

SJC-13223

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

COMMONWEALTH

V.

ANILDO LOPES CORREIA

**BRIEF *AMICI CURIAE* FOR CITIZENS FOR JUVENILE JUSTICE,  
THE COMMITTEE FOR PUBLIC COUNSEL SERVICES,  
THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS, THE NEW ENGLAND INNOCENCE PROJECT, PROFESSOR  
CHARIS E. KUBRIN, AND PROFESSOR JACK LERNER IN SUPPORT  
OF THE DEFENDANT-APPELLANT AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Judicial Court Rule 1:21, Citizens for Juvenile Justice (CfJJ) and the New England Innocence Project (NEIP) represent that they are 501(c)(3) organizations under Federal law and the laws of the Commonwealth of Massachusetts. The Massachusetts Association of Criminal Defense Lawyers (MACDL) represents that it is a 501(c)(6) organization. The Committee for Public Counsel Services (CPCS) is a statutorily created agency established by G.L. c. 211D, § 1. *Amici* do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in any *amici*.

## **PREPARATION OF AMICUS BRIEF**

Pursuant to Appellate Rule 17(c)(5), amici and their counsel declare that:

- (a) no party or party's counsel authored this brief in whole or in part;
- (b) no party or party's counsel contributed money to fund preparing or submitting the brief;
- (c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and
- (d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

## STATEMENTS OF INTEREST OF AMICI

**Citizens for Juvenile Justice** (“CfJJ”)\* is the only statewide, independent, non-profit organization working exclusively to improve the juvenile justice and other youth-serving systems in Massachusetts. CfJJ’s mission is to advocate for statewide systemic reform to achieve equitable youth justice. This includes promoting smart policies that advance the healthy development of children and youth so they can grow up to live as responsible and productive adults in our communities. CfJJ believes that both young people and public safety are best served by fair and effective systems that recognize the ways adolescents are different from adults and that focus primarily on rehabilitation rather than an overreliance on punitive approaches. Research has established that Massachusetts has pervasive racial disparities in its criminal legal system, making advocacy for still-developing adolescents in this system a core part of CfJJ’s mission.

The **Committee for Public Counsel Services** (“CPCS”), the Massachusetts public defender agency, is statutorily mandated to provide counsel to indigent defendants in criminal proceedings. See G.L. c. 211D, §§ 1, 5. The issue addressed in this brief — whether a defendant’s artistic expression can be used against him in a homicide prosecution despite having nothing to do with the events at issue — will

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\* CfJJ interns Madison Tompkins, Alexis Acosta, and Tonneia Lyles provided excellent research and editorial assistance in preparing this brief.

affect numerous defendants whom CPCS attorneys are appointed to represent. See *Patton v. United States*, 281 U.S. 276, 304 (1930) (“Whatever rule is adopted affects not only the defendant, but all others similarly situated”) (citation, quotation marks omitted).

The **Massachusetts Association of Criminal Defense Lawyers** (“MACDL”) is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal legal system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal legal system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

The **New England Innocence Project** (“NEIP”) is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for legal and policy reforms that will reduce the risk of wrongful convictions. This includes advocating for the increased use of

reliable scientific evidence and the exclusion of “common sense” misconceptions and assumptions to guide judicial decision-making. NEIP is committed to raising public awareness of the prevalence, causes, and costs of wrongful convictions, including bringing to light the racial disparities that exist within the criminal legal system and that have led to a disproportionate number of people of color who have been wrongfully convicted.

**Charis E. Kubrin** is Professor of Criminology, Law and Society and (by courtesy) Sociology at the University of California, Irvine. (University affiliation is indicated for identification purposes only.) She is co-author or co-editor of six books and has published dozens of journal articles, many of which focus on the intersection of music, culture, and social identity, particularly as it applies to hip-hop and youth of color in disadvantaged communities. Among other work, Professor Kubrin has been an author on several studies exploring, in a controlled experimental setting, the relationship between rap music and bias, and she authored a sociological study exploring the relationship between Black youth culture, rap music, and social identity. She is co-author of *Rap On Trial: A Legal Guide for Attorneys*, a legal treatise on the use of rap lyrics in criminal proceedings, and has served as an expert witness and consultant in numerous criminal cases involving rap music as evidence of alleged underlying criminal activity. Professor Kubrin gave a TEDx talk, “The

Threatening Nature of...Rap Music?” on the use of rap lyrics as evidence in criminal trials.

**Jack Lerner** is a Clinical Professor of Law and the Director of the Intellectual Property, Arts, and Technology (IPAT) Clinic at the University of California, Irvine School of Law. (University affiliation is indicated for identification purposes only.) He is a nationally known expert on the use of rap lyrics in criminal proceedings. Professor Lerner is the co-author of *Rap On Trial: A Legal Guide for Attorneys*, an annually updated treatise on the use of rap lyrics in criminal proceedings. The treatise includes explanations of common rap conventions that may be unfamiliar to lawyers, judges, and jurors; an overview of empirical research on rap and bias; and a regularly updated national survey of the decisions of trial and appellate courts on evidentiary and First Amendment challenges to admitting lyrics at trial.

### **SUMMARY OF ARGUMENT**

At trial, rap lyrics totally unrelated to the facts at issue were lifted from the YouTube videos of the defendant’s artistic persona, inappropriately introduced on cross-examination without prior disclosure, and erroneously admitted over objection and a motion for mistrial—despite their obvious prejudicial effect.

Decades of social science research and public opinion polling consistently prove that rap music and its performers are widely disliked and stereotyped as violent by members of the general public, and that admission of rap lyrics at trial triggers

deeply embedded implicit biases, resulting in profound prejudice to defendants. *Infra* at 18-28. Prosecutors' use of rap lyrics misunderstands the nature of rap as art—flattening a wide-ranging, intentionally hyperbolic artistic form developed by and strongly associated with Black people into mere criminal confessions. *Infra* at 29-31.

