No. 25-939

IN THE

Supreme Court of the United States

JAMES GARFIELD BROADNAX, *Petitioner*,

v.

STATE OF TEXAS, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF *AMICUS CURIAE* JACQUES BERMON WEBSTER II ("TRAVIS SCOTT") IN SUPPORT OF PETITIONER

ALEX SPIRO
ELLYDE R. THOMPSON
Counsel of Record
REBECCA ARNO
CHELSEA SINCOX
GRACE SULLIVAN
QUINN EMANUEL URQUHART & SULLIVAN, LLP
295 Fifth Avenue
New York, NY 10016
(212) 849-7000
ellydethompson@quinnemanuel.com
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus, a rap artist, seeks to provide the historical and artistic context within which to understand rap music—a genre often subject to misinterpretation.

Jacques Bermon Webster II ("Travis Scott") is a Grammy-nominated rapper, songwriter, record producer, philanthropist, and community activist. Mr. Webster has had more than one hundred charting songs, including five number-one hits on the U.S. *Billboard* Hot 100 chart. Through his Cactus Jack Foundation, Mr. Webster works to assist Houston youth with education expenses and creative endeavors, especially those from marginalized and at-risk communities. Mr. Webster's father is a soul musician and his grandfather was a jazz composer.

INTRODUCTION AND SUMMARY OF ARGUMENT

Today rap is one of the most popular musical genres in the world, and one of America's most celebrated and wide-reaching exports. Yet rap music has found its way into the courts, used increasingly as evidence against criminal defendants in a manner that exploits and perpetuates stereotypes associated with the genre and the artists who engage in it. *See* Mikah K. Thompson & Sierra Raheem, *Art as the*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution intended to fund preparation or submission of this brief. Counsel of record for all parties were timely notified of *amicus*'s intention to file this brief more than ten days prior to its filing.

Prosecutor's Weapon: The Use of Rap Lyrics Evidence at Trial, 65 SANTA CLARA L. REV. 81, 108 (2025).

This case provides an opportunity to clarify the extent to which constitutionally protected artistic expression may be used as propensity evidence against a criminal defendant. The manner in which prosecutors presented rap lyrics written by petitioner James Garfield Broadnax, a Black man, to an almost all-white jury during his capital sentencing hearing presents an ideal vehicle for addressing this issue because the prosecutors' conduct here was particularly egregious. The prosecutors argued Mr. Broadnax was likely to be dangerous in the future simply because he engaged in "gangster rap." Such an argument functionally operates as a categorical and straightforwardly unconstitutional content-based penalty on rap music as a form of expression.

Just as Chief Justice Roberts suggested during oral argument in *Elonis v. United States*, 575 U.S. 723 (2015), taking rap lyrics out of context could "subject to prosecution the lyrics that a lot of rap artists use." Tr. of Oral Arg. at 41:4–5, *Elonis v. United States*, 575 U.S. 723 (2015) (No. 13-983) (Roberts, C.J.). At a certain level of abstraction, the reality is even more problematic: taking rap *music* out of context subjects the entire genre to prosecution.

This brief, grounded in the work of leading legal and rap music scholars and informed by the experience of *amicus* as an artist, demonstrates the complexities of rap music as a genre and the limitations of the evidentiary rules to protect artistic expression. The brief opens with a primer on the history of rap music and hip-hop as quintessential political and artistic expression that have long faced

government regulation. It illustrates how rap music's characteristics as a genre, divorced from context, uniquely position it to be abused by prosecutors against criminal defendants and increase the likelihood that juries will be influenced to convict or inflict harsher sentences on improper grounds. The brief does this partly by explaining the origins and history of rap as a genre and situating the issues raised in Mr. Broadnax's case—and, more specifically, the prosecutors' *ipse dixit* assertion that engaging in "gangster rap" shows the artist is dangerous—within that context. Because rap often contains inflammatory messages and is otherwise often associated with certain racial stereotypes, the invocation of the genre as evidence against a criminal defendant is prone to misuse as a means to taint the jury, regardless of the actual content of the lyrics. These complexities both serve to explain the singular treatment rap music receives in the criminal justice system and to underscore the dire necessity of court intervention.

As a form of artistic and political expression protected by the First Amendment primarily created by and historically associated with minority artists, prosecutors should not be permitted to use rap lyrics—and the mere fact of engaging in a particular genre—against a criminal defendant as evidence of criminal propensity. *Amicus* respectfully submits that this Court should grant the petition to clarify the governing standard for the admissibility of constitutionally protected speech as evidence of criminal propensity.

