

No. 21-198

IN THE
Supreme Court of the United States

ANTHONY W. KNIGHTS,
Petitioner,

v.

UNITED STATES,
Respondent.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit**

BRIEF OF AMICI CURIAE CENTER ON RACE,
INEQUALITY, AND THE LAW; CHARLES HAMILTON
HOUSTON INSTITUTE FOR RACE AND JUSTICE;
FRED T. KOREMATSU CENTER FOR LAW AND
EQUALITY; CENTER ON RACE, LAW, AND JUSTICE;
AND NATHANIEL R. JONES CENTER FOR RACE,
GENDER, AND SOCIAL JUSTICE IN SUPPORT OF
PETITIONER

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INTEREST OF AMICI CURIAE¹

The **Center on Race, Inequality, and the Law at New York University School of Law²** was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. Among the Center's top priorities is wholesale reform of the criminal legal system, which has, since its inception, been infected by racial bias and plagued by inequality. The Center fulfills its mission through public education, research, advocacy, and litigation aimed at cleansing the criminal legal system of policies and practices that perpetuate racial injustice and inequitable outcomes.

The **Fred T. Korematsu Center for Law and Equality** is a non-profit organization based at Seattle University School of Law that works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of over 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has produced reports

¹ All parties have consented to the filing of this brief. No counsel for a named party authored this brief in whole or in part, and no counsel for a named party or a named party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

² Amici do not represent the official views of their respective academic institutions.

and participated in litigation and other reform efforts to address race discrimination in the criminal legal system.

The **Charles Hamilton Houston Institute for Race and Justice** at Harvard Law School strives through research-based solutions and remedies to ensure that all members of society have equal access to the opportunities, responsibilities, and privileges of membership in the United States. Founded in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law, the Houston Institute follows the model laid out by Charles Hamilton Houston in bringing social science research to bear on issues of racial discrimination and subordination in the law. The Institute acts as a bridge between scholarship, law, policy, and practice, using a “Community Justice” model. As particularly relevant here, the Houston Institute filed an amicus brief along with the NAACP Legal Defense and Educational Fund in *Commonwealth v. Evelyn*, 152 N.E.3d 108 (Mass. 2020), in which the Massachusetts Supreme Judicial Court considered whether race may be a proper factor in the totality of the circumstances to define the moment of a Fourth Amendment seizure.

Founded in 2016, Fordham Law School’s **Center on Race, Law, and Justice** works to generate innovative responses to racial inequality and discrimination. It prioritizes law, data, and social science-informed interventions capable of creating concrete change in communities, institutions, and public policy in a number of areas in the domestic and global contexts. The Center maximizes real-world impact through cross-disciplinary collaborations,

comparative analyses, and systemic interventions that push the boundaries of traditional approaches to race and inequality.

Founded in 2010, the **Nathaniel R. Jones Center for Race, Gender, and Social Justice** trains and cultivates scholars, leaders, and activists committed to positive social change. Jones Center students and affiliated faculty work and conduct research--always through an intersectional lens--to combat discrimination, harassment, violence against women, and economic inequalities that target our most vulnerable neighbors. Further, the Jones Center works to bridge theory to practice by forging relationships with local, national, and global communities and preparing students to take the lead in advancing justice.

SUMMARY OF ARGUMENT

In the United States, there is overwhelming evidence that a person's race affects how police treat that person during an encounter. Compared to white people, Black people are much more likely to be subjected to violent—and, at times, deadly—force at the hands of law enforcement. Being Black also increases the likelihood of being treated worse by police officers during an encounter in a variety of other ways. This is the case regardless of whether any officer involved in the encounter possesses any conscious racial prejudice, because racial bias can substantially influence a person's behavior even without their knowledge.

