IN THE COURT OF APPEALS OF MARYLAND

No. 61
September Term, 2021

EVERETT SMITH,
Appellant,

v.

STATE OF MARYLAND,
Appellee.

BRIEF OF *AMICI CURIAE*

THE PUBLIC JUSTICE CENTER,
ACLU OF MARYLAND,
NATIONAL LEGAL AID & DEFENDER ASSOCIATION,
BALTIMORE ACTION LEGAL TEAM,
SOCIAL ACTION COMMITTEE FOR RACIAL JUSTICE, AND
SURJ ANNAPOLIS AND ANNE ARUNDEL COUNTY

IN SUPPORT OF APPELLANT, BY WRITTEN CONSENT

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April 27, 2022

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STATEMENT 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.*, *Aleti et ux. v. Metro. Balt. LLC, et al.*, COA-REG-0039-2021 (*amicus*); *Goshen Run Homeowners Assoc., Inc. v. Cisneros*, 467 Md. 74 (2020) (*amicus*); *Sizer v. State*, 456 Md. 350 (2017) (*amicus*). The Statements of Interest of co-*Amici* are contained in the attached Appendix.

INTRODUCTION

As the renowned legal philosopher and jurist Jerome Frank put it: "A jury trial, at best, is chancy." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 642–64 (2d Cir. 1946) (Frank, J., dissenting). "Mr. Prejudice and Miss Sympathy are the names of witnesses whose testimony is not recorded, but must nevertheless be reckoned with; and most jurors have no trained capacity for doing so." *Id.* at 658–59. "Lawsuits, do what we will, are hazardous: A missing witness, a lost document—these and numerous other fortuitous factors may result in a man's losing his life, liberty or property unjustly." *Id.* Given the trial's fickle nature, even ostensibly minor conduct can cause mistrials. *See id.* at 646.

Thus, appellate judges who order do-overs for defendants in such circumstances are not "excessively soft-minded" or "mushy-souled sentimentalist[s]" who "demand perfection in trials" and "engage in fly-specking scrutiny of trial records." *Id.* at 660–61. Reversal may be strong medicine, but it ensures that the sanctity of the courtroom is a binding force. *See id.* at 661–62; *see also Pierce v. United States*, 86 F.2d 949, 953 (6th Cir. 1936) ("Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the government itself be there a litigant."). Ultimately, "[w]hen the government puts a citizen to the hazards of a criminal jury trial," the court should not "increase those hazards unfairly," and therefore, should not "summon that thirteenth juror, prejudice." *Antonelli Fireworks*, 155 F.2d at 659 (Frank, J., dissenting).

When courtroom officials oversee a criminal trial while wearing face masks displaying the "Thin Blue Line" flag, that thirteenth juror is given a seat in the box. Contemporary social science establishes that bias is often unconscious and difficult to remedy. And the flag is increasingly recognized for its connection to racist and extremist ideologies. Those connotations are especially likely to trigger implicit bias in juries because of the primacy of racism in American and Maryland history. The thin blue line flag's display therefore causes an unacceptable risk of impermissible influence, and this Court should reverse.

ARGUMENT

I. Bias is easy to trigger but difficult to cure, so even a seemingly minor risk can be inherently prejudicial.

The principles underlying this appeal are longstanding. *See, e.g.*, *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, ..."). Decades of social science about bias and juries now bolsters the case law. Jurors' perceptions are informed by easily triggered unconscious biases. And existing tools for combating jury bias are inadequate. Therefore, even subtle, wordless messages can impermissibly sway the jury, especially when those messages come from courtroom officials.

A. When weighing the risk of prejudice, courts must consider the role of implicit bias.

The phrase "implicit bias" may seem like a recent invention, but the concept has long been recognized in this area of law. *See, e.g.*, Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 Cornell L. Rev. 1016 (1988). Over a hundred years ago, for example, the Supreme Court acknowledged "the general tendency" of people to "look somewhat more favorably" on the case of a party they have a relationship with, "*though perhaps frequently unconsciously*." *Crawford v. United States*, 212 U.S. 183, 196 (1909) (emphasis added); *see also Turner v. Murray*, 476 U.S. 28, 35 (1986) ("[T]here is a unique opportunity for racial prejudice to operate but remain undetected. . . . More subtle, less consciously held racial attitudes could also influence a juror's decision."); *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It

is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials[.]").

When the Supreme Court first found a practice "inherently prejudicial," it acknowledged that "[t]he actual impact of a particular practice on the judgment of jurors cannot fully be determined." *Estelle v. Williams*, 425 U.S. 501, 504–06 (1976). The Court understood that, "[e]ven though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986). "Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.* (quoting *Williams*, 425 U.S. at 505). The inherent prejudice standard arose specifically from courts' recognition of the unconscious nature of bias.