This Court should hold that a defendant's artistic expression, including rap music, is not admissible unless the Commonwealth establishes its relevance by showing a direct connection to the facts at issue and only where the probative value of the evidence is not outweighed by its prejudicial effect. *Infra* at 31-36. Applying that standard here, the Court should reverse Correia's conviction: his lyrics had *nothing to do* with the events at issue, but spinning their content as literal effectively smeared him as a person with the *propensity* for violence, ruthlessness, and criminality. *Infra* at 36-39. Careful gatekeeping of such evidence is especially critical because rap is protected speech entitled to the same protections as other artistic expression under the First Amendment. *Infra* at 39-43.

## **BACKGROUND**

*Amici* adopt the Statement of the Case and detailed Statement of Facts recounted by Defendant-Appellant Correia, see Def. Br. at 9-19, and emphasize briefly how rap lyrics were used during Correia's trial. Correia was prosecuted for first-degree murder when, in the midst of a brawl involving dozens of young people

in a public park, he stabbed Ywron Martins with a small pocketknife, killing him. Correia thought Martins was reaching to unzip his backpack and likely pull out a gun. Tr.4/2:269–270. Correia developed that concern shortly after a series of punches between the two, when he made Martins stumble backward. Tr.4/2:265, 267, Tr.3/25:266.6. Correia laughed and asked if “that’s all he got.” Tr.4/2:265, 267, and Martins responded, “Nigga, do you know how the hot shit feel.” Tr.4/2:265. Correia recognized this as a lyric from a song about how it feels to get shot and killed: “burn from the bullets.” Tr.4/2:267. Just after Martins referenced “the hot shit”, he tried to unzip his backpack, which he had taken off. Tr.4/2:268–270. In the context of their fight, Correia perceived the lyrics plus the attempt to get into the backpack as an escalation: Martins was threatening to shoot him. Tr.4/2:269.

Earlier that year, Correia had seen Martins post photos on social media posing with multiple weapons, including two guns on separate occasions as well as a knife. Tr.4/2:222, 224–230, RA.44–46. And earlier the same day of the brawl, Correia had seen Martins post a photo of himself with a taser captioned, “Don’t let a sneakdissin to a murder,” which Correia thought meant “don’t get killed over talking behind someone’s back.” RA.41; Tr.4/2:232-234. In view of that recent activity, Correia worried that, having invoked those lyrics in the midst of their scuffle, Martins was trying to unzip his backpack in order to pull out a gun and shoot Correia.

Correia testified to these facts at trial, explaining why he felt he needed to act in self-defense. Tr.4/2:269-280. During cross examination, without any prior warning to the defense or to the judge, see Tr.4/2:295-296, 4/3:7, the prosecutor indicated that the Commonwealth intended to introduce lyrics from Correia's own rap songs that he had posted on YouTube—even though those songs were not mentioned or involved in the events that led to Martins' death. See Tr.4/2:293. Correia was known to have an artistic persona in his music production, using the name "AC\$TACK\$" on YouTube. RA.47, Tr.4/3/2019:25. Defense counsel immediately objected to admission of the lyrics as improper prior bad acts evidence, Tr.4/2:295-296; objected to the lack of notice, Tr.4/3:7, 8, 15, 23, 26-27, 29, 35, based on mandatory discovery required by Mass. R. Crim. P. 14 for the defendant's own statements, Tr.4/4:26; and the next day requested a mistrial, arguing that the lyrics were irrelevant and prejudicial and renewing the notice argument, see Tr.4/3:7, 17-19, 23.

The judge overruled defense counsel's repeated objections and denied counsel's motion for a mistrial, finding the lyrics "probative on the question of whether it's reasonable for *someone like this defendant* to interpret Mr. Martins postings as so threatening to him . . . he had to repeatedly stab him in self-defense." Tr.4/3:21-22 (emphasis added). The judge provided no limiting instruction on the lyrics, allowing the jury to hear them and use them for any purpose. Def. Br. at 19.

The record does not indicate when all of the recordings were made or posted. Def. Br. at 18. The songs included lyrics such as, “living this life of crime,” “friends turn to enemies, enemies turn to memories,” “and the police can’t stop us”, Tr.4/3:303–304, an allusion to a “war with the north side,” and references to weapons such as, “I love my Glock, pop, now you’re dead,” Tr.4/3:304, and “I keep my weapons everywhere in the field.” Tr.4/2:306. The Commonwealth also introduced the cover art of one song, which was a cartoon of someone wearing a t-shirt that had an AK-47 on it. Tr.4/3:305.

## ARGUMENT

### **I. The judge erred in admitting Correia’s lyrics because they were irrelevant and highly prejudicial.**

#### **a. Rap music and rap performers are widely stereotyped as violent and extensive social science research establishes that admission of rap lyrics substantially prejudices defendants at criminal trials.**

For decades, public opinion polling has shown that Americans, with some variation across race, ethnicity, and age cohort, have a negative assessment of rap music. According to a 2007 poll by the Pew Research Center, 48% of Hispanic people, 71% of Black people, and 74% of White people believed that “rap’s societal impact is bad.” *Rate Rap Low*, Pew Res. Ctr. (Feb. 5, 2008), <https://www.pewresearch.org/fact-tank/2008/02/05/rate-rap-low>. “When those calling hip hop a bad societal influence were asked in an open-ended question about the main reason why,” the most common explanations were “bad or offensive

language,” “negative stereotypes of women,” and the “promotion of violence or gangs.” Pew Res. Ctr. & Nat’l Pub. Radio, *Optimism about Black Progress Declines: Blacks See Growing Values Gap Between Poor and Middle Class* at 42-44 (Nov. 13, 2007), <https://assets.pewresearch.org/wp-content/uploads/sites/3/2010/10/Race-2007.pdf>. A poll nearly ten years earlier found similar results: in a random sample of 1,546 U.S. adults, 53% called “the advent of rap music a change for the worse,” compared to 23% saying the same about rock music. *Americans Condemn Rap Music In Poll*, MTV News (July 7, 1999), <https://www.mtv.com/news/o3qmq8/americans-condemn-rap-music-in-poll>. These generalized negative perceptions are undoubtedly tinged with implicit bias if not overt racism—the *vast majority* of rap performers are Black, and Black men in particular. See Welbeck, *All Eyes on Us: Meek Mill’s Legal Troubles, Hip-Hop, and the Narrative of Black Criminality*, Huffington Post (Jan. 19, 2016), [https://www.huffpost.com/entry/all-eyes-on-us-how-meek-m\\_b\\_8996858](https://www.huffpost.com/entry/all-eyes-on-us-how-meek-m_b_8996858) (“In a genre dominated by African American men, hip-hop continues to communicate an African American, primarily masculine, discourse of urban marginality.”).