Accordingly, one's perceptions of their rights and freedoms during a police interaction will vary along

racial lines; a reasonable Black person has particular cause to worry about unjustified violence and harassment if they attempt to end or walk away from an encounter with the police. This is a well-known axiom in Black communities, where traumatic experiences with the police are much more widespread than in white communities, as are incidents of unnecessary officer force. These negative perceptions of the police are shaped not just by shared personal experiences within Black families and communities but also by the distinct and sordid history of policing in the United States, which brings into sharp relief the racist underpinnings of our system of law enforcement across the country. Those experiences and that history have informed negative perceptions of police that are far more common among Black people than white people.

In determining whether a reasonable person feels free to leave or end a police interaction, that reasonable person's race is therefore not just a relevant factor but an essential one. There is clear evidence that race concretely bears on how a police encounter will play out—including whether a person will actually be allowed to leave the encounter peacefully. And there is clear evidence that racial identity affects how people in the United States *think* a police encounter will play out, regardless of the ultimate outcome. The Court should recognize this difficult reality, grant the petition, and reverse the judgment below.

ARGUMENT

I. POLICE TREAT PEOPLE OF DIFFERENT RACES DIFFERENTLY.

When Anthony Knights was approached by police officers after midnight on January 26, 2018, he may have been thinking of Philando Castile. On July 6, 2016, a police officer stopped Mr. Castile, a school cafeteria worker in Minnesota, allegedly because Castile’s “wide-set nose” reminded the officer of someone suspected of involvement in a robbery. As Castile reached for his wallet, the officer fatally shot him seven times, with Mr. Castile’s girlfriend sitting right beside him and her four-year-old daughter in the backseat—all just sixty-two seconds after the encounter began.³

Or maybe Mr. Knights was thinking of Laquan McDonald. Mr. McDonald was a teenager who lived in Chicago until October 20, 2014. That night, during a routine encounter, Chicago police shot and killed Mr. McDonald in the middle of the street as the teenager attempted to walk away from the scene. Mr. McDonald had not posed a threat to any officers present in the four police cruisers hemming him in and had, in fact, been walking away from them. Neither fact saved his life.⁴

Or perhaps Mr. Knights had Walter Scott on his mind. On April 4, 2015, a police officer in South

³ Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile Is Charged with Manslaughter*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html>.

⁴ Ben Austen, *Chicago After Laquan McDonald*, N.Y. TIMES MAG. (Apr. 20, 2016), <https://www.nytimes.com/2016/04/24/magazine/chicago-after-laquan-mcdonald.html>.

Carolina pulled Mr. Scott’s car over because of an allegedly broken taillight. During the traffic stop, Mr. Scott tried to leave on foot. He was unarmed, and the officer had no reason to believe that Mr. Scott was a danger to him or anyone else. Nonetheless, the officer fatally shot Mr. Scott in the back as he left the scene.⁵

Philando Castile, Laquan McDonald, and Walter Scott all had one thing in common—they, like Anthony Knights, were all Black men. And their stories are distressingly common. As such, whatever Mr. Knights’ thoughts that night, any reasonable Black person in his shoes would certainly have been aware of one reality: in the United States, being Black makes any police encounter much more dangerous. Writing two decades ago, Justice Stevens described how “among some citizens, particularly minorities,” there is a “belie[f] that contact with the police can itself be dangerous, apart from any criminal activity”—a belief “known to the police officers” that was “validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.” *Illinois v. Wardlow*, 528 U.S. 119, 132–34 (2000) (Stevens, J., concurring in part). Justice Stevens’s words are just as true today. It is “a matter of reality” that “racial biases, sympathies, and

⁵ Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.

prejudices still exist,” *Flowers v. Mississippi*, 139 S. Ct. 2228, 2274 (2019) (Thomas, J., dissenting), and the realm of policing is certainly not immune to the legacy of slavery and racism in the United States.

