

ENDORSED
FILED
San Francisco County Superior Court

MAR 14 2024

CLERK OF THE COURT
BY: R. SPEARS
Deputy Clerk

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Attorneys for [Proposed] Amici Curiae

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

People of the State of California,

Plaintiff,

vs.

Ronnie Louvier,

Defendant.

Case No. CRI-02388429

**EX PARTE APPLICATION OF
AMERICAN CIVIL LIBERTIES
UNION OF NORTHERN
CALIFORNIA AND AMERICAN
CIVIL LIBERTIES UNION OF
SOUTHERN CALIFORNIA FOR
LEAVE TO FILE AMICI CURIAE
BRIEF IN SUPPORT OF
DEFENDANT'S REQUEST FOR
NEW TRIAL UNDER RACIAL
JUSTICE ACT (PEN. CODE, § 745)**

Judge: Alexandra Robert Gordon
Dept: 28

Hearing Date: March 15, 2024
Time: 9:00 a.m.

*[Proposed Amici Curiae Brief Lodged
Herewith]*

1 **TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 The American Civil Liberties Union of Northern California and the American Civil Liberties
3 Union of Southern California respectfully request leave to file the proposed amici curiae brief,
4 concurrently lodged herewith, in support of Defendant Ronnie Louvier's request for a new trial pursuant
5 to the Racial Justice Act.¹

6 **INTERESTS OF AMICI CURIAE²**

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

14 The ACLU of Northern California and the ACLU of Southern California (together, the "ACLU
15 California Affiliates") are regional affiliates of the national ACLU. Each affiliate has frequently
16 appeared in federal and state court on cases involving the constitutional guarantees of equal protection,
17 due process, free expression, and free association, all of which are implicated here. (*See, e.g.,*
18 *O'Connor-Ratcliff v. Garnier* (9th Cir. 2022) 41 F.4th 1158, cert. granted Apr. 24, 2023, Case No. 22-
19 324 [amicus in Supreme Court]; *Phillips v. U.S. Customs & Border Protection et al.* (9th Cir. 2023) 74
20 F.4th 986 [plaintiffs' counsel]; *Black Lives Matter-Los Angeles v. Garcetti* (C.D. Cal., Case No. 20-cv-
21 04940) [plaintiffs' counsel]; *see also Los Angeles Police Protective League v. City of Los Angeles*, Case
22 No. S275272, review granted Aug. 17, 2022 [amicus in support of petition for review and in California
23
24

25 ¹ On March 13, 2024, counsel for proposed amici curiae sent separate emails to counsel for the Plaintiff
26 and Defendant advising of amici's interest in filing an amici curiae brief. Defense counsel has consented
to the filing, but the District Attorney's Office opposes it.

27 ² Proposed amici curiae state that no counsel for a party authored this brief in whole or in part, and no
28 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.

1 Supreme Court]; *People v. Peterson* (2023) 95 Cal.App.5th 1061 [amicus]; *People v. Padilla-Martel et*
2 *al.* (2022) 78 Cal.App.5th 139 [defense counsel].

3 For decades, the ACLU California Affiliates have also worked to advance racial justice for all
4 Californians. Most recently, the ACLU California Affiliates have been actively involved in litigation
5 and other advocacy to ensure the effective implementation of California's landmark Racial Justice Act
6 (AB 2542), which undergirds this appeal. (*See, e.g., Mosby v. Superior Court of Riverside County*
7 (2024) 99 Cal.App.5th 106; *Chicanxs Unidxs de Orange County v. Spitzer et al.* (Orange County
8 Superior Court, Case No. 30-2022-01291297-CU-WM-CJC); *see also ACLU of Northern California v.*
9 *Rosell et al.* (Santa Cruz Superior Court, Case No. 22CV00970); *ACLU of Northern California v.*
10 *Andrus et al.* (Siskiyou County Superior Court, Case No. CVPT 22-475). The ACLU California
11 Affiliates' 501(c)(4) counterpart, ACLU California Action, also sponsored and helped to enact the
12 Racial Justice for All Act (AB 256).