Criticisms of rap music are well-documented, dating back to the genre’s inception. While some of these criticisms may at times be valid, political and popular culture have frequently branded rap music—as a monolith—as misogynistic, homophobic, and violent, with many of those critiques rooted in stereotypes of rap

performers as opposed to rap’s actual content.<sup>1</sup> One report even went as far as claiming that rap was “hurting America’s children,” without accounting for its important historical background, political consciousness, and internal diversity.<sup>2</sup>

Rap music, distinct from other genres of music, is at a higher risk of undue prejudice and unwarranted negative stereotypes due to rap’s association with people of color, and Black men specifically. In court, rap music easily becomes a priming device to trigger and import a series of pernicious implicit associations—those of Black men as dangerous, violent, brutish, unfeeling. See *Commonwealth v. Sweeting-Bailey*, 488 Mass. 741, 770, 770 n.9 (2021) (Budd, C.J., dissenting), quoting *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (describing the “powerful racial stereotype—that of [B]lack men as ‘violence prone’” (internal citation omitted)). Rap music, in contrast to other genres of music, is consistently taken literally and presented as dangerous, intertwined with historical stereotypes associating Black men “with danger and criminality.”<sup>3</sup> These risks are compounded in the case of a teenager like Correia, where an additional body of social science evidence shows that Black young people are consistently seen as threatening and older than their

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<sup>1</sup> Lutes, Purdon & Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 Am. J. Crim. L. 77 (2019).

<sup>2</sup> *Id.* at 84.

<sup>3</sup> Oliver, *African American Men as “Criminal and Dangerous”: Implications of Media Portrayals of Crime on the “Criminalization” of African American Men*, J. African-Am. Stud., Vol. 7, Sept. 2003, at 3.

actual age. See generally K. Henning, *The Rage of Innocence: How America Criminalizes Black Youth* (2021); see also, e.g., Todd et al., *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli*, 27 *Psychol. Sci.* 384 (2016); Goff, Jackson, Di Leone, Culotta, & Di Tomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 *J. Personality & Soc. Psychol.* 526 (2014) (in study of mostly White female undergraduate and mostly White male police officer samples, Black children were considered to be less innocent than White children and children in general from the age of 10 years onwards, and thought to be more culpable for their actions); Graham & Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *L. & Hum. Behavior* 483 (2004); Rattan, Levine, Dweck & Eberhardt, *Race and the Fragility of the Legal Distinction between Juveniles and Adults*, *PLoS ONE*, Vol. 7, Iss. 5, 1-5 (2012). And studies have shown that white adults are more than *twice* as likely to view Black youth as “violence-prone” compared to white youth. See, e.g., Priest, Slopen, Woolford, Philip, Singer, Kauffman, Mosely, Davis, Ransome & Williams, *Stereotyping across intersections of race and age: Racial stereotyping among White adults working with children*, *PLoS ONE*, Vol. 13, Iss. 9, 1-20 (2018). Experimental research consistently confirms how these broader race- and age-based stereotypes

are triggered when rap lyrics are introduced in court, creating grave risks of prejudice to defendants like Correia.<sup>4</sup>

For two decades, researchers have tested the extent to which study participants have negative perceptions of rap and of people associated with rap in controlled experimental settings, including by presenting the same lyrics as if they were from different musical genres and gauging participants' reactions when those lyrics are labeled pop, country, heavy metal, and rap. In one study, the authors concluded, "there seems to be a perception that heavy metal and rap lyrics, but not country and pop lyrics, are related to a decrease in socially responsible and adaptive behavior." *Id.* at 484. Ballard, Dodson & Bazzini, *Genre of Music and Lyrical Content: Expectation Effects*, 160 *J. Genetic Psychol.* 476, 483-484 (1999). Researchers made similar findings in a study comparing, inter alia, sexually explicit rap lyrics and sexually explicit non-rap lyrics. Dixon & Linz, *Obscenity law and sexually explicit rap music: Understanding the effects of sex, attitudes, and beliefs*, *J. Applied Commc'n Rsch.* 217, 229-230 (1997). "Our results indicate that subjects found 2 Live Crew Nasty (Highly sexually explicit rap) condition more patently offensive when compared to equally highly sexually explicit non-rap music." *Id.* at 234. In addition to being considered more offensive, rap was also deemed less artistic. *Id.* at

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<sup>4</sup> See generally J.I. Lerner & C.E. Kubrin, *Rap on Trial: A Legal Guide for Attorneys*, The UCI Intellectual Property, Arts, and Technology Clinic, at 31-34 (June 2021), <https://perma.cc/B6G8-7AGE> (collecting studies).

233, 235. In a study where people read the same lyrics and then were randomly assigned to be told the lyrics were rap, country, or folk, participants were more likely to deem the lyrics threatening and/or offensive if labeled rap. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. Applied Soc. Psychol. 2135 (1996). “The exact same lyrical passage, which is acceptable as a country song or when associated with a White artist, becomes a dangerous, offensive song in need of government regulation when it is a rap song or associated with a Black artist. Even a Kingston Trio song would be threatening if it were a rap song.” *Id.* at 2141.