A. Being Black Increases the Dangerousness of Police Interactions

The persistent reality of racial bias in policing brought millions of people of all races into the streets last year after Minneapolis police officer Derek Chauvin murdered George Floyd while arresting him for allegedly cashing a counterfeit twenty-dollar bill. The extreme violence unleashed on Mr. Floyd rightly received national and international attention. But George Floyd was far from the first Black person to be brutalized by police. In Minneapolis alone, though Black people comprise about 19 percent of the population, they are on the receiving end of three-fifths of the department’s use-of-force incidents.⁶

Minneapolis is by no means the only city in which disparities like this can be found. In Tampa, Florida, where the events of this case occurred, a Black person is several times more likely than a white person to be killed by Tampa police.⁷ In fact, Tampa police have

⁶ Richard A. Oppel Jr. & Lazaro Gamio, *Minneapolis Police Force Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html>.

⁷ See *Tampa Police Department, POLICE SCORECARD*, <https://policescorecard.org/fl/police-department/tampa> (last

killed *only* Black men since 2018.⁸ Not surprisingly, the Department of Justice also has found “stark racial disparities” in how the Tampa Police Department enforces laws.⁹ This style of law enforcement has resulted in a city in which only seven percent of Black residents feel safer when they see a police officer—and three-fifths of Black residents feel less safe.¹⁰

Minneapolis and Tampa reflect broader trends. Nationally, Black “suspects” are killed by police at a rate five times greater than white “suspects.”¹¹ The race of those killed is not incidental; researchers have found that “officers are more likely to believe that the use of force against a [B]lack suspect is both reasonable and necessary, even if they would not make the same judgment with a white suspect acting

visited Aug. 10, 2021) (finding that Black people make up 22 percent of the population of Tampa but 55 percent of those killed by police, whereas white people make up 44 percent of population of Tampa but 27 percent of those killed by police).

⁸ MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> (last visited Aug. 10, 2021). To view this data, enter “Tampa Police Department (FL)” in the box following “Police Killing by the.”

⁹ See GREG RIDGEWAY ET AL., U.S. DEPT OF JUST., AN EXAMINATION OF RACIAL DISPARITIES IN BICYCLE STOPS AND CITATIONS MADE BY THE TAMPA POLICE DEPARTMENT 2 (2016), <https://www.tampa.gov/document/report-23341> (discussing this with regard to bicycle laws).

¹⁰ See TAMPA BAY PARTNERSHIP, STATE OF THE REGION: RACIAL SENTIMENT SURVEY 61 (2020). By contrast, most white residents feel safer when they see a police officer. *Id.*

¹¹ L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO STATE J. CRIM. L. 115, 118 (2014).

identically.”¹² Officers are about eight times as likely to aim or shoot at a Black person than a white person,¹³ and even a completely unarmed Black person is more than three times as likely to be shot by a police officer than an unarmed white person.¹⁴ Under these circumstances, it is plain that “an African-American man facing armed policemen would reasonably be especially apprehensive.” *Dozier v. United States*, 220 A.3d 933, 944 (D.C. 2019).

Black people fare no better during police interactions when it comes to nonlethal police force. Officers use force, or threaten to do so, against Black people at about four times the rate of white people.¹⁵ And outright violence is not the only racialized way in which officers disrespect the rights of civilians. Compared to being white, being Black means a greater chance of being stopped by the police without any legal justification. *See Utah v. Strieff*, 136 S. Ct.

¹² *Id.* at 123.

¹³ *See* ERIKA HARRELL & ELIZABETH DAVIS, BUREAU JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES 7 tbl.5 (2020), <https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf>.

¹⁴ *See* Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011–2014*, 10 PLOS ONE 1, 6 (2015) (finding that the probability of being Black, unarmed, and shot by police is 3.49 times the probability of being white, unarmed, and shot by police).

¹⁵ *See* HARRELL & DAVIS, *supra* note 13; *see also* Kimberly Barsamian Kahn & Karin D. Martin, *Policing and Race: Disparate Treatment, Perceptions, and Policy Responses*, 10 SOC. ISSUES & POL’Y REV. 82, 84 (2016) (discussing racial disparities in police use of force).