ARGUMENT

I. THE ORIGINS AND CRIMINALIZATION OF HIP-HOP AND RAP MUSIC

A. Rap Unquestionably Is Artistic And Political Expression Of Core First Amendment Importance

The rise of hip-hop, and specifically rap music, is "the single most important event that has shaped the musical structure of the American charts" since the 1960s. Matthias Mauch et al., *The Evolution of Popular Music: USA 1960-2010*, 2 ROYAL SOC'Y OPEN SCI 1, 6–7 (2015). Today, rap is a global phenomenon, spanning continents and varied sub-genres. Abenaa Owusu-Bempah, *The Irrelevance of Rap*, 2 CRIM. L.R. 130, 130 (2022). "It is nearly impossible to travel the world without encountering instances of hip-hop music and culture." Marcyliena Morgan & Dionne Bennett, *Hip-Hop & the Global Imprint of a Black Cultural Form*, 140 DAEDALUS 176, 176 (2011), http://www.jstor.org/stable/23047460 (archived at https://perma.cc/R254-QRRB). Rap artists are Pulitzer Prize winners and Rock and Roll Hall of Fame inductees. *See DAMN., by Kendrick Lamar*, THE PULITZER PRIZES, https://www.pulitzer.org/winners/kendrick-lamar (last visited Mar. 8, 2026) (archived at https://perma.cc/X3N4-VKVZ) (praising Kendrick Lamar's album DAMN for its "vernacular authenticity and rhythmic dynamism that offers affecting vignettes capturing the complexity of modern African-American life"); Starr Bowenbank & Mackenzie Cummings-Grady, *Every Rapper in the Rock & Roll Hall of Fame*, BILLBOARD (May 27, 2025), https://www.billboard.com/photos/rappers-rock-and-roll-hall-of-fame-1235026443/ (archived at

https://perma.cc/XU2N-388R) (as of 2025, 15 rap artists have been inducted into the Rock and Roll Hall of Fame). And in 2025, four of the top 10 streamed artists globally were rap artists. *The Top Artists, Songs, Albums, Podcasts, and Audiobooks of 2025*, SPOTIFY (Dec. 3, 2025), https://newsroom.spotify.com/2025-12-03/wrapped-top-artists-songs-albums-podcasts-audiobooks/ (archived at https://perma.cc/J37L-BFG7).

Hip-hop and rap originated in the Bronx in the 1970s, in a landscape dominated by burned-out buildings, poverty, and gang violence. JEFF CHANG, CAN'T STOP, WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION 10–19 (2005). Against this bleak backdrop, hip-hop and rap emerged as a defiant celebration of having a good time. Hip-hop was literally born at a block party. Okla Jones, *Inside the Block Party Where Hip-Hop Was Born*, ESSENCE (Feb. 21, 2023), https://www.essence.com/entertainment/the-block-party-where-hip-hop-was-born-1973/ (archived at https://perma.cc/93UG-6SH9). As cultural historian Jeff Chang once described, "The party people were moving to the shouts of James Brown, … shaking off history, having the best night of their generation's lives … at the moment when gangs had begun to wane and young people were looking for ways to gather and express themselves." David Chiu, *DJ Kool Herc: The Back-to-School Party That Started a Revolution*, PASTE (Aug. 5, 2013) (quoting CHANG, *supra*, at 70), https://www.pastemagazine.com/music/dj-kool-herc/dj-kool-herc-the-back-to-school-party-that-started (archived at https://perma.cc/K68V-9DEU).

From these humble beginnings, rap evolved into a vehicle for artists to offer social and political commentary "seeking to document and protest conditions of urban life, including police brutality and mass incarceration born of the War on Drugs, gang violence, and widespread urban decay and unemployment." Kelly McGlynn et al., *Lyrics in Limine: Rap Music and Criminal Prosecutions*, ABA (Jan. 11, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/ (archived at https://perma.cc/E4ZQ-HAYU). For example, in 1984, Run-DMC released "It's Like That" and "Hard Times," addressing unemployment, the cost of living, homelessness, and the difficulties of life in poor, urban environments: "Hard times spreading just like the flu/ Watch out, homeboy, don't let it catch you." *See generally* Andrea L. Dennis, *The Music of Mass Incarceration*, 13 LANDSLIDE 14, 14–16 (2020).

