

No. A163607

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION FIVE**

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THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Plaintiff and Respondent,*

v.

LEE SULLIVAN,  
*Defendant and Appellant.*

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San Francisco Superior Court  
Case No. SCN221448  
Hon. Charles S. Crompton

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**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF  
AND  
PROPOSED BRIEF OF *AMICI CURIAE* ACLU OF NORTHERN  
CALIFORNIA AND ACLU OF SOUTHERN CALIFORNIA  
IN SUPPORT OF DEFENDANT-APPELLANT**

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**APPLICATION FOR LEAVE TO FILE  
AMICI CURIAE BRIEF**

Pursuant to Rule 8.200 of the California Rules of Court, proposed *amici curiae* respectfully request leave to file the accompanying proposed *amici curiae* brief in support of Defendant-Appellant Lee Sullivan.

**INTERESTS OF AMICI CURIAE<sup>1</sup>**

The American Civil Liberties Union (“ACLU”) is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the federal and state constitutions. Since its founding in 1920, the ACLU has focused on protecting the free expression that is at the core of our constitutional democracy. (*See, e.g., United States v. Hansen* (2023) 599 U.S. 762; *Mahanoy Area School District v. B.L. ex rel. Levy* (2021) 594 U.S. \_\_\_, 141 S.Ct. 2038; *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844; *Brandenburg v. Ohio* (1969) 395 U.S. 444.)

The ACLU of Northern California and the ACLU of Southern California (together, the “ACLU California Affiliates”) are regional affiliates of the national ACLU. Each affiliate has frequently appeared in federal and state court on cases involving

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<sup>1</sup> Proposed *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no other person or entity, other than *amici curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief. (*See* Cal. Rules of Court, rule 8.200(c)(3).)

the constitutional guarantees of equal protection, due process, free expression, and free association, all of which are implicated here. (See, e.g., *O'Connor-Ratcliff v. Garnier* (9th Cir. 2022) 41 F.4th 1158, cert. granted Apr. 24, 2023, Case No. 22-324 [amicus in Supreme Court]; *Phillips v. U.S. Customs & Border Protection et al.* (9th Cir. 2023) 74 F.4th 986 [plaintiffs' counsel]; *Black Lives Matter-Los Angeles v. Garcetti* (C.D. Cal., Case No. 20-cv-04940) [plaintiffs' counsel]; see also *Los Angeles Police Protective League v. City of Los Angeles*, Case No. S275272, review granted Aug. 17, 2022 [amicus in support of petition for review and in California Supreme Court]; *People v. Peterson* (2023) 95 Cal.App.5th 1061 [amicus]; *People v. Padilla-Martel et al.* (2022) 78 Cal.App.5th 139 [defense counsel].

For decades, the ACLU California Affiliates have also worked to advance racial justice for all Californians. Most recently, the ACLU California Affiliates have been actively involved in litigation and other advocacy to ensure the effective implementation of California's landmark Racial Justice Act (AB 2542), which undergirds this appeal. (See, e.g., *Mosby v. Superior Court of Riverside County* (2024) 99 Cal.App.5th 106; *Chicanxs Unidxs de Orange County v. Spitzer et al.* (Orange County Superior Court, Case No. 30-2022-01291297-CU-WM-CJC); see also *ACLU of Northern California v. Rosell et al.* (Santa Cruz Superior Court, Case No. 22CV00970); *ACLU of Northern California v. Andrus et al.* (Siskiyou County Superior Court, Case No. CVPT 22-475). The ACLU California Affiliates' 501(c)(4)



counterpart, ACLU California Action, also sponsored and helped to enact the Racial Justice for All Act (AB 256).

This case has profound ramifications for free expression and racial justice that reach beyond the evidentiary rulings at issue. Given the ACLU California Affiliates' longstanding commitment to these issues, the proper resolution of this case is of substantial interest to the ACLU and its members. The ACLU California Affiliates also respectfully believe that their participation as *amici curiae* will assist the Court in resolving the present matter. *Amici* therefore request leave to file the accompanying proposed brief.