2056, 2070 (2016) (Sotomayor, J., dissenting) (discussing how “it is no secret that people of color are disproportionate victims of this type of scrutiny”). Being Black means a greater chance of having your car searched, based on less suspicion,¹⁶ during a stop.¹⁷ Being Black means that even the “little things” in a police encounter play out differently—and often to dangerous effect. Researchers have found that when officers speak to Black people during stops, they consistently do so with less respect and friendliness than when speaking to similarly situated white people, “contribut[ing] to racial gaps in police-citizen trust.”¹⁸

Disrespectful and inappropriate police treatment of Black people and blatant disregard of their legal rights has been an enduring problem.¹⁹ At times, it

¹⁶ *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings> (last visited Aug. 10, 2021) (finding that “police require less suspicion to search [B]lack and Hispanic drivers than white drivers”).

¹⁷ Kahn & Martin, *supra* note 15.

¹⁸ Nicholas P. Camp et al., *The Thin Blue Waveform: Racial Disparities in Officer Prosody Undermine Institutional Trust in the Police*, 120 J. PERSONALITY & SOC. PSYCH. (forthcoming 2021) (manuscript at 11), <https://www.apa.org/pubs/journals/releases/psp-pspa0000270.pdf>; Rob Voigt et al., *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PNAS 6521 (2017).

¹⁹ See, e.g., Ronald Weitzer, *Citizens' Perceptions of Police Misconduct: Race and Neighborhood Context*, 16 JUST. Q. 819, 823–24 (1999) (“In 1991, 28 percent of the [B]lacks polled and 16

has assumed truly tremendous proportions, such as “a Boston police department policy to ‘search on sight’ all young, black persons in Roxbury suspected of being gang members or of being in the company of a gang member,” which a court described as “a proclamation of martial law.” *Commonwealth v. Phillips*, 595 N.E.2d 310, 312 (Mass. 1992). In one case in Oneonta, New York, police seemingly attempted to stop and question the entire city’s Black population. *Brown v. City of Oneonta*, 235 F.3d 769, 780–83 (2d Cir. 2000) (Calabresi, J., dissenting). Knowing only that a young Black man had allegedly attacked an elderly woman and been cut on the hand while doing so, officers attempted, in the words of the chief investigator, “to examine the hands of all the [B]lack people in the community.” *Id.* at 780. The rest of the suspect’s description was immaterial: officers also stopped and questioned older Black people and at least one Black woman. *Id.* In a society in which a vague description can transform every single person of a particular race living in a city into a police suspect, that person’s race will also surely bear on the level of freedom they reasonably believe they have to walk away from a police interaction without express permission.

B. Being Black Increases the Dangerousness of Police Interactions Regardless of Whether Any Involved Officer Possesses Conscious Racial Bias.

percent of the whites reported that an officer had shown disrespect or had used insulting language toward them at some time.” (citation omitted)).

The overwhelming evidence that a person’s race affects how police officers treat them does not mean that all officers act with conscious racial prejudice or that an officer must be “a racist” to engage in racially biased behavior. Unconscious, implicit racial bias may go at least as far as conscious, explicit racial bias in explaining police conduct. *See Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring) (finding that “[c]ommon experience and common sense confirm this understanding” that “conscious and unconscious prejudice persist in our society and that it may influence” the criminal legal system). Implicit racial biases can influence a person’s behavior without that person’s awareness. These biases are most influential in situations that involve quick decision-making and ambiguity,²⁰ a description that often applies to encounters between officers and civilians.

In the United States, there exists a “powerful racial stereotype—that of [B]lack men as ‘violence prone.’” *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion)). This “particularly noxious strain of racial prejudice,” *id.*, is long-standing and pervasive in American society.²¹ To a person born and

²⁰ *See* Kahn & Martin, *supra* note 15, at 91 (describing the difference between explicit and implicit bias).