As the War on Drugs escalated in the 1980s, rap reflected the brutality of policing felt on the streets. In 1988, during the very month in which the LAPD conducted the infamous Dalton Avenue drug raid in South-Central Los Angeles, beating residents and causing millions of dollars in damages, N.W.A released "*Fuck tha Police*." *Id.* at 16. The song takes law enforcement to task for racial profiling and brutality with lyrics depicting retribution against law enforcement: "Ice Cube will swarm on any motherfucker in a blue uniform/ Just 'cause I'm from the CPT, punk police are afraid of me, huh." "Fuck tha Police" continues to be recognized as one of the greatest protest songs of all time, including by *Rolling Stone* magazine as among the 500 greatest songs of all

time, without limitation. *The 500 Greatest Songs of All Time*, ROLLING STONE (Feb. 16, 2024), https://www.rollingstone.com/music/music-lists/best-songs-of-all-time-1224767/bobbie-gentry-ode-to-billie-joe-3-1225147/ (archived at https://perma.cc/R4KW-9SSK).

Meanwhile, the sub-genre of "gangster rap" emerged, arguably functioning as a distinct means of conveying "unabashed[] antagonis[m] toward America's power structures." Erik Nielson, *"Can't C Me": Surveillance and Rap Music*, 40 J. BLACK STUD. 1254, 1269 (2010). In 1986, Ice-T released what many regard as the first "gangster rap": "6 'N the Mornin'," which portrays a first-person narrative of violence, drug dealing, prostitution, and a police chase: "I'm a self-made monster of the city streets/ Remotely controlled by hard hip-hop beats … We bust a corner doing sixty, one police car spun/ And all I was thinking was, murder one." The popularity of this "gangster" style grew as rap moved beyond Black and urban communities to obtain a young, white, and suburban audience. This new fan base tended to prefer music that was "more aggressive" and "abrasive," putting pressure on record companies to in turn encourage artists to cater to their tastes with fictionalized gangster personas and hyperbolic lyrics. Dre'Kevius O. Huff, *Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics*, 5 SAVANNAH L. REV. 335, 340 (2018).

As defining American art forms and tools of political expression, hip-hop and rap music are at the zenith of First Amendment protection. Even if rap were an obscure, distasteful, or even meritless genre, the First Amendment makes no distinction between

high and low art, between clear and indecipherable messages, or between popular and unpopular points of view. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (noting that the First Amendment "unquestionably shield[s]" music regardless of whether it conveys an easily articulable message); *303 Creative LLC v. Elenis*, 600 U.S. 570, 595 (2023) ("Nor, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive."). Any government action taken to repress, censor, or criminalize musical expression runs up against core constitutional protections: "From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order." *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (citations omitted).

B. The Criminalization Of Rap Music Infringes First Amendment Rights

Despite rap's enduring popularity, critical respect, and status as constitutionally protected artistic expression, rap has long been subject to suppression and surveillance. *See* Nielson, *supra*, at 1258. Indeed, the largest police force in the country, the NYPD, has operated its notorious Enterprise Operations Unit, aka the "Hip-Hop Police," for over two decades, dedicated to keeping tabs on rappers—including the likes of Jay-Z, Busta Rhymes, and 50 Cent—and

generating weekly reports on the alleged risks associated with performances scheduled in the city. *See* Shawn Setaro, *Why Are the NYPD 'Hip-Hop Police' Spying on Rappers?*, COMPLEX (June 11, 2020), https://www.complex.com/music/a/shawn-setaro/nypd-hip-hop-police (archived at https://perma.cc/H9C3-DG67). Renowned performers are not alone in facing censorship. For example, young aspiring rap artists have been subject to "out-of-school suspension, expulsion and referral to the juvenile or criminal legal systems" for bringing their rap lyrics to school. Andrea L. Dennis, *Schoolhouse Rap*, 41 POPULAR MUSIC 511, 512 (2022).

Following this pattern, rap lyrics are increasingly being wielded against artists by criminal prosecutors. Since the late 1980s, rap lyrics have been used as evidence in almost 700 cases—usually against criminal defendants. *Lyrics Are Art. Art Is Not Evidence.*, RAP ON TRIAL, https://www.rapontrial.org/ (archived at https://perma.cc/VA3T-3457) (last visited Mar. 8, 2026). "No other musical genre and no other art is used in the same way or to the same extent." Briana Younger, *The Controversial Use of Rap as Evidence*, THE NEW YORKER (Sept. 20, 2019) (quoting Andrea Dennis), https://www.newyorker.com/culture/culture-desk/the-controversial-use-of-rap-lyrics-as-evidence (archived at https://perma.cc/JKX8-PR4N).