Dated: February 27, 2024

Respectfully submitted,



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## BRIEF OF *AMICI CURIAE*

*For every rhyme I write, it's twenty-five to life.*  
—Mobb Deep, “Shook Ones, Pt. II,” on  
The Infamous (Loud, RCA, BMG 1995)

### INTRODUCTION

The right to exercise free speech is one of the most fundamental guarantees in our federal and state constitutions. The right encompasses all forms of expression, including rap music and rap videos. But the promise of constitutional protection for rap—a music genre with deep roots in Black communities and an element of hip-hop—rings hollow when, as here, it is treated like inherently incriminating evidence in court.

A growing body of social science research demonstrates that, for many, rap conjures up explicit and implicit negative racial stereotypes. These studies show that the general public tends to perceive rappers as menacing, and that juries can have an especially difficult time separating out the judgment of rap music from the judgment of a defendant who happens to rap. Given how pernicious the bias against rap can be, the admission of rap music and rap videos at trial risks tainting jury verdicts and permits an art form closely associated with young men of color to be effectively criminalized.

The California Legislature has recently committed itself to ensuring that such racial bias plays no role in criminal proceedings. In 2019, it enacted the Racial Justice Act and then promptly expanded its reach to apply retroactively. (*See* AB-2542,

Stats. 2020, ch. 317, § 2(i) [hereinafter “AB 2542”] & AB-256, Stats. 2022, ch. 739, § 2 [hereinafter “AB 256”], codified at Pen. Code, §§ 745, 1473, 1473.7.) In short order, the Legislature also passed the Decriminalizing Artistic Expression Act, which makes clear that rap and other forms of artistic expression can be admitted as evidence only after a careful balancing of the material’s probative value against “the substantial danger of undue prejudice.” (AB-2799, Stats. 2022, ch. 973, § 2 [hereinafter “AB 2799”], codified at Evid. Code, § 352.2.)

The evidentiary rulings in this case bring to the forefront the types of problems that the Legislature sought to address when enacting this recent legislation. At trial, the jury heard unduly prejudicial and cumulative evidence showing Defendant-Appellant Lee Sullivan in rap videos that featured lyrics describing murder, violence, gang life, and the mistreatment of women. It also heard from a “gang expert” who called rap lyrics “gang lyrics” and testified that such lyrics are known to be “true because they relate to crimes that we’re investigating.” (34 RT 6911.)<sup>2</sup>

Because this evidence helped to secure a verdict likely tainted by racial bias, reversal of Mr. Sullivan’s conviction is necessary. Mr. Sullivan should be afforded a new trial with the

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<sup>2</sup> *Amici* utilize the same terminology set forth in Appellant’s Opening Brief (“AOB”) at footnote 2, page 24. Accordingly, “RT” refers to the 52 Volume Reporter’s Transcript, and “CT” is the nine Volume Clerk’s Transcript.

benefit of the Legislature’s statutory mandates in place and all of the constitutional protections to which he is entitled.

## ARGUMENT

### I. Rap Lyrics and Videos are Not Literal Confessions, but Rather Constitutionally Protected Speech

Music, like other creative works, “is protected under the First Amendment” to the United States Constitution. (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 790.) It also falls under the protection of article I, section 2, of the California Constitution. (*See Serova v. Sony Music Entertainment* (2022) 13 Cal.5th 859, 867 [recognizing that “artistic works such as albums” generally “enjoy robust First Amendment protections”].)<sup>3</sup>

Building on this bedrock principle, the U.S. Supreme Court has emphasized that “a narrow, succinctly articulable message is not a condition of constitutional protection.” (*Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 569.) As the Court explained, if the First Amendment were merely “confined to expressions conveying a particularized message, [it] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” (*Ibid.* [internal citations and quotations omitted].)

