No. COA-REG-0015-2022

IN THE COURT OF APPEALS OF MARYLAND

TYRIE WASHINGTON,

Defendant-Appellant,

v.

STATE OF MARYLAND,

Plaintiff-Appellee.

On appeal from the Court of Special Appeals of Maryland
Case No. 739 | Hon. E. Gregory Wells

BRIEF OF WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, PUBLIC JUSTICE CENTER, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, AND MARYLAND CRIMINAL DEFENSE ATTORNEYS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

Bandes, Susan A. et al., *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCI. & L. 176 (2019) 11

Bor, Jacob et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302 (2018) 13

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Del Toro, Juan et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PROC. NAT'L ACAD. SCIS. USA 8261 (2019) 12

Eberhardt, Jennifer et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004) 7

Fagan, Jeffrey & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951 (2020) 11

Fagan, Jeffrey & Tom R. Tyler, *Legal Socialization of Children and Adolescents,* 18 SOC. JUST. RSCH. 217 (2005) 13

Futterman, Craig B. et al., *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125 (2016) 11

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Geller, Amanda et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321 (2014) 12

Goff, Phillip Atiba et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526 (2014) 8

Grunwald, Ben & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas,* 107 CAL. L. REV. 345 (2019) 15, 16

Helms, Ronald & S.E. Costanza, *Contextualizing Race: A Conceptual and Empirical Study of Fatal Interactions with Police Across US Counties*, 18 J. ETHNICITY CRIM. JUST. 43 (2019) 10

Henning, Kristin, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH (2021) 11, 12

Henning, Kristin, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018) 7, 8

Hinds, Lyn, *Building Police-Youth Relationships: The Importance of Procedural Justice*, 7 YOUTH JUST. 195 (2007) 13

Kramer, Rory & Brianna Remster, *Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops*, 52 LAW & SOC'Y REV. 960 (2018) 10

LaFave, Wayne R., 4 SEARCH AND SEIZURE § 9.5(g), (6th ed. Dec. 2021 Update) 23

LaFraniere, Sharon & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (Jul. 16, 2016) 9

Mann, Alex, *Family of Anton Black, 19-year-old Who Died at the Hands of Police on Eastern Shore, Reaches $5 Million Settlement in Federal Lawsuit*, BALTIMORE SUN (Aug. 8, 2022) 9

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Perez, Edith, *Don't Make a Run for It: Rethinking Illinois v. Wardlow in Light of Police Shootings and the Nature of Reasonable Suspicion*, 31 U. FLA. J.L. & PUB. POL'Y 137 (2020) 5

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Sorkin, Amy Davidson, *Freddie Gray's Death Becomes a Murder Case*, NEW YORKER (May 1, 2015) 9

Tynes, Brendesha M. et al., *Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color*, 65 J. ADOLESCENT HEALTH 371 (2019) 12

INTERESTS OF AMICI CURIAE[1]

See Addendum, *infra*.

SUMMARY OF THE ARGUMENT

With the proliferation of camera phones over the past two decades, the American public has witnessed a steadily increasing stream of high-profile incidents involving Black people suffering harm (and even death) at the hands of law enforcement. These tragic episodes, captured in real time and displayed across news and social media outlets nationally, have uncovered and fueled deep-seated fears within the Black community. And they confirm for the rest of the country what Black adults and children have long known: that there are compelling and rational reasons why Black and Brown individuals in the United States, and particularly young Black men like the defendant in this case, might be skeptical—even terrified—of police. Recent empirical research substantiates these observations and shows that a young Black man's "flight" from law enforcement is often far more likely to indicate an innocent fear of police than it is to support reasonable suspicions of criminal activity.

This appeal presents an opportunity to bring Maryland law into alignment with these realities. In 2000, the U.S. Supreme Court concluded in *Illinois v. Wardlow*, 528 U.S. 119 (2000), that an individual's "unprovoked flight" in a "high crime area" created sufficient "reasonable suspicion" of criminal activity to justify a stop, interrogation, and search of that individual under the framework prescribed in *Terry v. Ohio*, 392 U.S. 1 (1968). In this

[1] Pursuant to Maryland Rule 8-511(a)(1), amici curiae submit this brief with the prior written consent of all parties.

case, the Maryland Court of Special Appeals interpreted *Wardlow* as providing that "unprovoked flight from law enforcement in a high-crime area"—by itself—can be enough to trigger such an intrusion. Ct. Spec. App. Op. at 11 (Mar. 24, 2022) (hereinafter, "COSA Op."). In reaching that conclusion, the Court of Special Appeals acknowledged that a growing number of state and federal courts—following the standard announced in *Terry* and applied in *Wardlow*—account for the "reality that Black individuals have no shortage of innocent reasons to flee at the sight of law enforcement." *Id.* at 13. But the Court of Special Appeals, "constrained by [its] place in Maryland's judicial hierarchy," thought itself powerless to consider that reality in assessing the reasonableness of the detention and search at issue in this case. *Id.* at 13, 16.