Science now bolsters the Supreme Court's insight. "Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational" because the human brain "suffer[s] from a long litany of biases." Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1128 (2012). Many of these biases "hav[e] nothing to do with gender, ethnicity, or race," instead relating to how the brain handles numbers, memories, and uncertainty. *Id.* But the unconscious "attitudes and stereotypes that we have about social categories, such as genders and races," are another impactful way that implicit bias manifests. *Id.* People commonly think of racism as an explicit attitude, but science has "undermined these

conventional beliefs," instead showing that racial bias is frequently implicit, meaning it is "not consciously accessible through introspection." *Id.* at 1128–29. For example, in studies using subliminal stimuli to isolate unconscious associations, people tend to unknowingly associate Black people with danger, violence, and criminality. *Id.* at 1130, 1135–51.

Implicit racial bias inevitably manifests in the criminal legal system. *See generally* Demetria D. Frank, *The Proof is in the Prejudice*, 32 Harv. J. Racial & Ethnic Just. 1, 18–19 (2016) ("Race arguably has an effect at every phase" of the criminal process, as even the fundamental presumption of innocence "is highly contradicted by the realities of the human mind"). Black people are disproportionately subject to arrests and prosecutions, and because of implicit bias, their Blackness then effectively acts as evidence against them. *See id.*

The jury is especially fertile ground for implicit bias's influence. *See* Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 Calif. L. Rev. 965, 969 (2020) ("[S]tereotyped judgments are more likely to occur in stressful situations marked by high-stakes decision-making."). Bias can affect: "how jurors react to assertions that someone acted in self-defense" or "that there was excessive force by the police"; "whether the jury believes that remaining silent . . . is an admission of guilt"; and "how the jury perceives an expert witness who is a person of color," as just a few examples. Ronald J. Tabak, *The Continuing Role of Race in Capital Cases*, 37 N. Ky. L. Rev. 243, 256–57 (2010). And, perhaps counterintuitively, implicit racial bias is more likely to affect jurors in cases—such as this one—where race itself is not an explicit issue

in the case. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *How Much do we Really Know about Race and Juries?*, 78 Chi.-Kent L. Rev. 997, 1013–14 (2003) (collecting studies showing that "when salient norms regarding racism are absent," then "perceivers often let their guard down, allowing their behavior to be influenced by anti-Black attitudes and prejudice").

The nature of the juror's role invites bias's influence. Jurors are laypeople charged with reaching decisions based on conflicting presentations from adverse parties based on ambiguous evidence. While lawyers receive special training in legal reasoning, "most people make decisions and resolve conflicts deductively through emotionally-based decision-making, or heuristic thinking," meaning they rely on "information that is *peripheral* to the main issues." Jaclyn M. D'Esposito, *The Role of Nonverbal Persuasion in Juror Decision-Making*, 30 Notre Dame J.L. Ethics & Pub. Pol'y 143, 157–61 (2016). The substance of the speaker's argument is secondary to the "peripheral clues" jurors unconsciously rely on to make up their mind, such as the speaker's perceived trustworthiness, credibility, and likeability. *Id.*

Such subjective perceptions often rest upon implicit biases. Kang et al., *supra*, at 1142–46. Studies find that many racial stereotypes are associated with traits likely to guide jurors' thinking. For example, the stereotype that Black people are less intelligent, "which would be invoked if the Black witnesses were called upon to recall and describe events accurately"; or the stereotype that Black people are dishonest, "which would have obvious implications for any sort of trial testimony"; or the stereotype that Black people are violent, "such that any allegation regarding violence would be bolstered by its

consistency with the stereotype." Mikah K. Thompson, *Bias on Trial*, 2018 Mich. State L. Rev. 1243, 1258–66 (2018). Because those stereotypes are so prevalent, they inevitably affect jurors' unconscious judgments, so courts must consider implicit bias when applying the inherent prejudice standard.

B. Implicit bias is easily activated, including by subtle, nonverbal triggers.

Implicit bias is often activated by subtle "priming." "Racial priming functions by increasing the accessibility of culturally associated biases to the subconscious mind." Cecelia Trenticosta & William C. Collins, *Death and Dixie*, 27 Harv. J. Race & Ethnic Just. 125, 141 (2011). For example, a prosecutor's use of "race-coded language" might then "prime a jury to find that an individual acted in conformity with widely known stereotypes about the individual's race or ethnic group." Thompson, *supra*, at 1258; *see also* Kang et al., *supra*, at 1136–37 & n.34, 1147–48, 1149 & n.96 (discussing "priming" studies, such as the "seminal" 1989 study finding that "being subliminally primed with stereotypically 'Black' words prompted participants to evaluate ambiguous behavior as more hostile"). Even if the prime does not itself invoke a specific prejudice, "[o]nce the racial category is implicated, the prime makes the full complement of associated biases more accessible to the mind." *See* Trenticosta & Collins, *supra*, at 141 ("For African Americans, implicitly associated traits" include "aggression," "selfishness," "guilt," "criminality," and "dangerousness.").