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<sup>3</sup> The California “Constitution’s free speech provision is at least as broad as and in some ways is broader than the comparable provision of the federal Constitution’s First Amendment.” (*Kasky v. Nike* (2002) 27 Cal.4th 939, 958-59 [internal quotations and citations omitted].)

The California Courts of Appeal have similarly made clear that music lyrics are artistic expressions and not necessarily declarations of truth. Surveying the California Supreme Court’s precedence, the court in *People v. Coneal* (2019) 41 Cal.App.5th 951 held: “reasonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are, which means they are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory.” (*Id.* at p. 968 [quoting *In re George T.* (2004) 33 Cal.4th 620, 636-37] [internal quotations and alterations omitted].) “[W]ith respect to rap lyrics in which the author claim[s] to have committed a murder,” the *Coneal* court continued, the words are “*merely rap lyrics*”—not necessarily actual events. (*Ibid.* [emphasis added by *Coneal*] [quoting *People v. Melendez* (2016) 2 Cal.5th 1, 24].)

And yet, in trial after trial, rap music still gets treated literally. In *People v. Zepeda* (2008) 167 Cal.App.4th 25, for example, the California Court of Appeal admitted rap lyrics because—even though “lyrics and poems do not often establish their author’s true state of mind”—a “gang expert” had “testified that gangs communicate through music.” (*Id.* at p. 35; *see also* *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373 [admitting rap lyrics as evidence].) Worse yet, almost all of the criminal trials relying on rap music or rap videos as evidence involve a young Black or Latino defendant.<sup>4</sup>

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<sup>4</sup> According to one major study, the defendant in criminal cases where rap is introduced as evidence “is almost always a young man of color,” and, in an estimated “95 percent of these cases[,]”

Inside the courtroom, rap is seen not as an art form, but as inherently incriminating evidence.<sup>5</sup> Prosecutors often present a defendant’s rap songs or videos to the jury as if the lyrics were autobiographical confessions of criminal conduct—even when no clear connection exists between the lyrics and the crimes charged. (See *People v. Coneal*, *supra*, 41 Cal.App.5th at pp. 968-69; see also *id.* at p. 969, fn. 16 [discussing “literal treatment of rap lyrics”].)

Compounding these issues, prosecutors also tend to admit rap lyrics and videos divorced of context. Black artists have been rapping for decades as a form of resistance. Rap music tells stories that express frustrations with the status quo, economic hardship, disenfranchisement, police brutality, and the carceral state.<sup>6</sup> While some lyrics are potentially based on personal experience, most blend fact and fiction to create a highly stylized rapper persona.<sup>7</sup>

Rap songs are propelled by mimicry and hype, boasts and tropes, hyperbole and metaphor. Songs are also driven by the music business itself. Rap lyrics respond to the public’s appetite, covering the most commercially successful themes: drugs, sex,

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the defendant is either black or Latino.” (Nielson & Dennis, *Rap on Trial: Race, Lyrics, & Guilt in America* (2019) p. 14.)

<sup>5</sup> See, e.g., Dunbar, *Art or Confession?: Evaluating Rap Lyrics as Evidence in Criminal Cases* (2018) 10 *Race & J.* 320, 322.

<sup>6</sup> See Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence* (2007) 31 *Colum. J.L. & Arts* 1, 22-23.

<sup>7</sup> *Ibid.*

masculinity, guns, and gangs. Lyrics can, at times, sensationalize graphic violence, be replete with racial epithets and profanity, and even brag about assaulting or pimping women.<sup>8</sup>

Problematically, much of the public is not only predisposed to believe rap lyrics are true, but also to view them as especially violent.<sup>9</sup> Numerous studies confirm that, when provided the same set of lyrics, people are vastly more likely to find those words offensive, violent, and literal if they believe the lyrics come from a rap song instead of a country or folk song.<sup>10</sup> For this reason, no one thinks that Freddie Mercury confessed to his mama that he had “just killed a man,”<sup>11</sup> that the (Dixie) Chicks poisoned someone called Earl,<sup>12</sup> that Johnny Cash murdered a man in

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<sup>8</sup> See, e.g., Dixon and Linz, *Obscenity Law and Sexually Explicit Rap Music: Understanding the Effects of Sex, Attitudes, and Beliefs* (1997) 25 J. of Applied Communication Research 217, 234.