Consider the case of Jeffery Williams, a rapper better known as Young Thug, once characterized by Sir Elton John as a modern-day John Lennon. *See* Isabella Gomez Sarmiento & Rodney Carmichael, *Young Thug Pleads Guilty in YSL Trial, Will Serve Probation*, NPR (Nov. 1, 2024), https://www.npr.org/2024/10/31/nx-s1-5174207/young

-thug-guilty-plea-ysl-trial (archived at https://perma.cc/U5YY-MWQ8). In the summer of 2022, Williams was indicted on RICO and other gang, drug, and firearm-related charges, to which he eventually pleaded guilty. The State alleged that Williams's record label Young Stoner Life Records had a double function as a criminal street gang and that Williams used his Billboard-charting music to intimidate rival gangs. Specifically, prosecutors sought to treat as admissions the lyrics of Williams's song "Anybody": "I never killed anybody/ but I got something to do with that body." Williams's defense team argued these lines were figurative and a reference to the "body" of Williams's collaborator on the song, Nicki Minaj.

Yet another successful rapper, Darrell Caldwell, known as Drakeo the Ruler, had his own lyrics turned against him during his trial on a murder charge based on a 2016 killing at a warehouse party. Despite investigators determining that Caldwell was not the gunman and had no hand in the violence, prosecutors attempted to frame the murder as a casualty of Caldwell's beef with rival rapper RJ. Jeff Weiss, *Stabbing, Lies, and a Twisted Detective: Inside the Murder Trial of Drakeo the Ruler*, FADER (July 11, 2019), https://www.thefader.com/2019/07/11/drakeo-the-ruler-murder-trial-los-angeles-report (archived at https://perma.cc/U3VM-TF8W) (last visited Mar. 8, 2026). In the absence of any factual ties to the murder, prosecutors instead sought to implicate Caldwell through his music. Prosecutors played Caldwell's song "*Flex Freestyle*" not once but three times for the jury, attempting to draw attention to lyrics such as: "I'm ridin' 'round town with a Tommy gun in a Jag/ And you can disregard the yelling, RJ tied up in the back." On cross-examination, the defense asked one

of the detectives whether investigators had ever "come across any evidence of RJ ever being tied up in Drakeo's trunk?", to which the detective responded, "I have no evidence." *Id.* Caldwell was acquitted of murder and attempted murder. *Id.*

Prosecutors also have turned to lyrics as supposed evidence of defendants' violent proclivities. In 2025, rap lyrics were used in the sentencing phase of the Texas murder trial of rapper Taymor McIntyre, known as Tay-K. The jury sentenced McIntyre to 80 years in prison after reviewing the lyrics and the music video for McIntyre's song "*The Race*"—which appeared on Billboard's Hot 100 in 2017 and has amassed 250 million views on YouTube. Jessica Warner, *Tay-K Sentenced to 80 Years in Prison for the Murder of Photographer Mark Saldivar*, News4SA (Apr. 15, 2025), https://news4sanantonio.com/news/local/tay-k-sentenced-to-80-years-in-prison-for-the-murder-of-photographer-mark-saldivar (archived at https://perma.cc/GKN3-RZUZ).

These high-profile cases have brought attention to the risk that rap lyrics will be used as evidence of criminality or to enhance a criminal defendant's sentence. Unsurprisingly, this risk chills rap artists' speech. In 2020, Grammy Award-winning artist 50 Cent posted a word of caution to fellow rappers: "[I]f you say crazy shit on these records they are gonna use it," he wrote. "[I]f you in a gang on the song then you in the gang when the indictment come." *50 Cent Shares Warning to Rappers About Using Gang-related Lyrics*, Capital Xtra (Mar. 24, 2020), https://www.capitalxtra.com/artists/50-cent/news/

gang-lyrics-court-warning-heat-song/ (archived at https://perma.cc/JX8W-PB72).