In this way, the mere presence of an image or icon can trigger implicit biases. For example, studies have found that test subjects briefly exposed to an image of the Confederate flag are then "more prone to negatively evaluating a hypothetical African

American male." *See id.*[1] A flag's presence in the courtroom may strike the Court as incidental, hardly enough to cause a mistrial. But flags are powerful communicators. *See, e.g.*, Robert Shanafelt, *The Nature of Flag Power*, 27 Pol. & Life Scis. 13 (2008); Ran R. Hassin et al., *Subliminal Exposure to National Flags Affects Political Thought and Behavior*, 104 Proc. Nat'l Acad. Sci. 19757 (2007). Lest the Court find this point overwrought, the Supreme Court has previously acknowledged the influential power of iconic symbols and flags:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short-cut from mind to mind. Causes and nations, political parties, lodges, and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas, just as religious symbols come to convey theological ones. . . . Here, it is the State that employs a flag as a symbol of adherence to government as presently organized.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632–33 (1943).

Finally, an unconsciously prejudicing message that comes from the court itself takes on increased influence. Trenticosta & Collins, *supra*, at 149. For jurors, the courthouse is unfamiliar territory, and courtroom officials serve as their guides. *See* Hon. Arthur Gilbert, *Juror Perceptions*, 17 Judges J. 14, 16–18 (1978) (discussing survey of

[1] Notably, this finding has been replicated in multiple studies. *See, e.g.*, Brian M. Goldman et al., *Stimulating a Response*, 11 J. Pub. & Prof. Sociology 28, 42–47 (2019) (collecting studies and finding the same effect "even among a predominantly Black sample"); *see also* Trenticosta & Collins, *supra*, at 141 n.34 ("[T]his method of testing the subconscious effects of conventional displays of flags is well-accepted in the cognitive and social psychological communities.").

thousands of jurors, finding that "[j]udges are the ones who most directly affect the way in which jurors perceive th[e] system," and "court personnel" are "a direct reflection on you the judge, and consequently a reflection on the judiciary in general").

In particular, bailiffs are often the court's representative to the jury. Bailiffs have frequent, casual contact with the jury, and so they are often the vectors exposing jurors to impermissible influence.[2] Courts must account for the distinct influence that bailiffs can have. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 365 (1966) ("[T]he official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury . . . ."); *Lewis v. Pearson*, 556 S.W.2d 661, 664 (Ark. 1977) ("Because of the close relationship between the bailiff and the court itself any action on the part of the bailiff concerning the jury should be subject to close scrutiny by the court."). When a bailiff communicates a message that could "impact decisionmaking through subconscious channels," the "effect is heightened by authoritative status," which factors into the inherent prejudice analysis. Trenticosta & Collins, *supra*, at 151.

[2] *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (bailiff remarked to juror that defendant was guilty); *Mattox v. United States*, 146 U.S. 140, 151 (1892) (bailiff read article to jurors about defendant's criminal history); *Robinson v. Polk*, 438 F.3d 350, 352, 366 (4th Cir. 2006) (bailiff provided juror with a Bible); *United States v. Steele*, 785 F.2d 743, 746 (9th Cir. 1986) (bailiff provided jury with a dictionary); *State v. Merricks*, 831 So.2d 156, 159–60 (Fla. 2002) (bailiff gave ex parte explanation to jury); *Lewis v. Pearson*, 556 S.W.2d 661, 664 (Ark. 1977) (bailiff made racial comment to juror); *People v. Hutchinson*, 455 P.2d 132, 134 n.1, 137 (Cal. 1969) (bailiff urged jury to hurry).

C. Bias often evades existing mechanisms for its detection and resolution.

No formal action to combat implicit bias has been taken in the Maryland judiciary, nor was any taken in this case specifically. That leaves only the existing procedures for eliminating prejudice: the *voir dire* process and any instructions offered by the court. Research shows that these tools are insufficient.

The equal-protection-based rules for protecting juries from racism were developed to target explicit or conscious biases. As a result, "judge-dominated voir dire and the *Batson* challenge process . . . actually perpetuate legal fictions that allow implicit bias to flourish." Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 Harv. L. & Pol'y Rev. 149, 158 (2010). The processes purport to protect against prejudice but fail to ferret out implicit bias, thereby "sanitizing" or "providing cover" for the influences they are "purportedly designed to detect and eliminate." *Id.* at 158–65; *see also* Frank, *supra*, at 21 (collecting studies showing that "prodding jurors during jury selection on their ability to render unbiased judgments is unlikely to reveal jurors with strong implicit biases"). "While we purport to address bias, what we actually do is reinforce a false narrative of what bias is, where it comes from, and how it can be remedied." Adam Benforado, *Reasonable Doubts About the Jury System*, Atlantic (June 16, 2015), https://www.theatlantic.com/politics/archive/2015/06/how-bias-shapes-juries/395957.