As an initial matter, *Wardlow* did not expressly adopt a categorical rule that law enforcement is constitutionally permitted to stop and frisk anyone perceived to be fleeing from police in a purportedly "high-crime" area. *See People v. Flores*, 38 Cal. App. 5th 617, 631 (2019) (rejecting the argument "that 'flight' plus 'high crime area' equals reasonable suspicion for a detention," and confirming that "*Wardlow* . . . did not make such a bright-line holding"). Indeed, the term "high-crime area" has itself eluded consistent definition. Instead, *Wardlow* applied *Terry*'s holistic "reasonable suspicion" standard to the unique facts and circumstances presented. But the *Wardlow* Court made clear that any reasonable suspicion analysis must be based on "commonsense judgments and inferences about human behavior"—a directive that necessarily requires courts to account for societal advances, including evolving social science, over time.

Our understanding of human behavior has progressed dramatically in the twenty years since *Wardlow* was decided. State and federal courts around the country have relied on an expanding body of empirical evidence to deem unconstitutional under *Terry* police stops based on a Black individual's flight in a supposedly "high-crime area." Consistent with *Wardlow*'s teaching and that jurisdictional trend, this Court can—and should—take the opportunity to clarify that in Maryland, too, the "commonsense" implication of a Black man's flight from police is not criminal guilt, but rather an understandable desire to avoid an interaction fraught with fear and distrust. Amici therefore urge the Court to reverse the decision below, and to hold that the mere fact of flight from law enforcement in a "high-crime area" did not, without more, give the officers in this case adequate cause to stop and search the defendant, Mr. Washington.

ARGUMENT OF AMICI CURIAE

I. THE *WARDLOW* COURT APPLIED *TERRY'S* FACT-BOUND "REASONABLE SUSPICION" TEST

Under *Terry*, probable cause to perform "an on-the-street stop, interrogat[ion] and pat down for weapons" exists only where a police officer "observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot." 392 U.S. at 12, 30. In assessing the lawfulness of a "*Terry* stop," courts must draw "rational inferences" from the "specific and articulable facts" presented to determine whether they "reasonably warrant th[e] intrusion." *Id.* at 21.

The reasonable suspicion standard "takes into account 'the totality of the circumstances—the whole picture.'" *Navarette v. California*, 572 U.S. 393, 397 (2014)

(quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). Given its holistic nature, "[t]he concept of reasonable suspicion . . . is not 'readily, or even usefully, reduced to a neat set of legal rules.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citation omitted). And attempts to simplify the analysis with categorical rules risk "creat[ing] unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment." *Id.* at 7-8; *see also Florida v. Bostick*, 501 U.S. 429, 437 (1991) (emphasizing that courts should not evaluate the reasonableness of a *Terry* stop based "on a single fact," but rather "the totality of the circumstances"). In other words, "[t]here is no bright line rule; instead, 'common sense and ordinary human experience must govern over rigid criteria.'" *United States v. Morgan*, 729 F.3d 1086, 1090 (8th Cir. 2013) (citation omitted).

Wardlow applied *Terry*'s holistic standard to the unique facts presented. Police officers were patrolling a part of Chicago "known for heavy narcotics trafficking" when they observed Wardlow, a middle-aged Black man,[2] "holding an opaque bag." 528 U.S. at 121-22. When Wardlow saw the officers, he "fled." *Id.* at 122. The officers eventually caught up, stopped Wardlow, and conducted a "protective patdown." *Id.* That search revealed a gun, and Wardlow was arrested. *Id.*

In evaluating the constitutionality of the stop, the Court stressed that "the determination of reasonable suspicion must be based on commonsense judgments and

[2] "Wardlow's race and age were not mentioned in the Supreme Court's opinion although they were made known to the Court by the NAACP Legal Defense and Educational Fund, Inc." Tovah Renee Calderon, *Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOWARD L.J. 73, 75 n.13 (2000).

inferences about human behavior." *Id.* at 125. Under the circumstances, the Court viewed Wardlow's "presence in an area of heavy narcotics trafficking" coupled with his "unprovoked flight upon noticing the police" as creating "reasonable suspicion" of criminal activity. *Id.* at 124-25. But the Court emphasized its reluctance to impose "categorical rules concerning a person's flight and the presumptions to be drawn therefrom." *Id.* at 127, 135 (Stevens, J., concurring in part and dissenting in part) (agreeing with the "Court's rejection of the *per se* rules proffered by the parties"). Instead, *Wardlow* reinforced the need for courts to consider all the facts presented in any given case—viewed in light of "the factual and practical considerations of everyday life." *Navarette*, 572 U.S. at 402.

One relevant factor that the *Wardlow* Court highlighted is the teaching of "empirical studies dealing with inferences drawn from suspicious behavior." 528 U.S. at 124-25. At the time, the Supreme Court concluded that an adequately developed body of social analysis was not then "available." *Id.* But the Court's commentary on that score—and its command more broadly to draw "commonsense judgments and inferences about human behavior"—unquestionably invited courts to consider such empirical evidence as it evolved in the future. *See Kansas v. Glover*, 140 S. Ct. 1183, 1190 (2020) (emphasizing that the reasonable-suspicion inquiry must rest on "information that is accessible to people generally").