13 THE PROPOSED AMICI CURIAE BRIEF WOULD ASSIST THE COURT

14 This Court has "broad discretion over the conduct of pending litigation," which includes the
15 authority to grant applications for leave to file amicus. (*In re Marriage Cases* (2008) 43 Cal.4th 757,
16 791, fn.10; *see also ibid.* [superior courts retain "authority to determine the manner and extent of . . .
17 participation as amici curiae that would be of most assistance to the court"]; *Overstock.com, Inc. v.*
18 *Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 490 [noting with approval the practice of
19 granting interested parties leave to appear as amicus in trial court proceedings].)

20 Given the ACLU California Affiliates' longstanding commitment to free speech and racial
21 justice, the proper resolution of this case is not only of substantial interest to the ACLU and its members,
22 but the ACLU's expertise in this area should be of assistance to the Court. This case has profound
23 ramifications for free expression and racial justice that reach beyond the evidentiary rulings at issue.
24 Proposed amici curiae have specifically drafted their brief to address recent developments in California
25 law regarding the problematic use of rap lyrics at trial. Proposed amici curiae also bolster their brief with
26 extensive social science research explaining how criminal proceedings can be tainted when such lyrics
27 are admitted as evidence.

28 /

1 **CONCLUSION**

2 Amici curiae respectfully request that the Court grant their application for leave to file the
3 accompanying proposed brief.
4

5 Dated: March 14, 2024

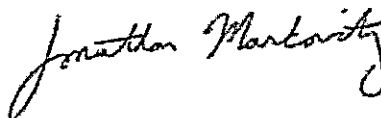
Respectfully submitted,

6 AMERICAN CIVIL LIBERTIES UNION
7 FOUNDATION OF NORTHERN CALIFORNIA, INC.

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14 People of the State of California,

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SCN 207079; MCN 2388429

PROOF OF SERVICE

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I, Brandee Calagui, am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 39 Drumm Street, San Francisco, CA 94111.

On March 14, 2024, I served copies of the foregoing documents:

EX PARTE APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT'S REQUEST FOR NEW TRIAL UNDER RACIAL JUSTICE ACT (PEN. CODE, § 745)

[PROPOSED] AMICUS CURIAE BRIEF BY AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA IN SUPPORT OF DEFENDANT'S REQUEST FOR A NEW TRIAL UNDER RACIAL JUSTICE ACT (PENAL CODE § 745)

on the interested parties listed below at the following addresses:

Party	Attorney/Address Served
Attorneys for Defendant People of the State of California	ATTN: Asst. D.A. Joseph Frislid* Asst. D.A. Maria Shih* Office of the District Attorney 350 Rhode Island Street, Suite 400n San Francisco, CA 94103 sfda.service@sfgov.org (Via OneLegal)
Attorneys for Plaintiff Ronnie Louvier	MARC J. ZILVERSMIT, ESQ., SBN 132057 28 Boardman Place San Francisco, CA 94103 (415) 431-3474 (Via OneLegal)

☒ BY PROCESS SERVING

I caused the foregoing document(s) to be transmitted to the addressees listed above via OneLegal LLC, and to the best of my knowledge, the transmission was complete and without error in that I did not receive an electronic notification to the contrary.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 14, 2024, at San Francisco, California.



Brandee Calagui
ACLU Foundation of Northern California

MAR 14 2024

CLERK OF THE COURT
BY: R. SPEARS
Deputy Clerk

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17 *Attorneys for Amici Curiae*

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA

19 COUNTY OF SAN FRANCISCO

20 People of the State of California,

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22 vs.

23 Ronnie Louvier,

24 Defendant.

Case No. CRI-02388429

**[PROPOSED] AMICI CURIAE
BRIEF BY AMERICAN CIVIL
LIBERTIES UNION OF
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CALIFORNIA IN SUPPORT OF
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*[Ex Parte Application for Leave to File
Lodged Herewith]*

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

I. 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. 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.

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 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 repeated argument using the n-word without redaction, as well as unduly prejudicial evidence in the form of rap lyrics attributed to Defendant Ronnie Louvier. (22 RT 2800-03, 2809; 23 RT 2844-45; *see also* Ex. 107.) The court permitted a purported “gang expert” to interpret rap lyrics replete with violent and animalistic imagery. In so doing, the court dismissed the possibility that these lyrics should be understood as a fictitious or expressive art form, explaining that the officer’s testimony was “not music interpretation,” but instead a straightforward explanation of what the lyrics meant “in the context of

gang culture.” (22 RT 2801.) The expert, in turn, insisted that Mr. Louvier’s lyrics were confessional and celebratory and that they should not be understood as “artistic expression.” (22 RT 2584-86, 2732-35; 23 RT 2953-54).¹

Because this evidence helped to secure a verdict likely tainted by racial bias, Mr. Louvier should be afforded a new trial with the benefit of the Legislature’s statutory mandates in place and all of the constitutional protections to which he is entitled.