Indeed, the Supreme Court developed the inherent prejudice standard specifically because existing protections alone are insufficient. In *Holbrook*, the Court stated that the trial judge's "assessment of jurors' states of mind cannot be dispositive" and that "little

stock" could be "placed in jurors' claims" not to be biased, because an inherently prejudicial practice could operate beneath their conscious awareness. 475 U.S. at 570. "This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial." *Id.*

There is no easy answer to how existing protections could be improved. Some researchers endorse, and some judges have adopted, a general instruction on implicit bias during jury instructions, and research shows "it is possible that having such an instruction may force jurors to consider and become aware of their biases." Tabak, *supra*, at 259. At the same time, "there is also a body of literature suggesting that simply being aware of bias does not significantly ameliorate its influence," and "calling attention to the risk of implicit racial bias [has] a negligible effect on reducing its impact." Natalie Salmanowitz, *Unconventional Methods for a Traditional Setting*, 15 Univ. New Hampshire L. Rev. 117, 132–33 (2017) (citing a study where, after an explicit warning to "avoid letting the face [of the suspect] impact their decisions," research subjects "still tended to identify the object as a weapon when primed with a black face"); *see also* Jennifer J. Ratcliff et al., *Camera Perspective Bias in Videotaped Confessions*, 12 J. Experimental Psych. 197, 203 (2006) (citing studies of mock jurors finding that "explicitly warning" about "the existence of the bias" was not "effective in eradicating it"). And "when awareness interventions take the form of emphasizing race salience . . ., the outcome might actually contribute to the impact of bias rather than mitigate it." *Id.*

Limiting instructions, warning the jury to disregard inappropriate conduct during trial proceedings, are probably most susceptible to this effect, commonly referred to as the "pink elephant" or "white elephant" effect. Tabak, *supra*, at 259 ("[I]f a juror is told that . . . 'you are not to consider race,' the juror may end up considering race more," particularly "if the juror has a high degree of prejudice."); *see also Antonelli Fireworks Co.*, 155 F.2d at 656 (Frank, J., dissenting) ("Indeed, the judge's cautionary instruction may . . . emphasize the jury's awareness of the censured remark—as in the story, by Mark Twain, of the boy told to stand in the corner and not think of a white elephant."). Limiting instructions in general are of questionable efficacy. *See, e.g.*, James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 Ind. L. Rev. 207, 235–36 (2019) ("[M]any studies show that instructions to disregard inadmissible evidence to which mock jurors have been exposed are generally ineffective."); Krystia Reed & Brian H. Bornstein, *Objection! Psychological Perspectives on Jurors' Perceptions of In-Court Attorney* , 63 S.D. L. Rev. 1, 10 n.72, 26 (2018) ("Psycholegal research suggests that jurors frequently engage in making attributions that influence their perceptions and verdicts, despite the procedural evidentiary safeguards.").

That cautionary instructions leave much to be desired is hardly breaking news. *See, e.g.*, *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.) (referring to "the recognized subterfuge of an instruction to the jury" to disregard testimony as "a mental gymnastic which is beyond,

not only their powers, but anybody's else"). But their ineffectiveness is especially relevant here. Deficiency of the tools for combatting prejudice informs whether there is "an unacceptable risk" of "impermissible factors coming into play," *Williams*, 425 U.S. at 505, because the "acceptable" degree of risk depends on the trial court's ability to mediate it.

Altogether, social science establishes that unconscious racial bias in jurors can be easily triggered and highly influential, and the trial court has limited capacity to fight it. Therefore, the risk of bias posed by even ostensibly "minor" conduct may rise to the level of unacceptable, constituting inherent prejudice.

II. Official display of the "Thin Blue Line" flag in a criminal trial is inherently prejudicial.

Because implicit bias shapes the jury's perception, and just a glance at certain images can prime unconscious racial bias—especially when displayed by a court official—thin blue line flag facemasks worn by bailiffs in a criminal trial constitutes inherent prejudice. The flag recently proliferated as an icon among extremist and white supremacist organizations. Even its more benign interpretations are polarizing and closely relate to the issues in a criminal trial. And the primacy of race across the entire nation—including on the Eastern Shore—heightens the risk of the flag triggering implicit racial bias in a jury. Therefore, the flag's display by the court's own officers throughout a trial poses an unacceptable risk of impermissible influence.

A. The flag represents racist and extremist ideologies.

In 1829, the British "Bobbies" formed as the first professionalized law enforcement corps, donning blue uniforms. Elizabeth Nix, *Why Are the British Police Officers Called 'Bobbies'*, Hist. (Aug. 22, 2018), https://www.history.com/news/why-are-british-police-officers-called-bobbies. The phrase "thin blue line" first appears in reference to the Bobbies soon after, likely a play on the "thin red line" nickname for the red-coated British military. Tyler Wall, *The Police Invention of Humanity: Notes on the 'Thin Blue Line'*, 16 Crime Media Culture Int'l J. 319, 323 & n.5 (2020). Eventually, the phrase came to conjure up an "honorific, romantic image of the police, as it refers to the idea that between the tidal waves of crime and the lives of ordinary citizens there is only, for protection, the 'thin blue line' of police officers." Lewis J. Poteet & Aaron C. Poteet, Cop Talk: A Dictionary of Police Slang 125 (2000).

