IN THE COURT OF APPEALS OF MARYLAND

No. 93
September Term, 2022

TYRIE WASHINGTON,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

BRIEF OF *AMICI CURIAE* THE PUBLIC JUSTICE CENTER, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AND ACLU OF MARYLAND IN SUPPORT OF PETITIONER

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May 17, 2022

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STATEMENTS OF INTEREST

The **Public Justice Center ("PJC")** is a non-profit civil rights and anti-poverty legal organization established in 1985. PJC uses impact litigation, public education, and legislative advocacy through a race equity lens to accomplish law reform for its clients. Its Appellate Advocacy Project expands and improves representation of disadvantaged persons and civil rights issues before the Maryland and federal appellate courts. The PJC has a demonstrated commitment to opposing institutionalized racism and pursuing racial equity in the judicial system. *See, e.g.*, *Smith v. State*, COA-REG-0061-2021 (*amicus*); *Belton v. State*, COA-PET-0031-2021 (*amicus*); *Aleti et ux. v. Metro. Balt. LLC, et al.*, COA-REG-0039-2021 (*amicus*); *Sizer v. State*, 456 Md. 350 (2017) (*amicus*).

Amicus **Washington Lawyers' Committee for Civil Rights and Urban Affairs** is a nonprofit civil rights organization established to eradicate racial discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy in the District of Columbia, Virginia, and Maryland. Since its founding in 1968, the Washington Lawyers' Committee has worked to reform the criminal justice system, including an active docket of prisoners' rights litigation.

American Civil Liberties Union of Maryland (ACLU) is the state affiliate of the ACLU, a nationwide, nonprofit organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Maryland is deeply committed to principles of race equity, endeavoring not only to defend people's rights but also to upend the systems of bias that undergird the structures and institutions we operate within. We cannot defend civil rights and civil liberties

without also challenging the implicit bias and systems that perpetuate white supremacy, which itself fuels the rights violations that the ACLU of Maryland is pledged to challenge. A core function of our legal work is to root out the bias ingrained within our institutions so that we may build a more equitable society that serves the interest of justice for all.

INTRODUCTION

The Petition asks this Court to define and limit the "high crime area" and "unprovoked flight" factors when considering whether reasonable suspicion supports a *Terry* stop. *See Illinois v. Wardlow*, 528 U.S. 119 (2000). This Court has applied those factors, *Sizer v. State*, 456 Md. 350, 367 (2017), but has not clarified their precise meaning and limitations, as the lower court expressly highlighted. *See Washington v. State*, No. 0739, 2022 WL 873315, at *6–8 (Md. Ct. Spec. App. Mar. 24, 2022) (questioning the validity of the factors in this case but concluding this Court's review is necessary to constrain them). Until the Court does so, these factors will serve as proxies for race, stacking the Fourth Amendment deck against Black and Latine Marylanders. Therefore, this appeal is of extraordinary public interest, and the review of this Court is desirable. Md. Rule 8-303(b)(1).

ARGUMENT

The "high-crime area" and "unprovoked flight" factors must be limited so they cannot serve as proxies for race.

Race is an "arbitrary," not "reasonable," basis for suspicion. Skin color bears no inherent relation to engaging in crime. Only generalizations and stereotypes *about* race

could link it to criminal activity. And that kind of reasoning is not objectively reasonable as applied to any single individual. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000) ("Reasonable suspicion requires *particularized* suspicion."); *cf. United States v. Avery*, 137 F.3d 343, 355 (6th Cir.1997) ("If law enforcement [stops] a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred.").

Yet it would be naïve—to put it generously—to think that race does not routinely inform the traffic stops and pat-downs that police carry out every day. *See Montero-Camargo*, 208 F.3d at 1135 n.24 ("A significant body of research shows that race . . . is often the defining factor in police officers' decisions to arrest, stop or frisk potential suspects."); *see, e.g.*, Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature: Hum. Behavior 736, 740–42 (2020) (finding, in analysis of nearly 100 million traffic stops, that Black and Latine drivers are disproportionately stopped by police, and that the effect decreases after sunset, when a driver's race is less apparent). Indeed, being regarded as inherently suspicious is a common feature of the minority experience in America. *See, e.g.*, *Curry v. United States*, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, J., concurring) ("[M]any of our fellow citizens already feel insecure" in "a society where some are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles"); Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 Am. Univ. L.

Rev. 863, 865–68 (2020) (discussing the "torrent of media reports of white Americans calling the police when they perceived that Black people were occupying spaces where they ought not be," including "in public parks; at youth sporting events; at community pools; in retail stores; in university classrooms, dining halls and dormitories; in parking lots; and on the sidewalk, among other places").

This state of affairs should be incompatible with the Fourth Amendment. *See United States v. Sokolow*, 490 U.S. 1, 12 (1989) (Marshall, J., dissenting) ("By requiring reasonable suspicion . . . , the Fourth Amendment protects innocent persons from being subjected to 'overbearing or harassing' police conduct . . . on the basis of irrelevant personal characteristics such as race."). Some criteria for reasonable suspicion are so broad, however, that police effectively have boundless discretion to justify stops, and race is "routinely and improperly used as a proxy for criminality." *See Montero-Camargo*, 208 F.3d at 1135 n.24.