In the more than two decades since *Wardlow*, social scientists have filled the empirical research gap that the Supreme Court then identified. And in turn, commentators calling for courts to revisit the *Wardlow* Court's implied invitation abound. *See, e.g.*, Edith Perez, *Don't Make a Run for It: Rethinking Illinois v. Wardlow in Light of Police Shootings*

and the Nature of Reasonable Suspicion, 31 U. FLA. J.L. & PUB. POL'Y 137, 160 (2020) (urging that, in "accord with the data of racial bias, mental health, excessive stops and frisks, and the baseless term of 'high crime,'" *Wardlow*'s "commonsense judgments" standard must account for "a more comprehensive interpretation of human behavior—whether it be the behavior of Black men or racially biased officers—and an acknowledgment of the media-bred fear of police officers").

This case offers a timely opportunity to clarify the state of the law in Maryland. Under *Terry* and *Wardlow*, reasonable suspicion requires a commonsense view of human behavior. But the decisions below disregard what we have learned in America over the last 20 years, including through a now-well-established body of research, *see infra* Section II, because they fail to account *at all* for the legitimate reasons—having nothing to do with guilt—that a Black man might wish to avoid police interactions. Amici urge this Court to make clear that Maryland courts not only may—but must—consider that practical (and empirical) reality when upholding the Fourth Amendment's protections. *See Wardlow*, 528 U.S. at 128.

II. TREATING A BLACK PERSON'S "UNPROVOKED FLIGHT" FROM POLICE AS EVIDENCE OF CRIMINAL ACTIVITY IGNORES COMMON SENSE AND SOCIAL SCIENCE

A. Empirical Research Confirms That Law Enforcement Interactions Are Often Fraught With Racial Bias, Potential Danger, And Lasting Trauma

Tragically, "the talk" has become a familiar necessity for modern Black families in America. *See Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting). Virtually all Black parents will, at some point, instruct their children how to safely navigate

encounters with law enforcement—for fear that their son or daughter could be the next Eric Garner, Tamir Rice, Breonna Taylor, George Floyd, or Anton Black. Over time, law enforcement's repeated targeting of Black communities has created a culture of mistrust from which an automatic, instinctual desire to avoid law enforcement interactions flows. *See* Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1556 (2018).

A robust body of social science bears out this commonsense view. The Court of Special Appeals recognized as much in this case—noting the "legitimate reasons" why "individuals might be wary of interactions with police in Baltimore City and elsewhere." COSA Op. at 16.

1. Empirical Research Confirms Pervasive Anti-Black Bias

The Black community's critical view of law enforcement stems from a history of over-policing and mistreatment ultimately rooted in racial biases. At a societal level, research reveals negative stereotypes of Black people—including assumptions associating Black individuals and crime. A 2004 study, for example, showed that individuals more easily identified crime-related objects after being primed with a rapid, almost imperceptible, image of a Black face, and that they paid more attention to Black faces after being subliminally primed with crime-related objects. Jennifer Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004).

Research also demonstrates the same biases among law enforcement. Studies have shown that "officers are more likely to attribute the ambiguous behaviors of nonwhites to criminality and the identical behaviors of whites to external factors." L. Song Richardson,

Cognitive Bias, Police Character, and the Fourth Amendment, 44 ARIZ. ST. L.J. 267, 268 (2012); *see also* Henning, *supra*, 67 AM. U. L. REV. at 1540-41. In one study, researchers showed photographs of young white, Black, and Latino men to police officers. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 530 (2014). The researchers told the officers that the subjects were accused of either a misdemeanor or a felony, and then asked them to estimate each child's age. *Id.* On average, the officers overestimated the age of adolescent Black children suspected of felonies by *nearly five years*. *Id.* at 531-32. By contrast, they *underestimated* the age of adolescent white felony suspects by one year. *Id.* And the older an officer believed a child to be, the more culpability the officer perceived. *Id.* at 532. The implication is that young Black people are more likely to be treated as adults much earlier in their lives than their white counterparts—receiving less of the benefits, presumption of innocence, and forgiveness commonly afforded to children.

Studies further show that *how* officers communicate with Black individuals reflects these same biases. A 2017 analysis of body-camera recordings found race-based disparities in how respectfully police spoke at the outset of an officer-civilian interaction, even when controlling for the officer's race, the severity of the infraction, and the stop's location and outcome. Rob Voigt et al., *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PROC. NAT'L ACAD. SCIS. USA 6521, 6523-24 (2017). So even from the start, interactions between law enforcement and Black individuals are frequently more hostile—which has the obvious consequence of reinforcing the Black community's concerns.

The impact of these biases matters in the Fourth Amendment context. For young Black men in particular, law enforcement interactions can carry high stakes, often based on factors beyond their control. Common sense would dictate simply avoiding the interaction altogether, where possible, for reasons wholly unrelated to criminal activity.

2. Empirical Research Confirms That Law Enforcement Interactions Are More Dangerous For Black Men

Recent, high-profile incidents of police violence highlight the dangers faced by young Black men. Philando Castile was killed by police while reaching for his identification, after having previously been pulled over 49 times in 13 years—mostly for minor infractions. *See* Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (Jul. 16, 2016). Police killed Elijah McClain when he was identified as a "suspicious" person who appeared "sketchy." *Officers And Paramedics Are Charged In Elijah McClain's 2019 Death In Colorado*, ASSOCIATED PRESS (Sept. 1, 2021), https://www.npr.org/2021/09/01/1033289263/elijah-mcclain-death-officers-paramedics-charged. And Freddie Gray died after attempting to avoid Baltimore police officers—ironically, under circumstances similar to Wardlow's. Amy Davidson Sorkin, *Freddie Gray's Death Becomes a Murder Case*, NEW YORKER (May 1, 2015); *see also* Alex Mann, *Family of Anton Black, 19-year-old Who Died at the Hands of Police on Eastern Shore, Reaches $5 Million Settlement in Federal Lawsuit*, BALTIMORE SUN (Aug. 8, 2022) (detailing story of Anton Black, who died after police officers chased him and pinned him down after he was seen wrestling with a relative).