William H. Parker, the Chief of the LAPD from 1950 to 1966, is most associated with the phrase's modern use. Wall, *supra*, at 2. Parker, an open racist and a staunch anti-communist at the height of the Red Scare, launched a public broadcast television show called "The Thin Blue Line," and he "used his bully pulpit to praise his officers, and warn the public of the communist menace and lax morality which would hasten the downfall of western civilization." Alisa Sarah Kramer, *William H. Parker and the Thin Blue Line* iii (2007), https://dra.american.edu/islandora/object/thesesdissertations%3A3293/datastream/PDF/view. Parker provided a paradigmatic example of the thin blue line ethos in the LAPD's 1951 Annual Report: "Between the law abiding elements

of society and the criminals who prey upon them stands a thin blue line of defense, your police officers." Wall, *supra*, at 2.

Thus, the thin blue line portrays police as the wall "dividing civilization from savagery," as "the frontlines, the barricades, the ramparts that hold back an invasion of savage hordes threatening to devour civilization." *Id.* at 5. That word choice is not hyperbole; it reflects the phrase's historical usage. As a police official wrote in 1955: "[Police make possible] the very existence of civilization, for without the thin blue line of police protecting the people from criminal depredation, the world would soon revert to savagery and bestiality." Wall, *supra*, at 6 (quoting Charles F. Sloane, *Dogs in War, Police Work and on Patrol*, 46 J. Crim. L. & Criminology 385, 388 (1955)). Or as President Reagan said in a 1981 speech: "[Police are] the thin blue line that holds back a jungle which threatens to reclaim this clearing we call civilization." *Id.* at 6–7 (quoting Lee Lescaze, *Reagan Blames Crime on 'Human Predator'*, Wash. Post (Sept. 29, 1981)).

While the thin blue line may seem like "a simple statement on the necessity of security and order for any 'civil society,'" that reading obscures its full message: that "society must be *defended* from what is fantasized as an attack from a savage species." *Id.* at 8 (emphasis added). It is this aspect of the phrase—"its power to split humanity in half," calling the "humanity or animality" of "entire communities" into question—that has overtly racial connotations. *See id.* ("Taking at face value and essentially celebrating the existence of a fundamental division between warring species, [the thin blue line] refuses, and even laughs at, what James Baldwin articulated as a 'plea for common humanity.'").

American policing cannot be separated from American racial hierarchy. *See generally* Jill Lepore, *The Invention of the Police*, New Yorker (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police (explaining how contemporary policing arose from enforcement of slavery and Jim Crow segregation). In significant part, professionalized police forces arose from "slave patrols," which were responsible for enforcing fugitive slave laws and thwarting organized slave activity. *See* Ben Brucato, *Policing Race and Racing Police: The Origin of US Police in Slave Patrols*, 47 Soc. Just. 115 (2020); Larry H. Spruill, *Slave Patrols, 'Packs of Negro Dogs' and Policing Black Communities*, 53 Phylon 42 (2016). And throughout American history, police violence has been most prevalent in impoverished, predominantly Black urban neighborhoods. Anna North, *How Racist Policing Took Over American Cities, Explained by a Historian*, Vox (June 6, 2020), https://www.vox.com/2020/6/6/21280643/police-brutality-violence-protests-racism-khalil-muhammad. So when the thin blue line is invoked as a guard against the "jungle," "savage hordes," the "invasion," or the "lawless criminal army," it calls to mind not only the line between lawfulness and crime, but also between white and Black.

This racialized dimension of the thin blue line has particular force in light of the flag's recent history. The thin blue line flag rose to its current prominence when, "in the years following highly publicized incidents of law enforcement violence [against Black Americans] in the mid-2010s," it became increasingly common for "police and their supporters [to] fly the flag or wear an image of it as a sign for support for the profession." Aaron Griffith, *Evangelicism and Modern American Policing*, 12 Religions 194, 205

(2021). Coinciding with the "Black Lives Matter" movement, the flag was adopted by an opposition movement of sorts, "Blue Lives Matter." Maurice Chammah & Cary Aspinwall, *The Short, Fraught History of the 'Thin Blue Line' American Flag*, Marshall Project (June 8, 2020), https://www.themarshallproject.org/2020/06/08/the-short-fraught-history-of-the-thin-blue-line-american-flag.

"This is not to suggest [all] those who wear the [thin blue line] t-shirt are consciously or intentionally racist." Wall, *supra*, at 8. It does explain, however, why the thin blue line "has become popular among Neo-Nazis and white supremacists." *See id.* For extremist and white supremacist groups, the flag and its connotations neatly aligned with their ideology. *Id.* at 8 n.9 ("[I]t is not a stretch to think of the [thin blue line] as a fascist, or fascistic, discourse in the ways it celebrates state authoritarianism, executive violence, and racialized hierarchies while also appealing to naturalistic language such as civilization and savagery," and "[t]he adoption of [the thin blue line flag] by overt neo-Nazi's helps bring these connections more directly to the surface.").

As a result of this confluence, the thin blue line flag has appeared in highly publicized images linked to political extremism or white supremacy:

Above: the flag waving on the steps of the U.S. Capitol building on January 6 2021, https://www.insider.com/capitol-rioters-who-pleaded-guilty-updated-list-2021-5.

Below: the flag amidst a crowd assaulting a police officer on January 6 2021, https://www.insider.com/how-thin-blue-line-became-controversial-symbol-to-represent-police-2021-2.