<sup>9</sup> See Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology* (2002) 49 UCLA L. Rev. 1241, 1263 (“[T]he stereotypes already present at the subconscious level do their work. Rap music activates the ‘Black’ stereotype, an aspect of which is ‘violence.’”).

<sup>10</sup> See, e.g., Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics* (1996) 26 J. of Applied Social Psych. 2135; Dunbar *et al.*, *The Threatening Nature of “Rap” Music* (2016) 22 Psych. Pub. Pol’y & L. 280, 281, 288; Dunbar and Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments* (2018) 14 J. Experimental Criminology 507, 514.

<sup>11</sup> Queen, “Bohemian Rhapsody,” on *A Night at the Opera* (EMI Records 1975).

<sup>12</sup> Chicks, “Goodbye Earl,” on *Fly* (Monument Records 2000).

Reno “just to watch him die,”<sup>13</sup> or that Bob Dylan “shot a man named Gray and took his wife to Italy”<sup>14</sup>—even though these artists famously sang those lyrics.<sup>15</sup>

However troubling or distasteful some might find rap music and rap videos, they are nonetheless artistic expressions and social commentary protected by law. “Indeed, the point of all speech protection is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” (*Snyder v. Phelps* (2011) 562 U.S. 443, 458 [citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, supra*, 515 U.S. at p. 574] [internal quotations and alterations omitted].)

The constitutional double standard against rap music has significant chilling effects, cutting into the “breathing space” that this important and popular form of expression needs to survive. (*NAACP v. Button* (1963) 371 U.S. 415, 433; *see also Reno v. ACLU* (1997) 521 U.S. 844, 871-72.) This Court must not abide a conviction that “may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects.” (*Street v. New York* (1969) 394 U.S. 576, 594.) Given

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<sup>13</sup> Johnny Cash, “Folsom Prison Blues,” on *At Folsom Prison* (Columbia Records 1968).

<sup>14</sup> Bob Dylan, “Idiot Wind,” on *Blood on the Tracks* (Columbia Records 1975).

<sup>15</sup> *See also* Fried, *Stereotypes of Music Fans: Are Rap and Heavy Metal Fans a Danger to Themselves or Others?* (2003) 8 J. Media Psych. 1, 7-9; Binder, *Constructing Racial Rhetoric: Media Depictions of Harm in Heavy Metal and Rap Music* (1993) 58 Am. Socio. Rev. 753, 754.



the free speech issues here, this Court should consider Mr. Sullivan’s appeal with heightened scrutiny of the constitutional implications.<sup>16</sup>

## **II. California Law Mandates that Courts Strive to Eliminate Racial Bias from Criminal Proceedings and to Strictly Limit the Use of Rap Lyrics and Videos at Trial**

### **A. Early Legislative Efforts to Address Implicit Bias**

Even before the Legislature passed the Racial Justice Act in 2020, it recognized the power and damaging effects of implicit biases and began to engage in efforts to address the problem. The Legislature, for example, passed Assembly Bill 242 in 2019, which required implicit bias training for attorneys and court personnel. (AB-242, Stats. 2019, ch. 418, § 2 [hereinafter “AB 242”], codified at Bus. & Prof. Code, § 6070.5.)

In support of this legislation, the Legislature found that “[a]ll persons possess implicit biases, defined as positive or negative associations that affect their beliefs, attitudes, and actions towards other people.” (AB 242, § 1, subd. (a)(1).) It further acknowledged: “In the United States, studies show that most people have an implicit bias that disfavors African

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<sup>16</sup> Contrary to the Attorney General’s arguments about forfeiture (Respondents’ Br. at pp. 89, 97-99), the issues raised in Mr. Sullivan’s appeal around the use of rap music merit a constitutional analysis independent of that implicated by the evidentiary rules in accordance with *Dawson v. Delaware* (1992) 503 U.S. 159. (See also *Chapman v. California* (1967) 386 U.S. 18, 23.)

Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent.” (*Id.*, § 1, subd. (a)(3).)

For just one example of the way in which this bias might manifest as disparate treatment on the basis of race, the Legislature noted that, “in California, Black defendants are held in pretrial custody 62 percent longer than White defendants and that Black defendants receive 28 percent longer sentences than White defendants convicted of the same crimes.” (*Id.*, § 1, subd. (a)(5).) Given this history and context, the Legislature declared its intent “to ameliorate bias-based injustice in the courtroom.” (*Id.*, § 1, subd. (b).)

## **B. The Racial Justice Act**

The Legislature enacted the Racial Justice Act, in part, to advance the intent expressed in AB 242. The bill reasserted the Legislature’s finding that implicit biases have long plagued California’s criminal proceedings and that “we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system.” (AB 2542, § 2, subd. (g).) In the bill, the Legislature also acknowledged that “[e]xisting precedent tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials.” (*Id.*, § 2, subd. (e).) It concluded with the command that “we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California, both prospectively and retroactively.” (*Id.*, § 2, subd. (g).)

The Racial Justice Act was intended “to eliminate racial bias from California’s criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California.” (AB 2542, § 2, subd. (i).) The Act was not designed to punish prosecutors, “but rather to remedy the harm to the defendant’s case and to the integrity of the judicial system.” (*Ibid.*) It is founded on the principle that “[i]mplicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias.” (*Ibid.*)

To this end, the Racial Justice Act, as codified, prohibits the state from seeking or obtaining a conviction or sentence “on the basis of race, ethnicity, or national origin.” (Pen. Code, § 745, subd. (a).) A defendant can establish a violation by, among other things, showing that a judge, attorney, law enforcement officer, expert witness or juror “used racially discriminatory language about the defendant’s race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity, or national origin, whether or not purposeful.” (*Id.*, § 745, subd. (a)(1)-(2).)<sup>17</sup>

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<sup>17</sup> “Racially discriminatory language” is defined as “language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to

The Legislature doubled down on its commitment to eliminating racial bias in 2022, when it passed the Racial Justice For All Act (AB 256), which made the Racial Justice Act retroactive.

### **C. The Decriminalizing Artistic Expression Act**

The same year that the Legislature passed the Racial Justice for All Act, it undertook further efforts to reduce racial bias in criminal proceedings by passing the Decriminalizing Artistic Expression Act (AB 2799). While this act protects against *any* form of artistic expression from introducing bias or prejudice into criminal proceedings, the Legislature was chiefly focused on the “significant risk of unfair prejudice when rap lyrics are introduced into evidence.” (AB 2799, § 1, subd. (a).) The Legislature’s analysis reflected a deep concern about rap lyrics being used as “racialized character evidence” and a worry that rap artists are, in effect, denied artistic license because their lyrics are construed as autobiographical and literal, rather than as, for example, metaphorical.<sup>18</sup>

Accordingly, the Decriminalizing Artistic Expression Act is intended “to provide a framework by which courts can ensure that the use of an accused person’s creative expression will not be

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an animal, or language that references the defendant’s physical appearance, culture, ethnicity, or national origin.” (*Id.*, § 745, subd. (h)(4).)

<sup>18</sup> AB 2799 Assembly Floor Analysis, Aug. 19, 2022, *available at* [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=202120220AB2799#](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB2799#).

used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence.” (AB 2799, § 1, subd. (b).) The act declares that “the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.” (*Ibid.*)

To effect this goal, AB 2799 added section 352.2 to the Evidence Code. The section modifies the existing balancing test under Evidence Code section 352, which permits a court to “exclude evidence if its probative value is substantially outweighed by the probability that its admission” will be unduly prejudicial, confusing, or time-consuming. (Evid. Code, § 352.)