²¹ *See* Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXP’L PSYCHOL. 1322, 1322 (2008) (discussing the “overwhelming evidence that young Black

raised in this environment, implicit racial bias can easily manifest; “[t]he mere presence of a Black man . . . can trigger thoughts that he is violent and criminal.”²² Knowing that a stereotype is racist is no prophylactic, because “the mere presence of a person can lead one to think about the concepts with which that person’s social group has become associated.”²³ Police officers of all races are subject to the influence of implicit racial bias.²⁴

Researchers have found that this stereotyping influences behavior in a wide range of situations and circumstances. They include “people’s memory for who was holding a deadly razor in a subway scene, people’s evaluation of ambiguously aggressive behavior, people’s decision to categorize nonweapons as weapons, the speed at which people decide to shoot someone holding a weapon, and the probability that they will shoot at all.”²⁵ That routine encounters between police and Black people often involve police violence is not surprising given that “[m]erely

men are stereotyped as violent, criminal, and dangerous”); see generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010).

²² Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

²³ *Id.*

²⁴ See Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1990–95 (2018) (discussing how “studies reveal that police officers”—including Black police officers—“are not immune from these implicit racial biases”).

²⁵ Eberhardt et al., *supra* note 22 (citations omitted).

thinking about Blacks can lead people to evaluate ambiguous behavior as aggressive, to miscategorize harmless objects as weapons, or to shoot quickly, and, at times, inappropriately.”²⁶ Because of this pervasive stereotype, from the moment a police interaction begins, a Black person is disadvantaged; one study of officers found that “[w]hen officers were given no information other than a face and when they were explicitly directed to make judgments of criminality, race played a significant role in how those judgments were made. Black faces looked more criminal to police officers; the more Black, the more criminal.”²⁷

II. RACE REASONABLY INFLUENCES PERCEPTIONS OF THE POLICE.

The heightened risk to Black people of unwarranted police violence and hostility has a racialized impact on perceptions of the police. In a study by researchers at the University of Michigan, one man spoke of his experience:

When I was at Midwest High School, after basketball practice, when I was in the ninth grade, I used to always run. I used to like to run all the time. I used to run all the time. So I was running home from a game. And these policemen pulled me over, threw me against the car, handcuffed me, took me down,

²⁶ *Id.*; see also Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXP'L PSYCHOL. 120 (2006).

²⁷ Eberhardt et al., *supra* note 22, at 889.

searched me, and I had three pennies
and two cookies in my pocket.²⁸

Stories like this are common among Black people.²⁹ It is therefore no surprise that “[o]ne of the most reliable findings in research on attitudes toward police is that citizen distrust is more widespread among African-Americans than whites.”³⁰ Compared to white people, Black people are more likely to believe that a police stop was made because of their race,³¹ that it was illegitimate,³² and/or that the police

²⁸ Andrea L. Dottolo & Abigail J. Stewart, “*Don’t Ever Forget Now, You’re a Black Man in America*”: *Intersections of Race, Class and Gender in Encounters with the Police*, 59 *SEX ROLES* 350, 355 (2008).

²⁹ *Id.* (describing this recollection as “certainly a common one, in the culture as in the sample”).

³⁰ Rod K. Brunson, “*Police Don’t Like Black People*”: *African-American Young Men’s Accumulated Police Experiences*, 6 *CRIMINOLOGY & PUB. POL’Y* 71, 73 (2007).

³¹ Drew DeSilver, Michael Lipka & Dalia Fahmy, *10 Things We Know About Race and Policing in the U.S.*, PEW RSCH. CTR. (June 3, 2020), <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s> (finding that “Black adults are about five times as likely as whites to say they’ve been unfairly stopped by police because of their race or ethnicity”).

³² See Robin S. Engel, *Citizens’ Perceptions of Distributive and Procedural Injustice During Traffic Stops with Police*, 42 *J. RSCH. CRIME & DELINQ.* 445, 470 (2005) (finding that “compared to White citizens, African Americans were 1.7, 2.0, and 2.6 times more likely to perceive that the stop was illegitimate, the police acted improperly, or both, respectively”).

acted improperly³³ and disrespectfully.³⁴ Black people “are less satisfied with—and more distrusting of—the police, perceive greater levels of injustice and racial bias in law enforcement practices, and are more likely to report a variety of negative personal experiences that stem from their police encounters, which include aggressive and discriminatory treatment.”³⁵ Black people are more likely than white people to believe that officers tend to use unnecessary violence and to personally know people who have been subjected to that violence.³⁶ When such violence occurs, Black people are less confident that officers will face serious consequences for it.³⁷ The evidence is clear that a person’s race affects the treatment they expect from the police—and for Black people as a whole, the expectation is violence, harassment, and disregard for their legal rights.