Above: the flag for sale alongside the Confederate flag and the Nazi swastika flag, https://pittsburgh.cbslocal.com/2020/09/06/nazi-flags-seen-being-sold-at-braddocks-inn-flea-market-in-fayette-county.

Below: the flag at the Charlottesville "Unite the Right" rally, among the flags of prominent white supremacist organizations, https://www.usatoday.com/story/news/nation-now/2017/08/18/thin-blue-line-what-does-american-flag-wit-flag-maker-condemns-use-white-supremacists-charlottesvill/580694001.

As these images demonstrate, the flag's affiliation with racism is prevalent and publicized. There is not enough space here to list all the press coverage generated by its display. In jurisdictions across the country, law enforcement leaders themselves have concluded that the risk of harm to police-community relationships warrants prohibition of the flag.[3] In Maryland alone, before the trial in this case, there was a highly publicized controversy involving the flag's display by the Montgomery County Police Department. *See, e.g.*, Christina Maxouris, *A Maryland Police Department Won't Display a Handmade American Flag with a Blue Line*, CNN (Nov. 4, 2019), https://www.cnn.com/2019/11/04/us/maryland-police-blue-line-flag/index.html. Even if these incidents show the flag's meaning is "contested," that only highlights its deeply political meaning and incompatibility with the courtroom environment, where law enforcement officers routinely testify on behalf of the state and jurors must evaluate their credibility. The Court cannot reasonably conclude an entire jury pool could be isolated from the flag's racist usage and the unconscious influence that results. The flag is therefore likely to prime implicit racial bias in jurors—especially when prominently displayed by the court itself—and has no place in a Maryland courtroom.

[3] There are even plentiful examples solely involving COVID-19 facemasks. *See, e.g.*, *No More 'Thin Blue Line' Masks for Columbia Police*, Columbia Missourian (Oct. 23, 2020), https://www.columbiamissourian.com/news/local/no-more-thin-blue-line-masks-for-columbia-police/article_2a9af262-1552-11eb-b964-a3108e9fa374.html; Associated Press, *San Francisco Police Chief Bans 'Thin Blue Line' Face Masks*, ABC News (May 4, 2020), https://abcnews.go.com/US/wireStory/san-francisco-police-chief-bans-thin-blue-line-70482540; Michael Gold, *What Happened When a School District Banned Thin Blue Line Flags*, N.Y. Times (Nov. 21, 2020), https://www.nytimes.com/2020/11/21/nyregion/police-flag-pelham-school-district.html.

B. The history of local race relations informs the risk of implicit racial bias impermissibly influencing the jury.

Implicit racial bias is not exclusively an individual *trait*, but also a social phenomenon, "a feature of social contexts." B. Keith Payne et al., *Historical Roots of Implicit Bias in Slavery*, 116 PNAS 11693, 11693 (2019). "According to this view, implicit bias reflects largely transient activation of associations cued by stereotypes and inequalities in social environments." *Id.* ("[S]ocial and cultural contexts shape individual cognition," and those contexts "vary geographically and across social networks and are themselves shaped by historical processes."). In other words, implicit bias arises from culture, environment, and history, not just an individual's way of thinking. *See id.* As an example: this study found that "[c]ounties and states more dependent on slavery in 1860 now have greater implicit bias among Whites, suggesting that intergroup stereotypes and attitudes are more likely to be automatically triggered in those areas." *Id.* at 11697 ("Our results shed light on the importance of history to modern forms of prejudice.").

In general, race is highly salient throughout American culture and history. *See generally* Katheen Osta & Hugh Vasquez, Nat'l Equity Proj., Implicit Bias and Structural Inequity 2 (2019), https://diversity.iu.edu/doc/anti-racist/tools/National-Equity-Project-Implicit-Bias.pdf. Maryland reflects that cultural make-up as much as any place, including in the history of the region where this trial was held.

Kent County is on the Eastern Shore, which has long been both a predominantly white region and home to a robust Black community. *See generally* Lydia Woolever, *Turning Tides*, Balt. Mag. (Feb. 2021), https://www.baltimoremagazine.com/

section/historypolitics/eastern-shore-begins-to-reckon-with-difficult-history-racism-slavery. "Tens of thousands of men, women, and children of African descent were brought by boat to tidewater ports that speckled the shorelines, tangling race and economics in a brutal web for centuries, particularly on the Eastern Shore." *Id.* As the Maryland region most reliant on enslaved labor and the racial caste system, some Eastern Shore counties considered seceding to join the Confederacy in 1861. *Id.* "Postwar 'Black codes' and eventually Jim Crow laws kept wealth, resources, and power largely in the hands of white landowners, influencing housing, education, and employment for decades to come." *Id.* Counties on the Eastern Shore were Maryland's last to comply with the 1954 *Brown v. Board* decision, holding out until 1969. *Id.* In recent decades, Shore counties are generally around 15 to 25 percent Black, and those Black residents "are nearly twice as likely to be unemployed or living in poverty compared to their white counterparts." *Id.*