By comparison, balancing under section 352.2 incorporates a strong presumption against admissibility. It requires that a court, when assessing whether to admit a form of creative expression into evidence, consider that:

(1) the probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available; and

(2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of Section 1101, treat the expression as evidence of the defendant’s propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.

(Evid. Code, § 352.2, subd. (a).)

In sum, while the Decriminalizing Artistic Expression Act acknowledges that rap lyrics and songs can, at times, be probative of their literal truth, it cautions that the introduction of rap evidence is very likely to inject racial bias into criminal proceedings and be unduly prejudicial. (*See People v. Venable* (2023) 88 Cal.App.5th 445, 448, 455-56, review granted May 17, 2023, S279081 [opining that Evidence Code section 352.2 “make[s] it more likely that rap lyric evidence will be excluded . . . .” and further concluding that the provision applies retroactively to “cases that are not yet final”]; *but see People v. Ramos* (2023) 90 Cal.App.5th 578, 595, review granted July 12, 2023, S280073 [concluding AB 2799 is not retroactive].)<sup>19</sup>

### **III. The Admission of Rap Lyrics and Videos at Trial Contravened Constitutional Protections, Infected the Proceedings with Racial Bias, and Unduly Prejudiced Mr. Sullivan**

The prosecution’s use of rap in this case provides a textbook example of the harm that constitutional protections, as well as the Legislature’s recent efforts to combat racial bias, were designed to prevent. The rap lyrics and videos introduced into evidence added very little (if any) relevant factual information not already available to the jury, and yet were highly

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<sup>19</sup> Amici agree with Mr. Sullivan: regardless of whether the California Supreme Court determines AB 2799 to itself be retroactive, “the Legislative findings in the [] Act which note that rap lyrics are used in a racially biased way against African Americans, should inform this Court’s analysis of the [Racial Justice Act] claims . . . .” (Appellant’s Supplemental Br. at p. 21.)

inflammatory and unfairly prejudicial. (*See, e.g., People v. Coneal, supra*, 41 Cal.App.5th at pp. 967-68 [finding that corroborating evidence had rendered the admitted rap lyrics and videos cumulative, adding no probative value while being “extremely prejudicial”].)

In particular, the rap evidence included six videos identified at trial as: “Public Announcement [sic] 3,” “Sick Crew ft. NBA,” “Money on Yo Head – Lil Blood,” “Off Safety – Taliban Shady,” “Why you Hatin – Taliban Shady,” and “Untitled Video Exhibit 250,” as well as 12 pages of rap lyrics in text files taken from Mr. Sullivan’s cellphone. (7 CT 1919-22, 1928-35, 1944-47, 1954-64; 35 RT 7118-44, 7149-56; Exs. 240, 242, 242D, 245-51.)

With the exception of “Public Announcement [sic] 3,” which was posted by the deceased Jaquan Rice, Jr. about Westmob’s rivalry with Big Block, the other videos purportedly feature members of Big Block, including Mr. Sullivan. These videos cover inflammatory topics, such as gang rivalry, hating the police, selling cocaine, gun charges, leaving rivals face down in the dirt, charred flesh, and kidnapping “b\*tches.” (*See ibid.*)

A law enforcement officer identified Mr. Sullivan as appearing in, but not necessarily narrating, two of these videos. (Exs. 243-48.) In another video, Mr. Sullivan’s connection derives only from the narrator calling for Mr. Sullivan’s and his codefendant’s release from custody. (Ex. 242D.) Yet another video boasting about keeping guns with the safety off appears not to have depicted Mr. Sullivan at all. (Ex. 249.) The only video in which Mr. Sullivan is actually identified as rapping is similarly

animated by violent rhetoric and wide-ranging rhymes; so too with the rap lyrics extracted from his phone. (AOB at pp. 85-88 [citing 35 RT 7145-49; 7 CT 1974-75; Ex. 250].)