Empirical evidence confirms that interacting with law enforcement is more dangerous for Black men than for others—even if they have done nothing wrong. A 2019 study found that police employ lethal violence more frequently in areas with higher African-American and Hispanic populations. *See* Ronald Helms & S.E. Costanza, *Contextualizing Race: A Conceptual and Empirical Study of Fatal Interactions with Police Across US Counties*, 18 J. ETHNICITY CRIM. JUST. 43 (2019). Another study analyzed 990 shooting incidents from *The Washington Post*'s National Police Shooting Database as of 2015, and found that—even after controlling for variables like age, mental illness, crime severity, and jurisdiction size—Black civilians were more than *twice as likely* as white civilians to have been unarmed when killed by police. Justin Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 CRIMINOLOGY & PUB. POL'Y 309, 325-26, 328-29 (2017). And other research shows that officers are more likely to overestimate the threat they face in fatal shootings involving civilians of color. *Id.* at 329.

Along the same lines, a 2018 study concluded that, relative to their white peers, Black individuals are more often stopped by police, subjected to force, and viewed as threatening to officers. Rory Kramer & Brianna Remster, *Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops*, 52 LAW & SOC'Y REV. 960, 987 (2018). These findings held true regardless of whether the subject was actually engaging in criminal activity. The data further showed that Black civilians were more likely than white civilians to experience lethal force even when police did not uncover any criminal behavior. *Id.* at 982.

Finally, a 2020 study found that Black suspects were over twice as likely than members of other racial or ethnic groups to be killed by police—even when there were no circumstances to warrant the use of deadly force. Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 961 (2020).

3. Empirical Research Confirms Policing's Traumatic Impact On The Black Community

Empirical research also demonstrates the traumatic impact of law enforcement interactions within the Black community.[3] Compared to white individuals, Black persons searched by police are more often subject to physical and sexual violence,[4] homophobic and racial slurs, and other tactics that make the individual feel like "less than a person"[5] or "like a target."[6] And such treatment instills lasting humiliation, fear, and distrust in not only the searched individual but, over time, the larger Black community.

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[3] "Trauma" can be described as "any distressing or disturbing experience that causes significant fear, helplessness, confusion, or other disruptive feelings intense enough to have a lasting negative effect on a person's attitudes, behaviors, and social, emotional, or spiritual wellbeing." Kristin Henning, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH, 208 (2021).

[4] *See, e.g.*, Press Release, Am. C.L. Union of DC, *ACLU-DC Settles Case Against D.C. Police Officer for Anal Search During Stop and Frisk*, (Dec. 6, 2018), https://www.acludc.org/en/press-releases/aclu-dc-settles-case-against-dc-police-officer-anal-search-during-stop-and-frisk (describing a stop-and-frisk where an officer "jammed his fingers into [the victim's] buttocks, stuck his thumb in his anus, and grabbed his scrotum").

[5] Craig B. Futterman et al., *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125, 142 (2016).

[6] Susan A. Bandes et al., *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCI. & L. 176 (2019).

This trauma develops in a variety of ways. Black individuals may be direct victims of police aggression or witness it first-hand. They may hear about police violence against someone they know—or, equally common today, see reports or recordings of police brutality on the news and social media. Often, they experience the daily reality of constant police presence in their neighborhoods. And for many, "the cumulative stress caused by the daily, gratuitous, and discriminatory encounters with police becomes overwhelming and paralyzing." Henning, THE RAGE OF INNOCENCE, *supra,* at 207-08.

One study found, based on a sample of predominantly Black and Latino adolescent boys, that youth who experienced more frequent police stops reported greater psychological distress. Juan Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PROC. NAT'L ACAD. SCIS. USA 8261 (2019). Another found that young men reporting police contact—especially more intrusive contact—displayed higher levels of anxiety and trauma associated with those interactions, with a significant connection between stop-and-frisk intrusions and post-traumatic stress disorder ("PTSD"). Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2324 (2014).

Even individuals who have not been targeted directly are often traumatized by high-profile accounts of police violence. Researchers have described "viral videos" of police killings as one of the most traumatic causes facing adolescents of color. Brendesha M. Tynes et al., *Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color*, 65 J. ADOLESCENT HEALTH 371, 372 (2019). In 2019, researchers analyzed data collected from a national sample of Black and Latino youth and found that

individuals with more frequent exposure to traumatic experiences while online reported higher levels of PTSD and depressive symptoms. *Id.* at 371-73.