The Eastern Shore was also the site of a disproportionate share of the lynchings in Maryland history. *See generally* Sherrilyn A. Ifill, *On the Court-house Lawn* (2007). Many of the lynchings were carried out as acts of extralegal "justice," sending the message that the white majority was effectively above the law, while the Black community was not entitled to the law's protections. *See id.* at 7–8 ("Between 1900 and 1935, courthouse lawns on the Eastern Shore were routinely the sites of lynchings or near lynchings, involving the participation of hundreds and sometimes thousands of white onlookers."). The most notable example here is the lynching of James Taylor in Chestertown, Kent County. *See generally* James Dissette, *A Reckoning: the Lynching of*

James Taylor in Chestertown, Chestertown Spy (July 13, 2020), https://chestertownspy.org/2020/07/13/a-reckoning-the-lynching-of-james-taylor-in-chestertown (hosting a video of historian G. Kevin Hemstock summarizing the story of the Taylor lynching). In May 1892, an eleven-year-old white girl was assaulted, and she identified Taylor, a Black farm laborer employed by her father, as the perpetrator. Marlon Wallace, *Shameful Past: Lynchings on Delmarva—James Taylor Lynched in Kent County, Md. in 1892*, WBOC (Oct. 21, 2021), https://www.wboc.com/archive/shameful-past-lynchings-on-delmarva--james-taylor-lynched-in-kent-county-md-in-1892/article_7f1351bd-1a03-5aef-ae37-baeb948cd9cc.html. Two days after his arrest, an angry white mob formed outside the Chestertown jailhouse, and Taylor was lynched directly across the street from the Kent County courthouse—the same building used today—in front of a crowd of hundreds. *Id.*

None of this is ancient history on the Eastern Shore. In recent years, community organizations have been working to publicize the local history of racism and address its present-day impact. *See, e.g.*, Social Action Comm. for Racial Just., *About Us*, https://sacracialjustice.com/about-us-3 (a community organization "to learn, grow, and take action against racism in Kent County"); *see also* Casey Cep, *My Local Confederate Monument*, New Yorker (Sept. 12, 2020), https://www.newyorker.com/news/us-journal/my-local-confederate-monument (describing the years-long effort to remove the "Talbot Boys" confederate monument in front of the Talbot County courthouse). That includes a group in Kent County named "the James Taylor Justice Coalition," which formed in July 2019 "[t]o educate our community about [the Taylor lynching], and to make the connection between the racial terror lynchings of the past and mass

incarceration, incidents of police brutality, and discrimination of today." James Taylor Justice Coalition, Sumner Hall, https://sumnerhall.org/programs/james-taylor-justice-coalition.

The organization is active and influential: in addition to monthly community meetings, it is helping to implement the "Maryland Lynching Truth and Reconciliation Law." *See id.* Since that law passed in 2019, there have been public community meetings across Maryland and the Eastern Shore, including in Kent County, to open a public discourse on Maryland's history of racism and "begin the process of reconciliation." *See, e.g.*, Leann Schenke, *Reconciliation Commission Leads Talks on History of Lynchings*, Kent County News (Oct. 24, 2019), https://www.myeasternshoremd.com/kent_county_news/news/reconciliation-commission-leads-talks-on-history-of-lynchings/article_1c63f4e0-c72e-5d56-9b04-4daf901e0cb9.html (reporting on the Chestertown meeting). The group won the official support of the Chestertown Mayor and Council, who announced a 16-month plan "to educate the community about its history pertaining to race relations; pursue legislative reforms that address systemic racism in the town of Chestertown; and promote unity, equality and inclusivity among all residents." Trish McGee, *Confronting the Legacy of Racial Terror*, Kent County News (Feb. 24, 2021), https://www.myeasternshoremd.com/kent_county_news/news/confronting-the-legacy-of-racial-terror/article_62d705be-fbd4-5800-8c8d-e9af81c7ccfa.html. In May 2021, the Governor formally pardoned Taylor, along with 33 other Black men lynched in Maryland between 1854 and 1933, and the Coalition hosted a "Justice Day" event in Chestertown, gathering prominent speakers to commemorate the occasion.

Trish McGee, *Governor Pardons Taylor, Other Maryland Lynching Victims*, Kent County News (May 13, 2021), https://www.myeasternshoremd.com/kent_county_news/news/governor-pardons-taylor-other-maryland-lynching-victims/article_aface96b-5aa2-55e5-ad3d-261bef3915fa.html.