The First Amendment is implicated by this indirect suppression of rap just as it would be by a censorship law outlawing "gangster rap" as a genre or by government efforts to cancel a particular performance. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[T]his Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."). Particularly in context of other efforts to surveil and criminalize rap artists, the deployment of rap lyrics as evidence of criminality is revealed to be part of a pattern of discrimination against rap, "target[ing] speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

II. THE PETITION PRESENTS AN IMPORTANT QUESTION AS TO WHEN PROTECTED ARTISTIC EXPRESSION MAY BE USED AS PROPENSITY EVIDENCE

A. Engaging In A Particular Genre Of Artistic Expression Should Not Be Grounds For A Conviction Or Harsher Sentence

Ever since its beginnings grounded in hip-hop culture and characteristically provocative lyrics, rap music has been a controversial fixture of American culture. Scholars have warned that "[c]ourts do not acknowledge that defendants authoring rap music lyrics are engaging in an artistic process that challenges everyday expectations regarding language."

Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 13–14 (2007). To the unfamiliar listener, rap lyrics are more likely to be perceived as literal or fact. And rap is more susceptible to provoking negative racial stereotypes than other genres of music or modes of artistic expression.

Rap lyrics often incorporate "metaphors and boasts" designed not to be believed, but to tantalize the listener who waits to see if the speaker "can top the last, preposterous episode he's spun … one outrageous lie after another." *Id.* at 22–23 (quotation omitted). Lyrical "boasts" include "exaggerated and invented boasts of criminal acts." *Id.* at 22 (quotation omitted). Indeed, "[t]he most frequent style of rap was … a boastful, bragging form of oral storytelling sometimes explicitly political and often aggressive, violent and sexist in content." TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 75 (1994). In this way, "[t]he art of rap is deceptive. It seems so straightforward and personal and real that people read it completely literally, as raw testimony or autobiography." JAY-Z, DECODED 41 (2011).

Judges and jurors unfamiliar with the genre may not know to separate a rapper's actual life from the pop culture image he or she seeks to project as an artist, just as implicit bias may encourage associations grounded in racial stereotypes between genre and artist. Indeed, from hip-hop's early beginnings, "media outlets created a hyper-stereotypical account of hip-hop as the product of poor, young black men who were literally 'wild' and

menacing"—a "depiction [which] has stuck in the United States." Morgan & Bennett, *supra*, at 189.

In his 2008 music video for his song "*Gangsta Rap Made Me Do It*," Ice Cube took these critics head-on. Ice Cube, Gangsta Rap Made Me Do It, YOUTUBE.COM (July 22, 2014), https://www.youtube.com/watch?v=1WkvomHrfVo (archived at https://perma.cc/SY3C-AYD9). The scene opens with a teacher, flanked by two American flags and wearing a Nazi-reminiscent uniform, lecturing a classroom of children that "prior to gangsta rap music, the world was a peaceful place .... Violence, rape, murder, arson, theft, war, these are all things that came about as a result of gangsta rap music." A child asks, "but wasn't Compton dangerous before gangsta rap?" The teacher responds, "Wrong! Compton was a nature preserve for bunny rabbits!" Then a screen plays a montage of clips from, for example, news coverage of the war in Iraq, actual shootings like the Virginia Tech mass shooting and footage of the Michael Richards Laugh Factory incident, during which the chorus repeats, "ain't nothing to it, gangsta rap made me do it."

Decades of research show that juries are likely to form negative perceptions of defendants when they are associated with rap music—regardless of the actual content of the lyrics. In one study, when researchers falsely told some participants that violent lyrics from a 1960 folk song, "*Bad Man's Blunder*" by The Kingston Trio, were from a rap song, and other participants that the lyrics were from a country song, the participants who were told that the lyrics were from a rap song were significantly more likely to say that the song was offensive, dangerous, and likely to incite violence. Carrie B. Fried, *Who's Afraid of Rap:*

Differential Reactions to Music Lyrics, 29 J. APPLIED SOC. PSYCH. 705, 708–11 (1999); *see also* Adam Dunbar et al., *The Threatening Nature of 'Rap' Music*, 22 PSYC. PUB. POL'Y & L. 280, 285 (2016) (same study, same result). Another study specifically sought to understand whether "negative stereotypes about rap music shape jurors' attitudes about the defendant, unfairly influencing outcomes." Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIMINOLOGY 507, 508 (2018). Participants were told music lyrics were from either a country, heavy metal, or rap song, then asked to read the lyrics and "make judgments about the person who wrote the lyrics." *Id.* at 516. The participants who believed the lyrics were from a rap song were significantly "more likely to assume that the songwriter is a member of a gang, is involved in criminal activity, and has a criminal record." *Id.* at 518.