Two decades later, researchers found the same prejudicial effects when lyrics were labeled “rap”: participants found identical lyrics to be more literal and autobiographical; more in need of regulation; and more offensive when labeled rap as opposed to country or an unspecified genre. Dunbar, Kubrin & Scurich, *The Threatening Nature of “Rap” Music*, 22 Psychol., Pub. Pol’y & L. 280, 281, 288 (2016). In a follow-up study, participants assumed the song writer was more violent and likely to be involved in criminal activity if the song lyrics, presented as written text, were labeled rap as compared to two other genres. Dunbar & Kubrin, *Imagining violent criminals: An experimental investigation of music stereotypes and character judgments*, 14 J. Exp’l Criminology 507 (2018). Participants were more likely to believe a rapper was in a gang, had a criminal record, and was involved in criminal activity than artists from other music genres, based exclusively on the genre of lyrics

presented as written text. *Id.* These stereotype-based judgments were particularly pronounced for older study participants, as older participants in the “rap” study condition evaluated the songwriter of exactly the same lyrics as having “significantly worse character” than older participants in the country and heavy metal conditions—“a finding that becomes more salient when one considers who is most likely to serve on a jury.” *Id.* And finally, “[w]hen the songwriter was imagined to be black, he was judged significantly more negatively than when he was imagined to be white, especially concerning assumptions about his criminal propensity.” *Id.*

In other studies, researchers have evaluated perceptions of *fans* of certain musical genres to further tease out these implicit biases based on musical genre. One study featuring 206 U.T. Austin students, the majority of whom were white women between 17 and 27 years old, gauged a variety of associations with behaviors, preferences, personal qualities, and values linked to various musical genres, and then further tested the actual validity of those stereotypes. Rentfrow & Gosling, *The content and validity of music-genre stereotypes among college students*, 35 *Psychol. Music* 306 (2007). Among other findings, people who like rap music were suspected of being *least* interested in “a world at peace,” “a world of beauty,” “inner harmony,” and “intellect” as compared to people who like rock, religious, or classical music. *Id.* at 316. Overall, stereotypes associated with “religious, country, classical and jazz

music genres displayed the highest validity,” but those associated with “pop, rap and soul” were “not valid.” *Id.* at 320-321.

In another survey-based study of 100 majority-White participants, half of whom were community members of South Bend, IN ages 20 to 60 and half of whom were college students at a small public university in Minnesota, researchers randomly selected participants to complete one of two forms. One form indicated the researcher was interested in “images that exist of fans of rap music” and asked participants to describe the “typical fan of rap music,” regardless of whether they believed those commonly associated traits were actually true of all such fans. The other form indicated the same prompts, but replaced “rap” with “heavy metal.” See Fried, *Stereotypes of Music Fans: Are Rap and Heavy Metal Fans a Danger to Themselves or Others?* J. Media Psychol. Online, Jan. 2003, at 1, 4. The results demonstrated significant negative perceptions of rap fans as antisocial and violent:

Rap fans were more likely to be described using traits related to being a threat to society. This included references to crimes against others, gang activity, and aggression / anger. Heavy metal fans were more likely to be described using traits related to self-destructive behaviors. Heavy metal fans were seen as a threat to themselves while rap fans were seen as a threat to others. Also, rap fans were more likely to be described in ways that set them apart as out-group members, as measured by references to race and SES/demographics.

*Id.* at 8. Other researchers have found similar results. See Binder, *Constructing Racial Rhetoric: Media Depictions of Harm in Heavy Metal and Rap Music*, 58 Am.

Soc. Rev. 753 (1993) (analyzing the rhetoric in media accounts from 1985 to 1990 of the dangers to children and society posed by heavy metal music and rap music and images used to amplify each genre, and finding that despite common lyrical and performance elements, they evoke different reactions that are explained by the racial composition of the music's audiences and producers).

Researchers have also examined the specific effects that occur when rap music is introduced at trial. A study based on rap lyrics introduced in a real murder prosecution against an 18-year-old Black defendant determined that the defendant was seen as more likely to have committed murder because he was presented as authoring rap lyrics—and that writing those rap lyrics “was more damning in terms of adjudged personality characteristics than was the fact of being charged with murder.” Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. Applied Soc. Psychol. 795, 795 (1999). The study divided participants into groups and asked them to evaluate the defendant for a series of character traits—the extent to which he was caring or uncaring, selfish or unselfish, gentle or rough, likable or unlikable, conceited or modest, truthful or untruthful, sexually nonaggressive or sexually aggressive, capable of murder or not capable of murder, and not a gang member or a gang member. *Id.* at 799. While all participants received information about the defendant's hobbies and career plans, only some were shown sexually explicit rap lyrics he had co-written as a high school senior. The group with exposure to the

lyrics gave more negative evaluations on *all nine trait dimensions*, with statistical significance on eight of the nine. *Id.* at 802. The study showed that the rap lyrics exerted a significant prejudicial impact on the participants' evaluation of the defendant's character, "and particularly so when the person has been accused of murder." *Id.* at 803. Shockingly, the study found that "participants were more put off by the rap lyrics than by the murder charges." *Id.* at 802.

Despite over 25 years of empirical findings showing over and over that the use of rap lyrics invokes and activates implicit, race-based stereotypes of young Black artists (in particular) as violent criminals, prosecutors have increasingly used rap lyrics and videos to tie defendants of color to gang life, violence, or lawless behavior—securing convictions by triggering deep-seated racial prejudices or invoking preconceived stereotypes about rap music and young men of color. See, e.g., Lee, Opinion, *This Rap Song Helped Sentence a 17-Year-Old to Prison for Life*, N.Y. Times (Mar. 30, 2022), <https://www.nytimes.com/2022/03/30/opinion/rap-music-criminal-trials.html> (“[O]ver the past three decades, rap—in the form of lyrics, music videos and album images—has been introduced as evidence by prosecutors in hundreds of cases, from homicide to drug possession to gang charges. Rap songs are sometimes used to argue that defendants are guilty even when there’s little other evidence linking them to the crime.”). In effect, rap lyrics and videos

function as an easy way for prosecutors to circumvent evidentiary rules against character or propensity evidence.<sup>5</sup>

Prosecutors themselves have admitted this in writing. A 2004 manual published by the American Prosecutors Research Institute and funded by the U.S. Department of Justice urged prosecutors to use select evidence, including rap lyrics, to “invade and exploit the defendant’s true personality.”<sup>6</sup> And an FBI intelligence analyst advised federal prosecutors in the 2006 *United States Attorneys’ Bulletin* to seek out rap lyrics on the premise that rappers “compose and put their true-life experiences into lyrical form.”<sup>7</sup> Even when rappers have a distinct artistic persona, prosecutors exploit the fact that people *perceive* rap music to be more literal and autobiographical, and rap artists to be more violent and criminal, weaponizing well-documented implicit biases concerning rap lyrics against Black defendants.