This is all relevant to the inherent prejudice analysis. *See, e.g.*, *Woods v. Dugger*. 923 F.2d 1454, 1457–60 (11th Cir. 1991) (discussing the rural economy and history of the county where the jury resided when evaluating the prejudicial potential of challenged conduct). *Not* because the lower courts should have regarded jurors on the Eastern Shore as especially bigoted.[4] Rather, because the prevalence of racism in the region means jurors likely have a high degree of "race salience" in their unconscious mind, with deeply rooted racial tropes and stereotypes lying in wait, ready to be primed by some stimuli for implicit bias. *See* Payne et al., *supra*, at 11694 ("The historical legacy of discrimination has created structural inequalities that may continue to cue stereotypical associations long after official legal barriers have been removed."). The recent public community discussions around confederate monuments, the legacy of lynchings, and racial

[4] After all, similar history exists throughout the nation and across this state. *See, e.g.*, Md. State Archives, A Guide to the History of Slavery in Maryland 1 (2007), https://msa.maryland.gov/msa/intromsa/pdf/slavery_pamphlet.pdf ("[S]laves could be found in every corner of Maryland: slaves labored in Cecil County's iron furnaces; enslaved farmhands harvested wheat in Washington County; and skilled slave artisans like Frederick Douglass caulked ships in Baltimore's harbor."); Eugene L. Meyer, *A Shameful Past*, Bethesda Mag. (Mar. 29, 2021), https://bethesdamagazine.com/bethesda-magazine/march-april-2021/a-shameful-past (detailing history of slavery, Confederate sympathy, and segregation in Montgomery County); Urb. Inst., *The Black Butterfly* (Feb. 5, 2019), https://apps.urban.org/features/baltimore-investment-flows (showing the ongoing impact of racial segregation in Baltimore city).

reconciliation only amplify that effect. The jurors in this case, sitting in the Circuit Court for Kent County in Chestertown, outside of which James Taylor was lynched in 1892, may well have been familiar with that history from the ongoing local activism. And so those jurors may have been more susceptible to a racially-coded message displayed by the officials policing the courtroom (regardless of whether the officers meant to communicate that message).

Therefore, when the courtroom officials with the most personal contact with the jury displayed the thin blue line flag on their faces throughout the trial, it posed an unacceptable risk of prejudice. The Defendant was Black, and like in many criminal cases, a law enforcement officer testified as a state's witness. The jury was therefore exposed to an image associated with racist ideology, or at the very least a slanted pro-police perspective, over a sustained period, apparently with the court's imprimatur. *See Williams*, 525 U.S. at 505 (considering whether the prejudicial conduct was "likely to be a continuing influence throughout the trial"); Trenticosta & Collins, *supra*, at 150 ("The flag's physical location and orientation give it an 'official character' in the subconscious mind of observers that heightens its impact on decisionmaking."). Given the science of implicit bias—showing that unconscious racial stereotypes can be easily triggered by images that bring race to mind, affecting decisionmaking and perception—the bailiffs' masks created an unacceptable risk of impermissible influence on the jury.

CONCLUSION

Amici curiae respectfully urge this Court to reverse and grant Mr. Smith a new trial in a neutral courtroom.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 6,479 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 April 27, 2022, the foregoing Brief of *Amici Curiae* in Support of Appellant 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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APPENDIX

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. Since its founding in 1931, the ACLU of Maryland has appeared before courts and administrative bodies in numerous civil rights cases, including dozens of cases concerning race discrimination impacting police practices, voting rights, education, employment and the justice system. 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, including the executive, legislative, and judicial branches of government. 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, including the legal profession, so that we may build a more equitable society that serves the interest of justice for all.

National Legal Aid & Defender Association ("NLADA"), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. For over 100 years, NLADA has pioneered access to justice and right to counsel at the national, state, and local levels through the creation of many public defender systems and development and refinement of nationally applicable standards for legal representation. NLADA serves as a collective

voice for our country's public defense providers and civil legal aid attorneys and provides advocacy, training, and technical assistance to further its goal of securing equal justice. The Association pays particular attention to procedures and policies that affect the constitutional rights of the accused, notably including the rights to counsel and due process. Specifically, NLADA is committed to ensuring that accused persons are not faced with the loss of liberty or other important rights—before, during, or after trial—without the guiding hand of counsel to assist in their defense.

Baltimore Action Legal Team ("BALT") is a community lawyering organization that formed in April 2015 in response to a call from community organizations for legal assistance. BALT transitioned from providing emergency response services during the Baltimore Uprising to working towards addressing structural causes of its symptoms. This work includes close partnerships with community organizations in presenting legal education, policy advocacy, and legal representation. BALT operates under 501c3 status. BALT has an interest in this case because of its commitment to ensuring fairness in the justice system and eliminating racism from Maryland's courts.

Social Action Committee for Racial Justice ("SACRJ"), formed in 2017, is made up of 200-plus members of the Kent County community on the Eastern Shore of Maryland, representing all races, classes, and cultures. SACRJ is a grassroots effort to learn, grow, and take action against racism in Kent County. Through community meetings and education, direct action, and political organizing, SACRJ works to identify systemic racism and take concrete steps to make change. SACRJ has an interest in this

case because it is committed to fighting racism in Kent County public institutions, including the courts.

SURJ Annapolis & Anne Arundel County ("SURJ3A") is a local chapter of Showing Up for Racial Justice ("SURJ"), a national network of groups and individuals organizing white people for racial and economic justice. SURJ does this work by building people power in multi-racial communities across their network—through campaigns, 200 chapters across the country, and deep local organizing projects. SURJ is committed to moving white people into action with organizations and coalitions led by People of Color. SURJ3A has an interest in this case because of its commitment to eradicating racism from systems of justice.