If one were to apply the new balancing test at Evidence section 352.2 to these rap videos and lyrics, it is challenging to see how all of this material would have been admitted. The images and lyrics do not bear a “sufficient level of similarity” to the shooting, or include “factual detail not otherwise publicly available.” (*Cf.* Evid. Code, § 352.2, subd. (a).) There was not, as the Attorney General asserts, “a persuasive basis to construe the lyrics in the videos literally.” (AOB at p. 101.) Instead, the premise for introducing them was precisely the (erroneous) assumption that rap lyrics and videos have unquestionable probative value for literal truth or as truthful narrative.

In attempting to dispatch Mr. Sullivan’s arguments, the Attorney General contends that the admitted rap videos and lyrics were “corroborative, not cumulative.” (Respondents’ Br. at p. 100.) Not so. Given the voluminous testimony and evidence before the jury about the rivalry between Westmobb and Big Block, the jury did not need to see an inflammatory rap video to “corroborate[] the fallout between Big Block and Westmobb”—as the Attorney General contends. (*Id.* at p. 101 [discussing basis for admissibility of “Slick Crew ft. NBA” video].)

Nor was it necessary to corroborate gang membership by showing the “Why You Hatin” video calling for Mr. Sullivan’s release or the extremely graphic “Money on Yo Head” video of Mr. Sullivan “throwing Big Block hand signs along with other Big



Block members in Big Block territory.” (*Ibid.*) That Mr. Sullivan was a member of Big Block was readily put to the jury in testimony and social media screenshots. (*See, e.g.*, 35 RT 7161-83; Exs. 252-71.)

Perhaps weakest of all is the Attorney General’s discussion of the “Off Safety” video. (Respondents’ Br. at p. 101.) In defending the admissibility of this video, the Attorney General omits any mention of Mr. Sullivan and instead argues that the video corroborated the gun possession conviction of a different individual who had rapped about having a gun in the video. (*Ibid.*)

Exacerbating the issues around the admission of the rap evidence, the prosecution relied upon a purported gang expert who dismissed the possibility that rap lyrics and videos should be seen as artistic expression and suggested instead that they are often true. (34 RT 6911.) This witness also clouded the jury’s view of Mr. Sullivan by testifying about unrelated criminal charges involving other persons identified on the rap videos. (35 RT 7139-42, 7145-49.)

Put simply: this evidence was both cumulative and extremely prejudicial. It placed Mr. Sullivan center stage within a sonic, visual, and linguistic tapestry that portrayed Black men as inherently violent. Such a portrait was likely to resonate with jurors because, as noted *supra*, studies show that racist stereotypes are ubiquitous within American culture and have been for centuries.

Even jurors who may reject these stereotypes at a conscious level are likely to harbor them at a level beneath their conscious awareness.<sup>20</sup> By bombarding the jury with multiple examples of rap lyrics and videos that closely associated Mr. Sullivan with violence or with other individuals charged with criminal conduct, the prosecution pursued a “guilt by association” strategy and “primed” jurors to connect Mr. Sullivan to deeply held implicit biases that they might not have been aware they possessed.<sup>21</sup>

Priming is particularly important for jurors who do *not* consciously believe in racist stereotypes and who would *not* want to produce a racially biased verdict.<sup>22</sup> While—as the Legislature found—“most people have an implicit bias that disfavors African Americans and favors Caucasian Americans” (AB 242, § (1), subd.

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<sup>20</sup> See Rachlinski and Johnson, *Does Unconscious Racial Bias Affect Trial Judges?* (2009) 84 Notre Dame L.Rev. 1195, 1196 (defining implicit biases as “stereotypical associations so subtle that people who hold them might not even be aware of them”).

<sup>21</sup> In criminal proceedings, “priming” is a process by which prosecutors can tap into implicit biases and subtly associate the defendant with deeply ingrained racial stereotypes. See Bowman, *Seeking Justice: Prosecution Strategies for Avoiding Racially Biased Convictions* (2023) 32 S. Cal. Interdisc. L.J. 515, 526 (“‘Priming’ involves using subtle environmental factors as cues to trigger associations with other ideas.”).

