hearing if, on the papers

before it, “a strong showing of selective enforcement, invidiously motivated, appears.” Klein, at 693.

x To prove discriminatory purpose, it has been suggested that motorists of color alleging that a traffic stop constituted a denial of equal protection must show that similarly

situated white motorists who could have been stopped, were not. United States v. Armstrong, 517 U.S. 456, 465 (1996). While there is extensive and compelling data and scholarship establishing racial disparities in traffic enforcement in the State1 – including in observations by

1 Charles R. Epp et al., *Pulled Over: How Police Stops Define Race and Citizenship* 2 [2014] [each year about 12% of all drivers are stopped by the police, and the share of Black drivers stopped is about double] ); Emma Pierson et al., *A Large–Scale Analysis of Racial Disparities in Police Stops Across the United States, Nature Human Behaviour* [2020], available at [http://web.stanford.edu/~csimoiu/doc/traffic-stops.pdf](http://web.stanford.edu/%7Ecsimoiu/doc/traffic-stops.pdf) [study of 95 million traffic stops finding Black drivers were more likely to be stopped, ticketed, searched, and arrested than white drivers, and that Hispanic drivers, when stopped, were more likely to be ticketed, searched, and arrested than white drivers]; Robert E. Worden et al., *Traffic Stops by Suffolk County Police* 7, 48 [Sept.2020], available at https://suffolkcountyny.gov/Portals/0/formsdocs/police% 20reform/Traffic% 20Stops% 20by% 20Suffolk% 20County% 20Police% 2010.19.2020.pdf [study of over 130,000 traffic stops by Suffolk police finding that, compared to white drivers, Black and Hispanic drivers were more likely to be stopped for equipment violations, Black drivers were over three times more likely to be subjected to physical force, and Hispanic drivers were 16% more likely to be searched and 16% more likely to be arrested]; New York Law School, Racial Justice Project, *Driving while Black and Latinx: Stops, Fines, Fees, and*

New York Court of Appeals Judges2 – on information and belief, no data is maintained showing

whether law enforcement does not enforce the traffic laws against similarly situated white drivers.

x. The Court of Appeals has stated that “[l]atittude should be allowed in this

complex area of proof.” Klein, 46 N.Y.2d at 693. In Commonwealth v. Long, 485 Mass. 711 (2020), the Massachusetts high court attacked this very problem in the context of racial profiling in traffic stops. Recognizing that “the right of drivers to be free from racial profiling will remain illusory unless and until it is supported by a workable remedy,” the court created a framework which allows a defendant to show that he or she was the victim of selective enforcement without the necessity of statistical data – data either unavailable or inaccessible. The court identified six, non-exclusive, factors that a court should consider in determining whether the defendant raised a “reasonable inference” of selective enforcement:

1. Patterns in enforcement actions by the particular officer - i.e. if a significant percentage of stops the officer made involved drivers of the same race for minor traffic violations.
2. Regular duties of the officer involved in the stop - i.e., an officer assigned to a

*Unjust Debts* (Feb. 2020), available at

https://finesandfeesjusticecenter.org/content/uploads/2020/02/RJP.-Drivers-License-Suspension.-Final.pd f [noting that although statewide data is not available, state police date compiled in seven New York Counties, as well as data from Suffolk County and Buffalo, show that people of color are disproportionately stopped by law enforcement. In 2017, Black individuals accounted for 31.38 percent of the New York State Police’s traffic stops in Monroe county, yet made up just 14.4 percent of the county’s population. In 2018, Black individuals accounted for 17.69 percent of the Suffolk County Police Department’s traffic stops, yet made up just 7.2 percent of the county’s population); Rushin and Griffin, An Empirical Assessment of Pretextual Stops and Racial Profiling, 73 Stn. L. Rev. 637 (March 2021)(employing a novel analysis of a newly available dataset, the Article analyzes almost 9 million traffic stops in Washington State, from 2008-2015, to illustrate empirically that judicial doctrines permitting police officers to engage in pretextual traffic stops contribute to a statistically significant increase in racial profiling of minority drivers).

2 See People v. Robinson, 97 N.Y.2d at 366-67 (Levine, J., dissenting); People v.Pena, 36 N.Y.3d 978, 990, 997-98 (Wilson, J. and Rivera, J. dissenting).

specialized unit, such as a gang unit or the domestic violent unit, suggests that the traffic enforcement is not a primary objective;

1. Sequence of events prior to the stop - i.e., if the officer followed the vehicle for an extended period of time;
2. The manner of the stop - i.e., whether the officer’s conduct, or the duration of the stop, was consistent with enforcement of a motor-vehicle violation;
3. The safety interests in enforcing the motor-vehicle violation - i.e., did the driver's conduct impact public safety (such as operating under the influence); and
4. The specific police department’s policies and procedures regarding traffic stops

- i.e., if an officer’s conduct deviates from specific policies.

x. In addition, the Appellate Division, Second Department found in People v. Jones that the inquiry of whether a traffic stop was premised on racial profiling includes “for example, whether the arresting officers were involved in a plausible investigation prior to executing the vehicle stop” as well as “consideration of the officers’ actions and comments during the encounter.” 210 A.D.3d 150, 156 (3d Dep’t 2022).

x. My client has made a prima facie, “colorable” showing” of the merits of his/her

claim of selective enforcement, Klein, 46 N.Y.2d at 695 – that the traffic laws were enforced with an “unequal hand and an evil eye” – to warrant an evidentiary hearing on his/her motion to dismiss.

1. Specifically, the defense sets forth the following:
   1. My client is a **[race/ethnicity]** person such that the selective enforcement of the laws that he/she alleges is based on an impermissible standard, see Klein at 693.
   2. Black and Latinx drivers in New York State and throughout the country are disproportionately stopped for committing traffic infractions. See fns. 1 and 2, ante **[If you are in one of the seven New York Counties, or Suffolk or Buffalo, the areas specifically referenced in New York Law School’s Fines and Fees report, reference that data].**
   3. Relevant statistical data obtained in connection with this case includes the following: [explain any data you obtained about traffic stops in your community, or the officer’s specific history, how accumulated, determine what the data means statistically if possible- this may require an expert. If you were not able to obtain data, explain your efforts and the results].
   4. In connection with the stop of my client’s car, certain facts stand out: [list any facts that support racial profiling and pretext]. These circumstances alone give rise to an inference of discriminatory purpose sufficient to require a hearing, consistent with the “latitude” the Court of Appeals has said is appropriate in this area. Klein, 46 N.Y.2d at 693. Even if deemed a departure from current law regarding the proof burden, this court should adopt this framework under state and federal constitutional principles of equal protection and due process and in light of our state’s unique commitment to achieving racial justice and equity, as reflected in the broader language of our state constitution’s equal protection clause.3 U.S. Const., amends., IV; N.Y. Const., art. 1, §§ 6, 11; see Commonwealth v. Long, 485 Mass. 711 (2020).

x. Wherefore, **[Client name]** seeks an order dismissing the charges against him/her, or, alternatively, a hearing on this motion.

3 The Fourteenth Amendment guarantees that “[no State] shall . . . deny to any person . . . the equal protection of the laws.” But Article 1, § 11 has even broader language: “no person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to *any discrimination in his or her civil rights* by any person or by any firm, corporation or institution, or by this state or any agency or subdivision of the state.” (Emphasis added).