³³ *See id.*

³⁴ Rod K. Brunson & Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 J. CONTEMP. ETHNOGRAPHY 425, 430 (2011).

³⁵ Eric A. Stewart et al., *Neighborhood Racial Context and Perceptions of Police-Based Racial Discrimination Among Black Youth*, 47 CRIMINOLOGY 847, 848 (2009); *see also* Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 URB. AFFS. REV. 858, 879 (2009).

³⁶ *See* Weitzer, *supra* note 19, at 824.

³⁷ DeSilver, Lipka & Fahmy, *supra* note 31 (reporting that “only about a third of [surveyed] black adults said that police in their community did an ‘excellent’ or ‘good’ job in using the right amount of force . . . , treating racial and ethnic groups equally . . . , and holding officers accountable for misconduct”).

C. Black People’s Perceptions of the Police Are Influenced by Common Racialized Experiences.

These attitudes, which often develop from a young age,³⁸ are spurred by both personal and community experiences.³⁹ Consider one young man’s recollection:

I saw my uncle [get beat up by the police]. They said he had a gun, but they didn’t find no gun so they couldn’t say that. Then they said he was resisting arrest so they beat him up and stuff like that. But I ain’t see no resisting arrest [especially] when they have the cuffs on you, you can’t resist no more. Then they maced him, and I felt like how is he resisting now? Only thing he tryin’ to do is get that [mace] out his eyes. And then I still saw ‘em hitting him with clubs and stuff.⁴⁰

Anyone who witnessed such a scene might well hesitate to attempt to end a future police encounter

³⁸ See Stewart et al., *supra* note 35, at 49 (noting “the large percentage of black youth who report being discriminated against by the police because of race”); see also Kahn & Martin, *supra* note 15, at 85 (discussing how “Black and Latino youth—and specifically boys—are more likely than White youth to be the focus of policing policies” (citation omitted)).

³⁹ See Brunson, *supra* note 30, at 72 (discussing how “[i]n making appraisals, [B]lacks not only draw from their own experiences, but also from patterns of events they are exposed to in their communities and knowledge imparted by members of their racial group” (citations omitted)).

⁴⁰ *Id.* at 89.

for fear of facing similar treatment for “resisting arrest.” And even when violence of this severity is avoided, the threat of unjustified arrest as punishment for “defiant” or “disrespectful” behavior—such as attempting to walk away from a police encounter—will understandably weigh more heavily on a reasonable Black person than it would a reasonable white person. Indeed, Black people are arrested at more than twice the rate of white people,⁴¹ and innocence is no inoculation against the harms that an arrest brings with it. The law allows a person who is arrested to spend up to two full days in the frightening conditions of a jail cell before being even brought before a magistrate. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991). A person who is arrested may be strip searched, an invasive and humiliating experience. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318 (2012). A person who is arrested will likely face negative collateral consequences from “immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, and education officials, among others.”⁴²

Daily experiences take their toll, and people who live in heavily policed neighborhoods often come to

⁴¹ Kahn & Martin, *supra* note 15, at 86 (noting that “[n]ationally, the arrest rate for African Americans is 2.5 times that for Whites”).