The fact is that the criminalization of rap lyrics is the weaponization of "racial stereotypes," as "lyrics [are] used to justify charging … or to justify sentencing recommendations." Jasmine B. Gonzales Rose et al., *Antiracist Expert Evidence*, 134 YALE L.J. 2362, 2381 (2025) (quotation omitted). Especially so where, as here, prosecutors overtly argued that the genre of the lyrics—even separate from the specific lyrics—had a tendency to show something criminal or dangerous about the speaker. One Louisiana judge revealed just such a genre-based bias when he lectured a criminal defendant and aspiring rapper during sentencing, "Your genre has a lot to do with the mindset people have. Your genre has normalized violence." Joe Gyan Jr., *Baton Rouge Teen Rapper*

Kentrell Gaulden Lectured by Judge, Given Probation in Drive-by Shooting, NOLA.COM (Aug. 22, 2017), https://www.nola.com/news/courts/baton-rouge-teen-rapper-kentrell-gaulden-lectured-by-judge-given-probation-in-drive-by-shooting/article_b418bb56-b333-5fe9-8b42-6cfdd525952c.html (archived at https://perma.cc/5D9A-PTA8).

B. This Court Should Clarify The Constitutional Limits On The Use Of Protected Artistic Expression As Evidence Of Criminal Propensity

With this context in mind, consider the State's arguments during Mr. Broadnax's capital sentencing hearing. Mr. Broadnax was convicted by an almost-all-white jury after the State struck every eligible Black juror during jury selection and a single Black juror was added back by the trial judge to avoid empaneling an all-white jury. During sentencing, the State relied on rap lyrics Mr. Broadnax had composed to prove that he had a dangerous future propensity to commit criminal acts—a required finding in Texas for the jury to sentence a defendant to death. Second Subsequent Appl. at 10–13. Referring to Mr. Broadnax's lyrics as "gangster rap," the State introduced more than 40 pages of handwritten lyrics from Mr. Broadnax's notebooks, *id.*, and argued that the rap lyrics Mr. Broadnax had composed proved his "gang mentality" because the lyrics were "gangsta rap" and "the root word of … gangster rap is gangster." *Id.* at 183. This presentation clearly had an impact on the jury; indeed, during deliberations, the jury requested to view the rap lyrics not once but twice.

Setting aside that the root word of "gangsta rap" is, in fact, rap—as "gangsta rap" is a sub-genre of rap—

such an argument can be reduced to simple logic. By the State's telling, because Mr. Broadnax engaged in a particular genre of artistic expression ("gangsta rap"), and "gangster" (the jury was encouraged to surmise) should be equated with "dangerous," Mr. Broadnax was dangerous and deserving of capital punishment. And because such "logic" does not rise or fall with anything specific to Mr. Broadnax, the argument can be re-stated as "anyone who engages in rap music is dangerous."

The State's argument runs afoul of multiple constitutional guarantees. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). "Accordingly, a court may not punish an individual by imposing a higher sentence for the exercise of first amendment rights." *United States v. Lemon*, 723 F.2d 922, 937 (D.C. Cir. 1983).

The State's argument here—that a heightened sentence should be imposed based on a defendant's constitutionally protected choice to engage in a particular genre of artistic expression and because of his rap lyrics—falls squarely within that category. And these arguments are particularly harmful in context of the history described above.

Multiple courts therefore have recognized these complexities and the myriad problems with admitting rap lyrics as evidence against criminal defendants, *see* Pet. at 9 (collecting cases), including the State of Texas. *Hart v. State*, 688 S.W.3d 883 (Tex. Crim. App. 2024) (holding that "the admission of rap music or rap videos is highly prejudicial due to the nature of the lyrics that distract from the charged offense").

For example, in *State v. Skinner*, the New Jersey Supreme Court held that "the violent, profane, and disturbing rap lyrics authored by defendant constituted highly prejudicial evidence against him that bore little or no probative value as to any motive or intent behind the attempted murder offense with which he was charged." 95 A.3d 236, 238 (N.J. 2014). In so doing, the court described rap as "a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture," the admission of which "risked poisoning the jury against defendant." *Id.*

In *Commonwealth v. Gray*, the Supreme Judicial Court of Massachusetts rejected the admission of rap lyrics "without contextual information vital to a complete understanding of the evidence," and acknowledged the disparate treatment of rap music as a genre: "We discern no reason why rap music lyrics, unlike any other musical form, should be singled out and viewed sui generis as literal statements of fact or intent." 978 N.E.2d 543, 561 (Mass. 2012).