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<sup>5</sup> Lerner & Kubrin, *supra* note 4, at 1. See generally, e.g., Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1 (2007-2008); Sripathi, *Bars behind Bars: Rap Lyrics, Character Evidence, and State v. Skinner*, 24 J. Gender Race & Just. 207 (2021); Araibi, Note, “*Every Rhyme I Write*”: *Rap Music as Evidence in Criminal Trials*, 62 Ariz. L. Rev. 805 (2020); Huff, Note, *Rap on Trial: the Case for Nonliteral Interpretation of Rap Lyrics*, 5 Savannah L. Rev. 335 (2018); Conklin, *The Extremes of Rap on Trial: An Analysis of the Movement to Ban Rap Lyrics as Evidence*, 95 Ind. L.J. Supp. 50 (2019-2020).

<sup>6</sup> Jackson, Am. Prosecutors Rsch. Inst., *Prosecuting Gang Cases: What Local Prosecutors Need to Know* 15-16 (2004), [https://ndaa.org/wp-content/uploads/gang\\_cases1.pdf](https://ndaa.org/wp-content/uploads/gang_cases1.pdf).

<sup>7</sup> Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, U.S. Att’ys’ Bull., May 2006, at 1, 8, <https://www.justice.gov/archive/olp/pdf/gangs.pdf>.

**b. Rap music is performative and hyperbolic by nature.**

Rap embodies a hyperbolic and competitive culture, which many jurors may not understand.<sup>8</sup> Rappers, often performing under assumed stage names, routinely overstate their criminal backgrounds and personal biographies—and at times invent them altogether—in order to fit the persona they market to the public.<sup>9</sup> In particular, rappers use both metaphors and boasts which stem from traditions of African-American oratory, making rap lyrics susceptible to misinterpretation.<sup>10</sup> The tradition of rap battles in the genre further casts doubt on the truth of lyrics, as it encourages writers to embellish their own life experiences.<sup>11</sup>

Artists may use rap to explore rebellious, and sometimes violent, themes they may not inhabit in their real lives, often presented in shocking libretto, and reflecting political consciousness and assertion of self within a culture of oppression.<sup>12</sup> For

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<sup>8</sup> Lerner & Kubrin, *supra* note 4, at 38.

<sup>9</sup> *Id.* at 17.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 20.

<sup>12</sup> See, e.g., M.E. Dyson, *Know What I Mean? Reflections on Hip-Hop* (2007); Klatskin, *Reclaiming the Black Personhood: The Power of the Hip-Hop Narrative in Mainstream Rap*, *Criterion: J. Literary Criticism*, Vol. 11, Winter 2018, at 33, 37-40; Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 *Soc. Probs.* 360, 367-369 (2005); Folami, *From Habermas to “Get Rich or Die Tryin”*: *Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 *Mich. J. Race & L.* 235, 274 (2007); Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 *UCLA Ent. L. Rev.* 345, 347, 350, 352-354, 356-359 (2005); Smith, *Method in the Madness: Exploring the Boundaries of Identity in Hip-Hop Performativity*, 3 *Soc. Identities* 345 (1997);

example, O’Shea Jackson, known popularly as Ice Cube, wrote his extremely popular album, *Straight Outta Compton*, while on scholarship at Phoenix Institute of Technology.<sup>13</sup> His popular song “Fuck Tha Police” sports lyrics like “Yeah, somethin’ like that, but it all depends on the size of the gat. Takin’ out a police would make my day,” but it was sung by a man who had never shot at the police, been arrested, or spent a night in jail. He was a college student; his music was art, not reality. Another popular rap artist, Kendrick Lamar, has written passages such as, “As a kid I killed two adults, I’m too advanced / I lived my 20s at 2 years old, the wiser man.”<sup>14</sup> Lamar grew up in Compton, where he was a good student who loved writing, first stories and poems, then lyrics.<sup>15</sup> Despite the violence described in his lyrics, Lamar has never been arrested and there is no evidence to suggest his lyrics are a true account of his life. In 2018, Lamar was awarded the Pulitzer Prize for Music for his “vernacular authenticity and rhythmic dynamism that offers affecting

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Watkins, *A Nation of Millions: Hip Hop Culture and the Legacy of Black Nationalism*, 4 *Comm’n Rev.* 373 (2001).

<sup>13</sup> *Ice Cube*, Biography.com, (Aug. 4, 2015), <https://www.biography.com/musician/ice-cube>.

<sup>14</sup> *Kendrick Lamar’s 20 Best Verses So Far, Ranked*, Vulture (Apr. 14, 2017), <https://www.vulture.com/2015/03/kendrick-lamar-best-verses-so-far-ranked.html>.

<sup>15</sup> *Kendrick Lamar*, Biography.com (Jan. 29, 2018), <https://www.biography.com/musician/kendrick-lamar>.

vignettes capturing the complexity of modern African-American life.”<sup>16</sup> Lamar has defended his artistry against critics who take his music literally:

This is our music. This is us expressing ourselves. Rather [than] going out here and doing the murders myself, I want to express myself in a positive light the same way other artists are doing. Not going out in the streets, go in the booth and talking about the situation and hoping these kids can find some type of influence on it in a positive manner.<sup>17</sup>

Lamar has taken artistic liberties, just as many poets, singers, playwrights, and novelists before him. As this Court has held, rap should not be viewed as uniquely literal, but instead as artistic expression like any other musical genre. *Commonwealth v. Gray*, 463 Mass. 731, 754-755 & n.24 (2012).

**c. Rap lyrics are not admissible in court unless they comport with the rules of evidence: they must be relevant—with a nexus to the facts at issue—and their probative value must not be outweighed by the clear danger of unfair prejudice.**

The basic guideposts for the admissibility of evidence are relevance and reliability. Material should not be admitted as evidence unless (1) it has any tendency to make the existence of a fact of consequence more or less probable and (2) it is not “far more prejudicial than probative,” *Commonwealth v. Gray*, 463 Mass. 731, 752

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<sup>16</sup> *DAMN.*, by Kendrick Lamar, Pulitzer Prizes (2018), <https://www.pulitzer.org/winners/kendrick-lamar>.