These experiences, understandably, can lead young Black people to fear, rather than trust, law enforcement. *See* Lyn Hinds, *Building Police-Youth Relationships: The Importance of Procedural Justice*, 7 YOUTH JUST. 195, 206 (2007); Amanda Geller & Jeffrey Fagan, *Police Contact and the Legal Socialization of Urban Teens*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 26-27 (2019); Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents,* 18 SOC. JUST. RSCH. 217, 236 (2005). And it appears young Black people carry this trauma with them into adulthood—a 2017 study found that news of police killings of unarmed Black Americans also had adverse mental health impacts for Black adults. Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302 (2018). By contrast, "[m]ental health impacts were not observed" for white Americans surveyed. *Id.* at 302.

Members of the Black community—and young Black men in particular—understand these empirical conclusions from an early age. They experience the effects of implicit bias; they witness the unique risks that Black people face, relative to their white peers, when encountering law enforcement; and the result of those interactions, over time, can harm their mental health. Against that backdrop, a young Black man's decision to avoid police contact is unsurprising.

B. Recent Incidents In Baltimore Validate The Reasonable Instinct To Avoid Police Contact

Highly publicized incidents of police violence create ripple effects nationwide. But the recent histories of certain cities across the country provide a particularly stark illustration of the empirical findings discussed above—and Baltimore, the location of the events underlying this case, is unquestionably among them.

As the Court of Special Appeals observed below, a 2016 U.S. Department of Justice ("DOJ") investigation uncovered a widespread pattern within the Baltimore Police Department ("BPD") of "using enforcement strategies that produce severe and unjustified disparities in the rates of stops, searches and arrests of African Americans." COSA Op. at 14 (quoting DOJ Report at 3). And BPD's Gun Trace Task Force ("GTTF") preyed upon Black residents, conducting illegal searches, planting evidence, and subjecting civilians to beatings, robberies, and "violent takedowns." *Id.* at 14-15.

The DOJ's report acknowledged BPD's particular history of making stops "with dubious justification . . . concentrated on a small segment of the City's population." U.S. Dep't of Justice Civil Rights Div., *Investigation of the Baltimore City Police Department*, at 25-26 (Aug. 10, 2016), https://www.justice.gov/crt/file/883296/download (hereinafter, "DOJ Report"). The DOJ Report revealed that BPD carried out a disproportionate number of stops in Baltimore's "central business district and several poor, urban neighborhoods with mostly African-American residents," with "police record[ing] nearly 1.5 stops per resident over a four-year period. *Id.* at 26. The DOJ also found that "[c]ountless

individuals . . . were stopped multiple times in the same week without being charged with a crime." *Id.*[7]

Mr. Washington's opening brief provides a detailed recitation of the highly publicized incidents that have marred BPD's reputation in recent years—and amici will not repeat that account here. But that significant history must inform any objective assessment of a Black Baltimore resident's decision to flee from law enforcement. The fear of being treated unfairly, wrongfully accused, or, worse yet, placed in physical danger is palpable in Baltimore as in many areas around the state and nation. And it makes clear why Mr. Washington's flight in this case was not evidence of criminal activity, but rather a reasonable effort to avoid contact with members of the same BPD reported to have framed, robbed, and assaulted people who look like him.

C. Traditional Assumptions Regarding "High-Crime Areas" Are Not Empirically Substantiated

Some readings of *Wardlow* suggest that unprovoked flight from police is more relevant to the holistic "reasonable suspicion" inquiry if the flight occurred in a so-called "high-crime area." The *Wardlow* Court did not specify what constitutes a "high-crime area," and scholars and courts have struggled to agree on a definition. Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas,* 107 CAL. L. REV. 345, 363-67 (2019). This lack of an objective standard only exacerbates the potential for police overreach. Indeed, research indicates that the identification of a purportedly "high-crime

[7] Notably, the impetus for DOJ's report was the death of Freddie Gray following his unsuccessful attempt to avoid interaction with BPD officers—a similar situation to the one in which Sam Wardlow found himself.

area" often turns on the subjective beliefs of individual officers—informed by the very racial biases outlined above. *See supra* Sections II.A-1 and B.

A 2019 study analyzed over two million investigative stops conducted by the New York Police Department from 2007 to 2012. Grunwald & Fagan, *supra*, at 347-49. The data revealed several startling conclusions, including that officers deemed nearly every city block a "high-crime area," with minimal correlation between actual crime rates and officer characterizations. *Id.* at 396. Instead, "[t]he racial composition of the area and the identity of the officer" proved to be "stronger predictors of whether an officer deems an area high crime than the crime rate" itself. *Id.* And officers were "more likely to invoke HCA [high-crime area] against young Black male suspects." *Id.* at 385-87.

The Court of Special Appeals also acknowledged the dangers of relying on the "high-crime" classification in assessing the constitutionality of *Terry* stops—and other courts have made similar observations. All too often, racial biases result in a "problematic connection between a 'high-crime area' and an area which is simply majority-minority." COSA Op. at 15-16 (citations omitted); *see also* Grunwald & Fagan, *supra,* at 352. Specifically, "[b]ecause officers are more likely to perceive majority-minority neighborhoods as 'high-crime areas,' African Americans are viewed suspiciously wherever they go. Majority-minority neighborhoods become 'high-crime' neighborhoods, and otherwise innocent conduct appears to some as suspicious." *United States v. Weaver*, 9 F.4th 129, 156 n.3 (2d Cir. 2021) (en banc) (Lohier Jr., J., concurring). Thus, "[t]o conclude that mere presence in a high-crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth

Amendment protections are reserved only for a certain race or class of people." *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013). Tellingly, in fact, the BPD itself now recognizes as a matter of policy that presence in a high-crime area is *not* a relevant factor in assessing reasonable cause to make a stop. *See* Baltimore Police Dep't Policy 1112, *Field Interviews, Investigative Stops, Weapons Pat-Downs & Searches*, ¶ 25 (Feb. 9, 2021), https://www.baltimorepolice.org/transparency/bpd-policies/1112-field-interviews-investigative-stops-weapons-pat-downs-searches.