II. ARGUMENT

A. Rap Songs 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”].)²

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].)

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 precedents, 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

¹ *Amici* utilize the same terminology set forth in Defendant’s October 27, 2023 Motion for New Trial Pursuant to the California Racial Justice Act (“Mot.”) at footnote 4, page 4. Accordingly, “RT” refers to the Reporter’s Transcript on Appeal, and “CT” is the Clerk’s Transcript on Appeal.

² 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].)

1 of prose oratory.” (*Id.* at p. 968 [quoting *In re George T.* (2004) 33 Cal.4th 620, 636-37] [internal
2 quotations and alterations omitted].) “[W]ith respect to rap lyrics in which the author claim[s] to have
3 committed a murder,” the *Coneal* court continued, the words are “‘merely rap lyrics’”—not necessarily
4 actual events. (*Ibid.* [emphasis added by *Coneal*] [quoting *People v. Melendez* (2016) 2 Cal.5th 1, 24].)

5 And yet, in trial after trial, rap music still gets treated literally. In *People v. Zepeda* (2008) 167
6 Cal.App.4th 25, for example, the California Court of Appeal admitted rap lyrics because—even though
7 “lyrics and poems do not often establish their author’s true state of mind”—a “gang expert” had
8 “testified that gangs communicate through music.” (*Id.* at p. 35; *see also People v. Olguin* (1994) 31
9 Cal.App.4th 1355, 1373 [admitting rap lyrics as evidence].) Worse yet, almost all of the criminal trials
10 relying on rap as evidence involve a young Black or Latino defendant.³

11 Inside the courtroom, rap is seen not as an art form, but as inherently incriminating evidence.⁴
12 Prosecutors often present a defendant’s rap songs or videos to the jury as if the lyrics were
13 autobiographical confessions of criminal conduct—even when no clear connection exists between the
14 lyrics and the crimes charged. (*See People v. Coneal, supra*, 41 Cal.App.5th at pp. 968-69; *see also id.* at
15 p. 969, fn. 16 [discussing “literal treatment of rap lyrics”].)

16 Compounding these issues, prosecutors also tend to admit rap lyrics divorced of context. Black
17 artists have been rapping for decades as a form of resistance. Rap music tells stories that express
18 frustrations with the status quo, economic hardship, disenfranchisement, police brutality, and the
19 carceral state. While some lyrics are potentially based on personal experience, most blend fact and
20 fiction to create a highly stylized rapper persona.⁵

21 Rap songs are propelled by mimicry and hype, boasts and tropes, hyperbole and metaphor. Songs
22 are also driven by the music business itself. Rap lyrics respond to the public’s appetite, covering the
23 most commercially successful themes: drugs, sex, masculinity, guns, and gangs. Lyrics can, at times,

24 ³ According to one major study, the defendant in criminal cases where rap is introduced as evidence “is
25 almost always a young man of color,” and, in an estimated “95 percent of these cases[,] the defendant is
26 either black or Latino.” (Nielson & Dennis, *Rap on Trial: Race, Lyrics, & Guilt in America* (2019) p.
14.)

27 ⁴ *See, e.g., Dunbar, Art or Confession?: Evaluating Rap Lyrics as Evidence in Criminal Cases* (2018) 10
Race & J. 320, 322.

28 ⁵ *See Dennis, Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence* (2007) 31
Colum. J.L. & Arts 1, 22-23.

1 sensationalize graphic violence, be replete with racial epithets and profanity, and even brag about
2 assaulting or pimping women.⁶

3 Problematically, much of the public is not only predisposed to believe rap lyrics are true, but also
4 to view them as especially violent.⁷ Numerous studies confirm that, when provided the same set of
5 lyrics, people are vastly more likely to find those words offensive, violent, and literal if they believe the
6 lyrics come from a rap song instead of a country or folk song.⁸ For this reason, no one thinks that
7 Freddie Mercury confessed to his mama that he had “just killed a man,”⁹ that the (Dixie) Chicks
8 poisoned someone called Earl,¹⁰ that Johnny Cash murdered a man in Reno “just to watch him die,”¹¹ or
9 that Bob Dylan “shot a man named Gray and took his wife to Italy”¹²—even though these artists
10 famously sang those lyrics.