<sup>17</sup> Stutz, *Kendrick Lamar Responds to Geraldo Rivera: ‘Hip-Hop Is Not the Problem, Our Reality Is’*, Billboard (July 2, 2015), <https://www.billboard.com/music/rb-hip-hop/kendrick-lamar-responds-geraldo-rivera-alright-bet-awards-6620035>.

(2012). See Mass. G. Evid. §§ 401, 403 (evidence not admissible if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues [or] misleading the jury”). These bedrock principles direct that, given the extensive social science research showing a near certainty of unfair prejudice, confusion of the issues, or misleading the jury when rap lyrics are admitted, rap music must meet a very high threshold of probative value in order to be admissible in court.

This Court has experience defining those limits and enacting that balance. Ten years ago this Court found reversible error in admitting a rap video in which the defendant appeared. *Gray*, 463 Mass. at 752-757. The trial judge admitted the video, along with “expert” testimony from a police officer, to explain the defendant’s gang affiliation. This Court reversed, vacated his convictions, and ordered a new trial, concluding “the rap video should not have been admitted” because “[i]t was minimally if at all probative, and highly prejudicial.” *Gray*, 463 Mass. at 753. This Court did not analyze whether the evidence constituted improper propensity evidence of bad character or other bad acts, finding the video should have been excluded because its “prejudicial effect . . . far outweighed its probative value.” *Id.* at 756-757. See also Mass. G. Evid. § 403.

The *Gray* Court decisively rejected the approach of other jurisdictions that viewed “rap music lyrics ‘not as art but as ordinary speech’ and have allowed their

admission in evidence as literal statements of fact or intent ‘without contextual information vital to a complete understanding of the evidence.’” *Id.* at 754-755, quoting Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 4, 38 & n. 224 (2007). This Court rejected the biased notion that rap lyrics are more autobiographical or literal than other genres, explaining, “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.” *Gray*, 463 Mass. at 755. Further, this Court collected research demonstrating that “[o]ver the past twenty years there has been extensive academic discourse on the role and function of rap music, and in particular the violence in ‘gangsta rap,’ as a form of political expression.” *Id.* at 755 n.24.

Other jurisdictions have supplied additional helpful contours for evaluating the probative value of rap lyrics in criminal prosecutions as inadmissible character evidence. See Mass. G. Evid. § 404(b). In *State v. Skinner*, the prosecution was permitted to introduce rap lyrics in an attempted murder trial to demonstrate motive and intent, and the New Jersey Supreme Court applied a Rule 404(b) framework to reconsider admissibility on appeal. *State v. Skinner*, 95 A.3d 236, 247 (N.J. 2014). The *Skinner* Court determined that Rule 404(b) applies because introducing rap lyrics risks that a defendant would “be convicted simply because the jury believes that he is a bad person.” *Skinner*, 95 A.3d at 247. *Id.* at 249 (“Rule 404(b) serves as

a safeguard against propensity evidence that may poison the jury against a defendant. Violent, degrading rap lyrics, of the type authored by defendant, have the capacity to accomplish just that.”). The court applied four factors it had used for decades to evaluate the admissibility of prior bad acts evidence. *Id.* Those factors were (1) relevance to a material issue, (2) similarity and reasonable temporal proximity to the offense charged, (3) meeting the clear and convincing evidence threshold, and (4) the probative value was not outweighed by its apparent prejudice. *Id.* at 247, citing *State v. Cofield*, 605 A.2d 230 (N.J. 1992) (“the *Cofield* factors”). Applying the *Cofield* factors, the *Skinner* Court held that the rap lyrics were “highly prejudicial” with little to no probative value and thus should have been excluded.

The *Skinner* Court distinguished cases in which rap lyrics serve as “direct proof against a defendant—such as an admission or details that are not generally known and dovetail with the facts of the case,” *Skinner*, 95 A.3d at 249 n.5, which it held should be evaluated under the relevance standard of Rule 401 and the prejudice standard of Rule 403. But absent that direct link, the Court found it appropriate to apply the *Cofield* factors to evaluate rap lyrics operating as propensity character evidence under the standard for prior bad acts, *id.* at 249, and concluded:

[W]e hold that rap lyrics, or like fictional material, may not be used as evidence of motive and intent except when such material has a *direct connection* to the specifics of the offense for which it is offered in evidence and the evidence’s probative value is not outweighed by its apparent prejudice.

*Skinner*, 95 A.3d at 253 (emphasis added). This Court should similarly require the Commonwealth to establish a nexus between the lyrics they seek to introduce and the underlying facts of the case; such a requirement is critical to weeding out rap music nominally proffered for a specific purpose by the prosecution but actually operating as improper “other bad acts” evidence. This Court has already held that the standard for evaluating the admission of such evidence is whether its probative value is outweighed by the risk of unfair prejudice to the defendant—the prejudice to the defendant need not “substantially outweigh” the probative value of the evidence. *Commonwealth v. Crayton*, 470 Mass. 228, 249 & n.27 (2014).

Finally, because rap lyrics are almost always wielded against defendants of color, in criminal trials they operate prejudicially in every sense of the word. The justices of this Court, collectively and individually, have repeatedly recognized how implicit racial bias and systemic racism undermine the administration of justice in the Commonwealth<sup>18</sup>—in policing, in traffic enforcement, in jury selection, in sentencing, and the list goes on. See, e.g., *Commonwealth v. Sweeting-Bailey*, 488 Mass. 741, 754-755 (2021); *id.* at 756 (Lowy, J., concurring); *id.* at 757 (Wendlandt, J., concurring); *id.* at 764-765, 770-771 (Budd, C.J., dissenting); *id.* at 778-779

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<sup>18</sup> See *Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar* (June 3, 2020), <https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and>.