⁴² Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015).

expect poor treatment from the police.⁴³ “I start feeling violated sometimes, but then I think, nah, that’s something I should expect ‘cuz that’s just the police. I figure since they got some authority and can do whatever they want to do, they gonna do it,” described one Black youth.⁴⁴ For Black people, police violence seems a real possibility during any encounter.⁴⁵ “Being innocent is not the same as being perceived to be innocent, and “[e]ven the innocent person . . . might well fear that he is perceived with particular suspicion by hyper-vigilant police officers,” a fear that “is particularly justified for persons of color.” *Dozier*, 220 A.3d at 944; *see also Commonwealth v. Evelyn*, 152 N.E.3d 108, 125–26 (Mass. 2020) (finding that “a long history of race-based policing” might “lead an African-American male to be nervous or evasive in his dealings with police officers”); *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (finding that, in light of “a pattern of racial profiling of [B]lack males in the city of Boston,” Black Bostonians without any “consciousness of guilt” might “be motivated [to avoid officers] by the desire to avoid the recurring indignity of being racially profiled”).

D. As Signified by “the Talk,” Black People Are Influenced by a Distinct Communal

⁴³ Brunson, *supra* note 30, at 85.

⁴⁴ *Id.* at 87.

⁴⁵ *See id.* at 88 (finding that violence at the hands of the police . . . happened enough to convince [Black youth] that it was a real possibility during any encounter with police officers”).

History of Suffering Police Abuse Explicitly Because of Race.

In many Black families, the fear of being the victim of sudden, unexpected police violence has even given rise to the common—indeed, intergenerational—practice of Black parents “giv[ing] their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.” *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting). This conversation “is remarkably consistent and is passed down from generation to generation like a grandmother’s recipe for cornbread,” aimed at “diffusing negative perceptions and stereotypes to avoid being hurt or killed by police during routine activities.”⁴⁶ “It happens when you’re about 12 or 13,” described Reverend Kenneth Lewis of Green Memorial AME Zion Church in Portland, Oregon. “You’re told to be polite and keep your hands visible. Even if you’re

⁴⁶ Tracy R. Whitaker & Cudore L. Snell, *Parenting While Powerless: Consequences of “the Talk”*, 26 J. HUM. BEHAV. SOC. ENV’T 303, 304 (2016); see also Brunson & Weitzer, *supra* note 34, at 436 (“The norm of signaling respect to a police officer is often coupled with concrete advice regarding proper demeanor, namely, to act in a deferential, obedient, and compliant manner, even if provoked.”).

being disrespected or offended, don't respond. Keep calm and just say, 'Yes, sir, No, sir.'"⁴⁷

The ubiquity of “the talk” in Black communities illustrates a particular racialized and transgenerational experience of policing that, though it may manifest differently for different individuals, exists on a national level. Being Black in the United States means being tied to a collective, communal history in which the threat of unjustified police violence has loomed large across the centuries. Southern slave patrols, tasked with the control of enslaved people in urban areas, were an influential progenitor of modern American police forces,⁴⁸ sometimes evolving directly into police departments.⁴⁹ Following the Civil War, “police took the place of slave patrols in preventing insurrection by free Blacks and maintaining the social order.”⁵⁰ Writing to the *New York Tribune*, Black Virginians lamented how “the present police, who are now hunting us through the streets, are the men who

⁴⁷ Kelly Bouchard, *African-American Parents Say ‘the Talk’ Is a Life-and-Death Matter*, PORTLAND PRESS HERALD (July 24, 2016), <https://www.pressherald.com/2016/07/17/african-american-parents-say-the-talk-is-a-life-and-death-matter>.

⁴⁸ See ROBERT C. WADMAN & WILLIAM THOMAS ALLISON, *TO PROTECT AND TO SERVE: A HISTORY OF POLICE IN AMERICA* 27 (2004) (discussing the “entrenched policing concepts grounded in racial violence and . . . ingrained police culture rooted in slavery” in the South); BRYAN WAGNER, *DISTURBING THE PEACE: BLACK CULTURE AND POLICE POWER AFTER SLAVERY* 60 (2009) (discussing the same).

⁴⁹ WADMAN & ALLISON, *supra* note 48, at 34 (discussing how “patrols often evolved into police forces for cities”).