The "high-crime area" factor is a prime example. In *Wardlow*, the Supreme Court "provided remarkably little guidance on how to interpret and implement the high-crime area standard in practice." Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 Calif. L. Rev. 345, 347–48 (2019). Without a clear definition from the courts, police "enjoy wide discretion to define high-crime areas however they want" while avoiding "meaningful judicial scrutiny" because courts will typically "defer to the expertise of the police officer." *Id.*; *see, e.g.*, *Montero-Camargo*, 208 F.3d at 1143 (Kozinski, J., concurring) ("[I]t's a high-crime area because the officers say it's a high-crime area."). Thus, because "the demographics of those who reside in high crime

neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances," the high-crime area factor results in many Black and Latine people effectively facing a lower bar for being stopped by the police. *See United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013); *United States v. Griffin*, 589 F.3d 148, 158 (4th Cir. 2009) (Gregory, J., dissenting) ("[W]e relegate those unfortunate enough to live in such 'high crime areas' to second-class citizenship for purposes of the Fourth Amendment.").

Some courts may see no problem with that: any correlation with race and class is only incidental to a high-crime area's substantive correlation with crime, so the factor still meaningfully guides the reasonable suspicion inquiry. But there is little evidence—under the present regime—that any underlying justifications for the factor hold up to scrutiny. For "high-crime area" designations to have "predictive power," they would have to be limited in geographic scope; be accurately assessable by police officers; and actually correlate with increased criminal activity among bystanders. *See* Grunwald & Fagan, *supra*, at 348–49. In a study of over two million stops in New York City, researchers found that none of these justifications played out in practice. Officers applied the factor "to large geographic areas" and "in 57 percent of all stops—more often than any other basis of reasonable suspicion." *Id.* at 350 ("[O]fficers are claiming that every block in New York City is high crime at one time or another."). And officers' assessments of whether areas are, in fact, high crime "appear inaccurate." *Id.* at 350–51 (finding "actual crime rates predicted only one percent of the variation" in where the factor is used, which correlated more strongly with racial demographics). Finally, the

factor did not correlate with increased likelihood of finding contraband; in fact, "the probability of an arrest or the recovery of a weapon *decreases* when an officer invokes [high-crime area] to justify the stop." *Id.* ("[This] suggests that officers may invoke [the factor] to manufacture the appearance of reasonable suspicion in their weakest stops.").

Although the high-crime area factor cannot support reasonable suspicion alone, it can when coupled with the "unprovoked flight" factor, which also has a significant racial dimension. "[I]t is beyond dispute that many members of the Black community," along with other people of color in highly policed communities, "have justified fear of interaction with the police." *Alexander v. State*, No. 500, 2022 WL 833375, at *12 (Md. Ct. Spec. App. Mar. 21, 2022) (Friedman, J., concurring); *see also Dozier v. United States*, 220 A.3d 933, 944 (D.C. Ct. App. 2019) ("[Fear of the police] is particularly justified for persons of color, who are more likely" to face "hyper-vigilant" "police surveillance"); *People v. Horton*, 142 N.E.3d 854, 868 (Ill. App. Ct. 2019) (concluding, from federal policing investigations, that "one can readily understand why a young black man having a conversation with friends in a front yard would quickly move inside when seeing a police car"). Thus, especially for Black and Latine youth, "flight from the police is just as likely to reflect a personal desire to avoid contact with a corrupt system as it is to be consciousness of guilt." Kristin N. Henning, *The Reasonable Black Child*, 67 Am. U.L. Rev. 1513, 1554 (2018); *see also* Jocelyn R. Smith Lee & Michael A. Robinson, *"That's My Number One Fear in Life. It's the Police."*, 45 J. Black Psych. 143, 157–68 (2019) (finding, in qualitative study of Black youth in Baltimore, that "exposures to

witnessing, experiencing, and grieving police violence shaped participants' appraisals of their vulnerability to police violence").

In sum, because these factors correlate with race but are not meaningfully defined, they effectively authorize racial profiling. What results is an equivocal Fourth Amendment: "liberty from governmental intrusion can be taken for granted in some neighborhoods, while others 'experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures.'" *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 348 (4th Cir. 2021) (quoting Devon W. Carbado, *The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 130 (2017)); *see also Montero-Camargo*, 208 F.3d at 1135 ("Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone" and "enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second."). This Court should take the opportunity presented by the Petition to limit these factors, ensuring that the Fourth Amendment protects all Marylanders equally.

CONCLUSION

Amici curiae respectfully urge this Court to grant the Petition.

Respectfully submitted,

/s/ Michael R. Abrams

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STATEMENT RE INTENT TO FILE AMICUS BRIEF IF PETITION GRANTED PURSUANT TO RULE 8-511(E)(2)

If the writ is issued, *Amici Curiae* intend to seek written consents or leave to file an *Amicus* brief, possibly on behalf of additional *amici*, on the issues before the Court.

/s/ Michael R. Abrams
Michael R. Abrams

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 1,879 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Michael R. Abrams
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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 20-201(g), on May 17, 2022, the foregoing Brief of *Amici Curiae* in Support of Petitioner was served via the MDEC File and Serve Module, and that, pursuant to Rule 8-502(c), two copies each were mailed, postage prepaid, first-class, to:

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