(Gaziano, J., dissenting); *Commonwealth v. Carter*, 488 Mass. 191, 197-199 (2021); *Commonwealth v. Long*, 485 Mass. 711, 717-718 (2020); *Commonwealth v. Evelyn*, 485 Mass. 691, 708 (2020); *Commonwealth v. Williams*, 481 Mass. 443, 451 n.6 (2019); *Commonwealth v. Buckley*, 478 Mass. 861, 877 (2018) (Budd, J., concurring); *Commonwealth v. Warren*, 475 Mass. 530, 539-540 (2016); *Commonwealth v. Gonsalves*, 429 Mass. 658, 670 (1999) (Ireland, J., concurring); *Commonwealth v. Phillips*, 413 Mass. 50, 53 (1992). Given the racially disparate use of rap lyrics to skirt the rules of evidence and functionally diminish the prosecution's burden of proving guilt beyond a reasonable doubt, this Court in its superintendence role should expand upon *Gray* and adopt an "other bad acts" analysis akin to *Skinner*.

**d. Lacking any nexus to the charged offense, Correia's rap music was irrelevant to the proceedings and far more prejudicial than probative in this homicide prosecution.**

In the case at bar, Correia's lyrics had no probative value and their admission was highly prejudicial. As in *Skinner*, and compared favorably to *Gray*, there was no nexus between the rap music introduced and the facts underlying this prosecution. The songs were pre-recorded under a performative persona, "AC\$TACK\$," on YouTube. RA.47, Tr.4/3/2019:25. The fight was spontaneous rather than planned and it unfolded unrelated to the previously posted videos. Correia's lyrics referenced guns, but Martins was killed with a small pocketknife and there was no evidence Correia owned a gun, possessed a gun during the fight, or planned to use one. The

Commonwealth asserts that “the lyrics bore a sufficient level of similarity to the facts of the charged crime of murder in the first degree,” Comm. Br. at 42. In reality, the lyrics reflect sweeping rhetorical allusions to a “war” against “enemies” that “turn to memories”—none of the lyrics described a scenario like the fight that unfolded or intent to kill any person. The cover art was a *cartoon* of an *image on a t-shirt* depicting an AK-47; it had no tendency to make any fact of consequence more or less probable. In the trial judge’s own words, the purpose of this “evidence” was to help the jury determine whether it was reasonable for “*someone like this defendant*” to act in self-defense. Tr.4/3:21-22 (emphasis added). The rap music here was introduced as a symbol of the defendant’s character, to paint the defendant with a broad brush as a violent criminal. As such, it was improper character evidence with no nexus to the circumstances of the fight and therefore no probative value at trial. Accordingly, it was excludable even without taking into account its highly prejudicial effect. See, e.g., *Commonwealth v. Schuchardt*, 408 Mass. 347, 350 (1990).

Turning to prejudice, it is apparent the rap videos and cover art were introduced for the purpose of evoking emotion from the jury. The Commonwealth baldly asserts that these recordings related to motive and concludes, “his lyrics were likely literal and relevant to the disputed issues at trial,” Comm. Br. at 41. See also *id.* at 44 (taking the lyrics as literal). Given the substantial social science evidence

that bias leads people to perceive rap music as literal, it is appropriate to apply the “other bad acts” standard here and reverse because admission of Correia’s irrelevant but violent music was undoubtedly more prejudicial than probative. See *Crayton*, 470 Mass. at 249 & n.27; see also *Skinner*, 95 A.3d at 247, 249, 253. Further, given that the admission of rap lyrics at trial subjects Black defendants in homicide prosecutions *in particular* to significant unfair prejudice, Correia should prevail even if the Court applies *Gray* to determine whether the probative value of the lyrics was substantially outweighed by their prejudicial effect. Defense counsel expressed concern that neither the venire itself nor the empaneled jury reflected a cross-section of the defendant’s community, given the majority-White demographics of Plymouth County and that just six of the 68 venire members were African-American. Tr.2:26-27. The opinion polling and social science literature discussed in Part I.A. consistently found White participants most likely to exhibit biases against Black rap artists, music, or fans. Failing to provide a limiting instruction compounded the judge’s error because that failure invited the jury to consider the lyrics for *any* purpose, tainting the proceedings with deeply embedded implicit biases. In presenting Correia’s rap lyrics without any limiting instruction, the Commonwealth urged and the judge allowed the jury to take the content of the lyrics literally, but see *Gray*, 463 Mass. at 755, without fully comprehending the performative and often

fictional nature of this particular genre of music and without a reminder that rap is not distinct from other forms of cultural or artistic expression.

Finally, the fact that Correia recounted the effect of hearing Martins quote a rap song's lyrics to him in the midst of the brawl does not change this analysis. First, unlike Correia's own rap music, what Martins said has a *clear nexus* to the facts at issue. He quoted the lyrics *during the fight* in order to evoke a particular reaction from Correia, and Correia testified that he interpreted the combination of those lyrics, Martins' earlier social media postings with guns, and Martins moving to unzip his backpack as a threat to pull out a gun and potentially shoot him. Second, to the extent this Court finds the defendant opened the door to his own lyrics, "evidence that poses a risk of unfair prejudice need not always be admitted simply because a defendant has opened the door to its admission; the judge still needs to weigh the probative value of the evidence and the risk of unfair prejudice, and determine whether the balance favors admission." *Commonwealth v. McCowen*, 458 Mass. 461, 479 n.15 (2010). The balancing above makes clear that Correia's videos should have been excluded whole cloth as substantially more prejudicial than probative.

**II. Rap lyrics are protected speech under the First Amendment, and using Correia's rap lyrics to support his homicide prosecution impinged his core First Amendment rights.**

While U.S. Supreme Court precedent allows evidentiary use of speech to establish the elements of a crime or to prove motive or intent, it prohibits courts from

allowing defendants to be prosecuted for their abstract beliefs or group associations. *Dawson v. Delaware*, 503 U.S. 159, 167-168 (1992). If a defendant’s abstract beliefs have “no bearing on the issue being tried,” or a defendant’s speech serves only to paint the defendant as “morally reprehensible,” they should not be admitted. *Id.* Rap music should be treated no differently than any other art form: admitting rap lyrics in criminal trials is “as dangerous as it is unconstitutional.”<sup>19</sup> Nevertheless, the deeply ingrained implicit biases attendant to rap music may cloud judges’ understanding of whether the lyrics actually bear on the trial issue, with multiple federal courts having rejected *Dawson*-based First Amendment defenses.<sup>20</sup>

Still, at least one federal court has excluded rap lyrics in a civil case seeking damages for police misconduct. Mr. Bey-Cousin alleged that officers planted a firearm on him during an arrest and asserted violations of 42 U.S.C. § 1983 for malicious prosecution and malicious use and abuse of process, and the officers attempted to introduce his song lyrics against him to show that, even though the criminal case against him had been dismissed, he really was a criminal. The United States District Court for the Eastern District of Pennsylvania granted Bey-Cousin’s motion to exclude the lyrics based on relevance grounds, finding it was not enough to show even that “an artist wrote in the first person about events that resemble real

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<sup>19</sup> Lutes, Purdon & Fradella, *supra* note 1.