Attaching greater weight to a Black person's flight from police in an area perceived to be "high-crime" only multiplies the opportunities for stops propelled by implicit bias rather than reasonable suspicion. In some respects, moreover, the supposedly high-crime "character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so," COSA Op. at 15, because those areas are all the more likely to have witnessed the kind of over-policing and resulting trauma described above.

III. OTHER COURTS HAVE PROPERLY DISCOUNTED THE RELEVANCE OF FLIGHT IN A "HIGH-CRIME" AREA WHEN ANALYZING A STOP-AND-FRISK

These developments in social science over the past two decades can, and should, inform the way Maryland courts consider flight from police—particularly in a "high-crime area"—as a potential indicator of criminal activity. As Mr. Washington's briefing demonstrates, numerous courts across the country now rely upon empirical data—and, more broadly, advances in our collective "commonsense" understanding—when evaluating reasonable suspicion under *Terry*'s totality-of-the-circumstances framework.

See Pet. Br. 36-39. This brief adds context to those cases, highlights others, and urges this Court to follow the same well-reasoned path.

Mr. Washington also outlines the perils of applying the amorphous "high-crime area" factor cited in *Wardlow*. Pet. Br. 39-43. As with unprovoked flight, courts have begun the much-needed effort of prescribing objective principles that guide the "high-crime area" analysis and avoid the harms Mr. Washington rightly identifies. *See also supra* Section II.C. This case is an opportunity to provide similar clarification in Maryland.

A. Several State Courts, Applying *Terry* And *Wardlow*, Have Reasonably Considered Empirical Data To Determine The Relevance Of Flight

Several state courts have considered empirical data concerning flight when deciding whether a stop was objectively reasonable under *Terry*. In the leading case, *Commonwealth v. Warren*, a police officer canvassing a Boston neighborhood for suspects connected to a break-in observed two Black men walking down the street. 58 N.E.3d 333, 336-37 (Mass. 2016). After the officer shouted to them to stop, the two jogged into an adjacent park. *Id.*

In evaluating flight for purposes of a reasonable suspicion analysis, the court focused on a Boston Police Department report that found, *inter alia*, that Black men were more likely both to experience police-civilian encounters and to experience those encounters repeatedly. *Id.* at 342. Based on these findings, the court commonsensically concluded there may be "a reason for flight totally unrelated to the consciousness of guilt." *Id.* The court further held that this report's findings should be considered "in appropriate cases . . . in weighing flight as a factor in the reasonable suspicion calculus." *Id.*

In so holding, the court did not stray from *Wardlow.* On the contrary, the court noted that it was not "eliminat[ing] flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop." *Id.* Even so, the court reasonably concluded that the probative value of flight is lower when empirical evidence suggests innocent reasons to run. *See id.*; *see also Commonwealth v. Evelyn*, 152 N.E.3d 108, 125-26 (Mass. 2020) (reaffirming *Warren* in discounting relevance of Black man's evasiveness to reasonable suspicion analysis in light of empirical data).

Massachusetts is not alone. *See, e.g.*, *People v. Horton*, 142 N.E.3d 854, 868 (Ill. App. Ct. 2019) (concluding empirical data offered an "eminently reasonable and noncriminal reason" for Black man's flight); *Mayo v. United States*, 266 A.3d 244, 260-61 (D.C. 2022) (recognizing empirical data provided "myriad reasons" that "undermine[d] the reasonableness of an inference of criminal activity from all instances of flight" and discounting relevance of flight in reasonable suspicion analysis).

B. Federal Courts, Too, Reasonably Consider Empirical Data To Determine The Relevance Of Flight

Federal courts have likewise recognized the role empirical data should play in a reasonable suspicion analysis under *Terry*. In *United States v. Brown*, officers received an anonymous tip and later located Mr. Brown—a Black man—that matched the 911 caller's description. 925 F.3d 1150, 1152 (9th Cir. 2019). When the officers activated the lights on their police cruiser, Mr. Brown began to run. *Id.*

In analyzing whether the officers had reasonable suspicion for the resulting stop, the *Brown* Court first observed the Supreme Court's "long history of recognizing that innocent

people may reasonably flee from police." *Id.* at 1155 (citing *Alberty v. United States*, 162 U.S. 499, 511 (1896)). The court then distinguished *Wardlow*, observing that it could not "totally discount the issue of race" and stressing the yawning gap in time between *Wardlow* and when *Brown* was decided—a gap which had been filled by "amplifying awareness" of racial disparities in policing due in part to "the availability of information and data on police practices." *Id.* at 1155-56. That such data "cannot replace the 'commonsense judgments and inferences about human behavior' underlying the reasonable suspicion analysis" was not in question. *Id.* at 1156-57 (quoting *Wardlow*, 528 U.S. at 125). But the court reasonably recognized such data "*can inform the inferences drawn* from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise"—specifically, such data "offer an 'innocent' explanation of flight." *Id.* (emphasis added); *see also Navarette*, 572 U.S. at 403 ("[W]e have consistently recognized that reasonable suspicion 'need not rule out the possibility of innocent conduct.'" (citation omitted)).