These courts rightly recognized that the lyrics at issue lacked probative value and risked a prejudicial effect precisely because of their expressive First Amendment character. Because rap lyrics are art, they are not literal. And introduction of rap lyrics as evidence against criminal defendants invites jurors to transfer their opinions about the genre onto the individual before them, risking punishment for expression unrelated to the crime at issue.

In the vacuum created by the lack of a rule applying the First Amendment to the rules of evidence, each case in which prosecutors seek to introduce rap lyrics as evidence "becomes a case-by-case assessment

as to whether the rules of evidence permit or prohibit the evidence," which is "a train wreck." ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 113–14 (2019); *see also* McGlynn et al., *supra* ("Some courts undertake the required analysis with sufficient attention to the essential context, but the application of key protective principles is unacceptably inconsistent.").

This case shows the limitations of the evidentiary rules to protect against the infringement of free speech and a defendant's right to due process. At its core, an argument that engaging in rap music proves that the artist has a dangerous future propensity is only effective because, "[t]o the extent that individuals associate rap music with crime and criminal behaviors, they negatively perceive defendants who are involved with rap music." *State v. Leslie,* 843 N.W.2d 476 (Table), 2014 WL 70259, at *6 (Iowa Ct. App. 2014) (quoting Dennis, *Poetic (In)Justice?*, at 29–30). Stated differently, entrenched in a test that allows such an argument is the tolerance for an intellectually dishonest assumption: that evidence that a criminal defendant engaged in rap music *always* has a tendency to show a dangerous future propensity. *See* Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL'Y 33, 38–39 (2016) (emphasis added) ("[U]sing hip-hop rap music to target criminal behavior is more about criminalizing young Black men for what they say, under the premise that it exposes what they do … it works because it is grounded in the history of policing and anti-Blackness in American law."). Failing to acknowledge rap music as artistic

expression functionally operates as a content-based penalty on expression.

Because rap lyrics are entitled to First Amendment protection, *see Hurley*, 515 U.S. at 569; *Ward*, 491 U.S. at 790, the issue of the admissibility of rap lyrics as propensity evidence against a criminal defendant warrants constitutional analysis independent of that encompassed by the evidentiary rules. *See Dawson v. Delaware*, 503 U.S. 159, 165–67 (1992) (holding that the First Amendment prohibited the use of evidence that proved nothing more than a defendant's "abstract beliefs"). Additional safeguards are needed to uphold the promise that courts will not "sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects." *Street v. New York*, 394 U.S. 576, 594 (1969).

Indeed, the Due Process Clause calls for consideration of "whether a State's procedures for guaranteeing a fundamental constitutional right are sufficiently protective of that right." *Cooper v. Oklahoma*, 517 U.S. 348, 367–68 (1996). "[T]he State's power to regulate procedural burdens [is] subject to proscription under the Due Process Clause if it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 367 (cleaned up). "[F]reedom of speech" is, of course, "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925).

And this Court has recognized that, when protected speech without a meaningful connection to

the offense is introduced against a criminal defendant to increase punishment, it raises both First Amendment concerns and due process concerns as to the fairness and reliability of the proceedings. *See Dawson*, 503 U.S. at 165–67. Accordingly, petitioner's question presented under the Due Process Clause invites this Court to consider whether introduction of rap lyrics renders criminal proceedings fundamentally unfair for the additional reason that the use of such evidence burdens First Amendment expression.

In the absence of this Court's intervention, many more voices may be silenced before they ever have an opportunity to be heard. A jury was told that it should sentence Mr. Broadnax to death because he had a "gangster mentality," evidenced by the fact that he wrote lyrics in the style of "gangsta rap," and "the root word of gangster rap is gangster." But engaging in rap music should not be a death sentence. A lack of proper safeguards around protected speech risks criminalizing the genre altogether.

CONCLUSION

For the reasons set forth above, *amicus* respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ALEX SPIRO
ELLYDE R. THOMPSON
Counsel of Record
REBECCA ARNO
CHELSEA SINCOX
GRACE SULLIVAN
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
295 Fifth Avenue
New York, NY 10016
(212) 849-7000
ellydethompson@
quinnemanuel.com

Counsel for Amicus Curiae

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