<sup>20</sup> See, e.g., *United States v. Graham*, 293 F. Supp. 3d 732, 736 (E.D. Mich. 2017).

life.” *Bey-Cousin v. Powell*, 570 F. Supp. 3d 251, 256 (E.D. Pa. 2021). “In a society that treasures First Amendment expression, courts should start with a presumption that art is art, not a statement of fact. . . . that an artistic expression resembles reality is not enough because holding otherwise would risk chilling the free expression that our society holds dear.” *Id.* at 254. The court’s reasoning emphasized that admitting the lyrics would create a First Amendment problem: “doing so would not be a search for truth. It would instead be a trial about an artist’s process, asking the jury to decide where the line is between inspiration and narration.” *Id.* at 256.

This Court should adopt stricter guidelines for the admission of lyrics into criminal trials because they are First Amendment protected speech—and because the fundamental freedom of speech needs “breathing space to survive.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). Where speech is particularly insulting or outrageous, such as the sometimes-shocking lyrics in rap songs, “breathing space” becomes more critical. Further, the First Amendment is especially meant to protect speech which criticizes or discusses matters of public concern. Such expressions are “at the heart of the First Amendment’s protection.” *Snyder v. Phelps*, 562 U.S. 443, 451-452 (2011) (citation and quotations omitted). Rap music, at its core, is a form of artistic expression which uses poetic language, such as rhyme and metaphors, to express concerns about political and social life for Black Americans. See, e.g., Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40

Sociological Persp. 265 (1997); C. Ridenhour & Y. Jah, *Fight The Power: Rap, Race and Reality* (1997). This is exactly the kind of core speech the Constitution aims to protect.

Since the very inception of hip hop culture in the early 1970's, rappers have categorized their lyrics as a mix of education and entertainment for Black Americans, a vehicle for recounting Black history and contemporary life.<sup>21</sup> Carlton Ridenhour, stage name "Chuck D," a member of the Rock and Roll Hall of Fame and the front-man for the legendary rap group Public Enemy, famously stated during a September 1988 interview in *Spin Magazine* that "Rap is [B]lack America's TV station. It gives a whole perspective of what exists and what [B]lack life is about. And [B]lack life doesn't get the total spectrum of information through anything else."<sup>22</sup> Rap music has long served as a means for people of color, in particular Black men, to explain concerns about poverty, housing and job crises, law enforcement, and overall discontent with conditions for Black people in America, as well as deal

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<sup>21</sup> See, e.g., Dennis, *supra* note 5; Firestre, *Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 Loy. L.A. Ent. L. Rev. 1, 2 n. 5, 18 (2000); Folami, *supra* note 12, at 274-281; Johnson, *Silencing Gangsta Rap: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics*, 3 Temp. Pol. & Civ. Rts. L.Rev. 25, 28 (1994); Kubrin, "I See Death Around the Corner": *Nihilism in Rap Music*, 48 Soc. Persp. 433 (2006); Smitherman, "The Chain Remain the Same": *Communicative Practices in the Hip Hop Nation*, 28 J. Black Stud. 3 (1997).

<sup>22</sup> Leland, *Public Enemy: Our 1988 Interview with Chuck D*, Spin (Aug. 18, 2019), <https://www.spin.com/2019/08/public-enemy-chuck-d-it-takes-a-nation-of-millions-to-hold-us-back-september-1988-interview-armedddon-in-effect>.

with negative stereotypes and their societal and political positions.<sup>23</sup> These critiques of political and social life are incredibly important and deserve First Amendment protection.

The mischaracterization of rap music as “bad,” “vulgar,” or “angry” and *therefore criminal* thus presents an intertwined First Amendment and racial injustice problem. The practice of admitting rap lyrics in criminal trials “raises a significant question of racial injustice” since the target of this practice is predominantly Black men.<sup>24</sup> The tendency to take rap lyrics literally makes it dangerous to present these lyrics to a jury, and especially without any form of limiting instruction, as the negative stereotypes of both Black men and rap music—in isolation and interdependently—create a significant likelihood that juries will misinterpret the lyrics or infer guilt based on them. Admitting rap music in a criminal trial against a Black 18-year-old of Cape Verdean descent therefore presents an interrelated First Amendment and racial justice issue, and was reversible error.

## CONCLUSION

This case follows a trend of prosecutors asking courts and juries to take rap music literally and conflate art with character in a genre of music dominated by

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<sup>23</sup> See, e.g., Droppin’ Science: Critical Essays on Rap Music and Hip Hop Culture (William Eric Perkins ed., 1999); A. Krims, *Rap Music and the Poetics of Identity* (2000); C.L. Keyes, *Rap Music and Street Consciousness* (2004).

<sup>24</sup> Lutes, Purdon & Fradella, *supra* note 1.

Black men, a prospect that would be unthinkable with other art forms. Given all of the social science evidence about the explosive negative impact of injecting rap into a trial, and the racial justice implications of the impact of this evidence, courts must be particularly careful to only admit such evidence when it has real probative value—a direct nexus between the lyrics and the crime. Because no such nexus existed here, the defendant’s conviction must be vacated.

Respectfully submitted,



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Dated: September 17, 2022

## **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to those specified in Rule 16(k), 17, and 20. It complies with the type-volume limitation of Rule 20(2)(C) because it contains 7,498 words, excluding the parts of the brief limited by the rule. It complies with the type-style requirements of Rule 20 because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.



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**CERTIFICATE OF SERVICE**

Pursuant to Massachusetts Appellate Rule of Procedure 13(2), I certify that on September 17, 2022, I have made service of this Brief upon the attorneys of record for each party by Electronic Filing System.

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