<sup>22</sup> See Bowman, *Seeking Justice*, *supra*, 32 S. Cal. Interdisc. L.J. at p. 527, which noted that individuals who “consciously reject stereotypes . . . may nevertheless be influenced by them,” and that “[o]ne way that happens is through use of ‘coded language,’ which invokes stereotypes without directly referencing them. For example, words like . . . ‘superpredator’ can invoke stereotypical associations between Black people and animals.”

(a)(3)), “something is needed to trigger the power of stereotype for people who do not harbor explicit biases.”<sup>23</sup>

That trigger—as the Legislature also recognized—can occur when the prosecution relies on rap evidence. (AB 2799, § 1, subd. (b).) Here, the admission of rap lyrics and videos in Mr. Sullivan’s trial created a risk of undue prejudice by introducing stereotypes into the criminal proceedings. The goal of the new balancing test in Evidence Code section 352.2, subdivision (a), is to uphold the principle that prosecutors must not inappropriately “prime” jurors to rely on their unconsciously held racial stereotypes and implicit biases in their deliberations. Whether it intended to or not, the prosecution violated that principle.

Because prosecutors introduced rap lyrics and videos in a manner that encouraged jurors to think of the material as truthful representations, jurors were also likely to “treat the expression as evidence of [Mr. Sullivan’s] propensity for violence or general criminal disposition,” contrary to step 2 of the Section 352.2(a) balancing test. The likelihood the jury did so is particularly pronounced because, as has been discussed, social science research demonstrates that implicit biases associating rap with Blackness and Blackness with violence and criminality

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<sup>23</sup> Bowman, *Seeking Justice*, *supra*, 32 S. Cal. Interdisc. L.J. at p. 526.

have predisposed much of the population to understand rap as autobiographical.<sup>24</sup>

The error here was not trivial. This case turned on whether a jury believed that Mr. Sullivan was the unidentified third person riding in the car that shot at and killed Mr. Rice. Given the conflicting eyewitness testimony of the incident, there is a more than reasonable probability that the jury assessed Mr. Sullivan's character and propensity for violence based on the rap music before it. (See AOB at p. 99 [collecting record citations].)

For all these reasons, the use of rap lyrics and videos in this case was highly likely to “explicitly or implicitly inject racial bias into the proceeding[]” and was unduly prejudicial. (Evid. Code, § 352.2, subd. (a).) A new trial is necessary under the Racial Justice Act because the convictions here were obtained “on the basis of race” or, at a minimum, were the product of “bias or animus” based on “the defendant’s race, ethnicity, or national origin, whether or not purposeful.” (Pen. Code, § 745.)

### CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to conclude that the trial court committed reversible error in admitting the rap lyrics and rap videos. Because this evidence was unduly prejudicial to Mr. Sullivan, it tainted his trial with bias and his convictions should be reversed.

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<sup>24</sup> See, e.g., Dunbar *et al.*, *The Threatening Nature of “Rap” Music*, *supra*, 22 Psych. Pub. Pol’y & L. at pp. 281, 288.

Dated: February 27, 2024

Respectfully submitted,



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## CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed *Amici Curiae* Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 4,707 words. This total includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File *Amici Curiae* Brief required under Rule 8.520(f), this certificate, and the signature blocks. (See Rule 8.204(c)(3).)

Dated: February 27, 2024

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## PROOF OF SERVICE

I, Kassandra Dibble, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is kdibble@aclunc.org. On February 27, 2024, I served the attached,

**Application For Leave To File *Amici Curiae* Brief and  
Proposed Brief of *Amici Curiae* ACLU of Northern California and  
ACLU of Southern California in Support of Defendant and Appellant**

BY ELECTRONIC TRANSMISSION OR U.S. MAIL: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system or a hard copy of the document via U.S. Mail as indicated:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 27, 2024 in Alameda, CA.



Kassandra Dibble, Declarant

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