The *Brown* Court's conclusion rings true here:

> Given that racial dynamics in our society—along with a simple desire not to interact with police—offer an "innocent" explanation of flight, when every other fact posited by the government weighs so weakly in support of reasonable suspicion, we are particularly hesitant to allow flight to carry the day in authorizing a stop.

Brown, 925 F.3d at 1157.

Other federal court decisions are to the same effect. In *United States v. Washington*, for example, the U.S. Court of Appeals for the Ninth Circuit analyzed whether a Black man was seized under the Fourth Amendment during a traffic stop, emphasizing that "[r]ecent relations between police and the African-American community in Portland are also

pertinent to our analysis[.]" 490 F.3d 765, 768 (9th Cir. 2007). Those "relations" included "two well-publicized incidents where white Portland police officers, during traffic stops, shot, and in one instance killed, African-American Portland citizens," after which Portland police issued pamphlets to the public on "how to respond to a police stop." *Id.* And in *United States v. Smith*, the Seventh Circuit recognized not only the "relevance of race in everyday police encounters with" citizens of the city in which the seizure occurred, but also the "empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system." 794 F.3d 681, 688 (7th Cir. 2015).

C. Courts Have Adopted Reasonable Principles For "High-Crime Areas" Analyses To Reduce The Likelihood Of Bias

The lack of clarity surrounding the term "high-crime area" since *Wardlow* has not been without criticism, including from Maryland courts. *See Johnson v. State*, No. 2465, 2018 WL 5977917, at *4 (Md. Ct. Spec. App. Nov. 14, 2018) (Arthur, J., concurring) ("Others have pointed out that the term 'high-crime area' is not only amorphous and undefined, but that it can be used as a proxy for race and ethnicity."); *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) (en banc) (cautioning against using the term "high-crime area" as a "proxy for race or ethnicity"); *see also* U.S. Dep't of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*, at 5-6 (Dec. 2014), https://www.dhs.gov/sites/default/files/publications/use-of-race-

policy_0.pdf (adopting standard prohibiting "the use of pretexts as an excuse to target minorities," particularly when law enforcement is "focused on 'high crime areas'").

As with unprovoked flight, several courts have suggested—correctly—that some level of objective, empirical information should be admissible, or perhaps *required*, to support a finding that an area is, in fact, a "high-crime" location. Such evidence is essential to ensure that "persons in bad parts of town" are not relegated to a "second-class status in regard to the Fourth Amendment." *United States v. Flowers*, 6 F.4th 651, 662 (5th Cir. 2021) (Elrod, J., concurring in part) (internal quotation marks and citation omitted); *see also Black*, 707 F.3d at 542 (similar).

To that end, courts have identified several reasonable principles that provide analytical guardrails. The First Circuit, for example, has prescribed a three-part framework for any "high-crime" determination. First, courts should consider "the nexus between the type of crime most prevalent in the area and the type of crime suspected in the instant case." *United States v. Wright*, 485 F.3d 45, 53-54 (1st Cir. 2007). Second, courts should limit the "geographic boundaries of the 'area' or 'neighborhood' being evaluated." *Id.* at 54. Third, courts should focus on the "temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue." *Id.* The *Wright* Court further noted that the evidence germane to each factor "could include a mix of objective data and the testimony of the officers, describing their experiences in the area." *Id.*

Judge Lohier of the U.S. Court of Appeals for the Second Circuit has also endorsed a three-pronged framework. First, "officers may reasonably believe that an area has a high crime rate only if supported by data." *Weaver*, 9 F.4th at 157 (en banc) (Lohier Jr., J.,

concurring). An officer's "war stories" should be eschewed not only because such evidence is "demonstrably weak, possibly biased, and arbitrary" but also because "[l]aw enforcement agencies are now fully capable of logging and mapping the locations of actual criminal conduct." *Id.*

Second, the evidence put forth to describe an area as "high-crime" should be relevant, if at all, only if "the area's boundaries are narrowly circumscribed." *Id.* Such "very specific locations" could include, for instance, a particular "intersection where illegal deals are made." *Id.*; *see also Montero-Camargo*, 208 F.3d at 1138 ("We must be particularly careful to ensure that a 'high crime' area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity.").

Third, courts "should focus on recent and relevant criminal activity." *Weaver,* 9 F.4th at 158. On this point, "the crime rate in the last few weeks matters far more than the rate in the last few years," and some similarity between the crimes described and the suspected crime should be required to make an individual's conduct "more suspicious." *Id.*; *see also United States v. Beauchamp*, 659 F.3d 560, 570 (6th Cir. 2011) (discounting district court's "high-crime area" finding based on multiple drug complaints when officer "did not observe [the defendant] engage in any type of behavior that is consistent with drug activity"); 4 Wayne R. LaFave, SEARCH AND SEIZURE § 9.5(g) (6th ed. Dec. 2021 Update) ("Unspecific assertions that there is a crime problem in a particular area should be given

little weight, at least as compared to more particular indications that a certain type of criminal conduct of the kind suspected is prevalent in that area.").