⁵⁰ *Id.* at 27.

relentlessly applied the lash to our quivering flesh.”⁵¹ These “[p]ostwar police forces . . . transform[ed] patrolling in to a highly effective but still legal means of racial oppression.”⁵² Officers ensured “that nightly curfews and vagrancy laws kept [B]lacks off city streets, as patrollers had done in the colonial and antebellum eras.”⁵³

As lynchings of Black people became an integral tool of maintaining white supremacy, police not only tolerated such acts but often mediated and directly participated in them.⁵⁴ This behavior was not limited to the South. “I want to explain to you officers that these colored people could not have been rioting among themselves. Bring me some white prisoners,” remarked an annoyed judge in the aftermath of a brutal racial pogrom against Black Chicagoans in 1919, during which police had shown great enthusiasm in arresting Black people but little interest in arresting the perpetrators.⁵⁵ Everyday police conduct like this led Martin Luther King, Jr. to write in 1963 that “[t]oday . . . armies of officials are clothed in uniform, invested with authority, armed with the instruments of violence and death and conditioned to believe that they can intimidate, maim

⁵¹ SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 193 (2001).

⁵² *Id.* at 202.

⁵³ *Id.* at 219.

⁵⁴ See EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 9, 32, 47, 58, 60 (3d ed. 2017).

⁵⁵ See WILLIAM M. TUTTLE, *RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919*, at 64 (1970).

or kill Negroes with the same recklessness that once motivated the slaveowner.”⁵⁶

Racial disparities in police encounters and how they play out reflect daily experiences of violence and humiliation that do not occur in a vacuum but rather in a continuum with this history.⁵⁷ Thus, any potential police encounter can instill fear of deadly escalation. “I tell young people, or people I know, whenever the police stop you, put your hands up high so they can see them, especially if you’re [B]lack, because you don’t want them to think that you are reaching for something,” one man in a predominantly Black Washington, D.C. neighborhood told researchers, capturing this dynamic.⁵⁸ “[W]e say to our son, you know, we say, ‘Don’t ever forget you’re a Black man in America,’” said another parent.⁵⁹ As one mother put it, “We want them to come home. Everything comes out of that. We do it so that they won’t be killed, so that they can survive — that’s the baseline.”⁶⁰

Clearly, to many reasonable people in the United States, their race bears a great deal on how they assess the extent of their rights and freedoms,

⁵⁶ MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 15 (Penguin Books 2000) (1964).

⁵⁷ See Brunson, *supra* note 30, at 76.

⁵⁸ Weitzer, *supra* note 19, at 833.

⁵⁹ Dottolo & Stewart, *supra* note 28, at 356.

⁶⁰ Rhea Mahbubani, *As Police Violence Comes Under More Scrutiny, Black Parents Say They’re Still Giving Their Kids ‘the Talk’ About Dealing with Cops*, INSIDER (Jun. 27, 2020, 11:30 AM), <https://www.insider.com/black-parents-the-talk-racism-kids-police-violence-2020-6>.

particularly during any interactions they or a loved one may have with police. Indeed, majorities of both Black *and* white people believe Black people are treated less fairly than white people when dealing with the police.⁶¹ One person deciding whether they're free to walk away from an inquisitive officer may be reasonable in their belief that it would be appropriate and safe to do so. A different person, however, might be reasonable in their concern that attempting to leave a police encounter will mean being beaten, shot, or violently arrested in the process. The reasonableness of those competing lines of thought depends, in large part, on their race and the nature of the collective experiences their communities have had with law enforcement. This Court “cannot turn a blind eye to the reality that not all encounters with the police proceed from the same footing, but are based on experiences and expectations.” *Dozier*, 220 A.3d at 945. When the court below declared that well-documented racial differences in police interactions can *never* inform the totality of the circumstances for whether a reasonable person would feel free to leave police presence, it did not adopt a race-neutral standard—it effectively imposed the norm of a reasonable white person. This Court should recognize that one's own race is an important factor that influences a reasonable person's judgment of whether they are free to end a police encounter and walk away.

CONCLUSION

⁶¹ DeSilver, Lipka & Fahmy, *supra* note 31.

For the foregoing reasons and those stated in Petitioner's submission, the Court should reverse the judgment below.

Respectfully Submitted,

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