Amici urge this Court to provide similarly objective guidance in Maryland.

CONCLUSION

The defendant in this case—a 22 year-old Black man—did not want to interact with members of the BPD, so he ran away from them. Overwhelming empirical evidence shows that young Black men are disproportionately subject to police mistreatment and violence, with resulting trauma to individual Black people and to the Black community as a whole. That reality cannot be reasonably disputed. And it must be considered when interpreting the significance of a young Black man, like Mr. Washington, deciding to flee from police in a purported "high-crime area." This is because we now understand, from decades of studies and societal learning, that such flight is *at least* equally likely to signal a reasonable (and innocent) fear of police as it is to evidence criminal guilt. Acknowledging as much is precisely the kind of "commonsense judgment and inference about human behavior" that the *Wardlow* Court endorsed more than twenty years ago.

Accordingly, amici urge this Court to reverse the holding of the Maryland Court of Special Appeals.

Respectfully submitted,

Dated: September 12, 2022

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CERTIFICATE OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

I certify that the foregoing **Brief of Washington Lawyer's Committee for Civil Rights & Urban Affairs, American Civil Liberties Union of Maryland, Public Justice Center, National Association of Criminal Defense Attorneys, and Maryland Criminal Defense Attorneys' Association as Amici Curiae in Support of Appellant** contains 6,417 words, excluding the parts of the brief exempted from the word count by Rule 8-503. This brief complies with the requirements stated in Rule 8-112.

Dated: September 12, 2022

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CERTIFICATE OF ADMISSION TO PRACTICE

The undersigned hereby certifies that although he does not maintain an office for the practice of law in Maryland, he was admitted to the Maryland Bar on March 18, 2009, is currently in good standing with the Maryland Court of Appeals, and is authorized to practice law in Maryland.

Dated: September 12, 2022

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ADDENDUM:

INTERESTS OF AMICI CURIAE

The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a nonprofit civil rights organization established to eradicate racial discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy in the District of Columbia, Virginia, and Maryland. Since its founding in 1968, the Washington Lawyers' Committee has worked to reform the criminal justice system.

American Civil Liberties Union of Maryland (ACLU) is the state affiliate of the ACLU, a nationwide, nonprofit organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1931, the ACLU of Maryland has appeared before courts and administrative bodies in numerous civil rights cases, including dozens of cases concerning race discrimination impacting police practices, voting rights, education, employment and the justice system. The ACLU of Maryland is deeply committed to principles of race equity, endeavoring not only to defend people's rights but also to upend the systems of bias that undergird the structures and institutions we operate within, including the executive, legislative, and judicial branches of government. We believe it is not sufficient to defend civil rights and civil liberties without also challenging the systems that perpetuate white supremacy, which itself fuels the rights violations that the ACLU of Maryland is pledged to challenge.

The Public Justice Center ("PJC") is a non-profit civil rights and anti-poverty legal organization established in 1985. PJC uses impact litigation, public education, and

legislative advocacy through a race equity lens to accomplish law reform for its clients and client communities. Its Appellate Advocacy Project expands and improves representation of disadvantaged persons and civil rights issues before the Maryland and federal appellate courts. The PJC has a demonstrated commitment to opposing institutionalized racism and pursuing racial equity in the judicial system. See, e.g., *Smith v. State*, __ Md. __, 2022 WL 3699202 (2022) (amicus); *Belton v. State*, COA-PET-0031-2021 (amicus); *Sizer v. State*, 456 Md. 350 (2017) (amicus).

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL submits this brief in support of appellant Tyrie Washington because of its strong interest in promoting criminal justice reforms that take account of systemic racial disparities.

The Maryland Criminal Defense Attorneys' Association ("MCDAA") was formed to promote study and research in the field of criminal defense law, to advance knowledge of the law as it relates to criminal defense practice, and to advocate for the proper administration of justice and the protection of individual rights. MCDAA signs on to the brief of *amicus curiae* Washington Lawyers' Committee for Civil Rights & Urban Affairs, in support of Appellant, Tyrie Washington. MCDAA is committed to pursuing racial equity in the judicial system, to opposing institutionalized racism, and to rectifying the systemic inequities that affect that of people of color.

CERTIFICATE OF SERVICE

I, Michael E. Bern, hereby certify that on September 12, 2022, I electronically filed the foregoing **Brief of Washington Lawyer's Committee for Civil Rights & Urban Affairs, American Civil Liberties Union of Maryland, Public Justice Center, National Association of Criminal Defense Attorneys, and Maryland Criminal Defense Attorneys' Association as Amici Curiae in Support of Appellant** with the Clerk of the Court for the Court of Appeals of Maryland by using the MDEC system, which will send notice of such filing to all counsel of record. Additionally, eight paper copies of the brief will be delivered to the Court, and two paper copies of the brief will be delivered by Federal Express to the following counsel for the parties:

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