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

16 The constitutional double standard against rap music has significant chilling effects, cutting into
17 the “breathing space” that this important and popular form of expression needs to survive. (*NAACP v.*
18 *Button* (1963) 371 U.S. 415, 433; *see also Reno v. ACLU* (1997) 521 U.S. 844, 871-72.) This Court must

19
20 ⁶ 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.

21 ⁷ See Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology* (2002) 49
22 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.’”). *See also* Fried,
23 *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.

24 ⁸ See, e.g., Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics* (1996) 26 J. of Applied Social
25 Psych. 2135; Dunbar et al., *The Threatening Nature of “Rap” Music* (2016) 22 Psych. Pub. Pol’y & L.
26 280, 281, 288; Dunbar and Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments* (2018) 14 J. Experimental Criminology 507, 514.

27 ⁹ Queen, “Bohemian Rhapsody,” on *A Night at the Opera* (EMI Records 1975).

28 ¹⁰ Chicks, “Goodbye Earl,” on *Fly* (Monument Records 2000).

¹¹ Johnny Cash, “Folsom Prison Blues,” on *At Folsom Prison* (Columbia Records 1968).

¹² Bob Dylan, “Idiot Wind,” on *Blood on the Tracks* (Columbia Records 1975).

1 not abide a conviction that “may have rested on a form of expression, however distasteful, which the
2 Constitution tolerates and protects.” (*Street v. New York* (1969) 394 U.S. 576, 594.) Given the free
3 speech issues here, this Court should consider Mr. Louvier’s appeal with heightened scrutiny of the
4 constitutional implications.

5 **B. California Law Mandates that Courts Strive to Eliminate Racial Bias from Criminal**
6 **Proceedings and to Strictly Limit the Use of Rap at Trial**

7 **1. Early Legislative Efforts to Address Implicit Bias**

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

13 In support of this legislation, the Legislature found that “[a]ll persons possess implicit biases,
14 defined as positive or negative associations that affect their beliefs, attitudes, and actions towards other
15 people.” (AB 242, § 1, subd. (a)(1).) It further acknowledged: “In the United States, studies show that
16 most people have an implicit bias that disfavors African Americans and favors Caucasian Americans,
17 resulting from a long history of subjugation and exploitation of people of African descent.” (§ 1(a)(3).)

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

23 **2. The Racial Justice Act**

24 The Legislature enacted the Racial Justice Act, in part, to advance the intent expressed in AB
25 242. The bill reasserted the Legislature’s finding that implicit biases have long plagued California’s
26 criminal proceedings and that “we can no longer accept racial discrimination and racial disparities as
27 inevitable in our criminal justice system.” (AB 2542, § 2, subd. (g).) In the bill, the Legislature also
28 acknowledged that “[e]xisting precedent tolerates the use of racially incendiary or racially coded

1 language, images, and racial stereotypes in criminal trials.” (*Id.*, § 2, subd. (e).) It concluded with the
2 command that “we must act to make clear that this discrimination and these disparities are illegal and
3 will not be tolerated in California, both prospectively and retroactively.” (*Id.*, § 2, subd. (g).)

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

12 To this end, the Racial Justice Act, as codified, prohibits the state from seeking or obtaining a
13 conviction or sentence “on the basis of race, ethnicity, or national origin.” (Pen. Code, § 745, subd. (a).)
14 A defendant can establish a violation by, among other things, showing that a judge, attorney, law
15 enforcement officer, expert witness or juror “used racially discriminatory language about the
16 defendant’s race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the
17 defendant because of the defendant’s race, ethnicity, or national origin, whether or not purposeful.” (*Id.*,
18 § 745, subd. (a)(1)-(2).)¹³

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

21 3. The Decriminalizing Artistic Expression Act

22 The same year that the Legislature passed the Racial Justice for All Act, it undertook further
23 efforts to reduce racial bias in criminal proceedings by passing the Decriminalizing Artistic Expression
24 Act (AB 2799). While this act protects against *any* form of artistic expression from introducing bias or
25 prejudice into criminal proceedings, the Legislature was chiefly focused on the “significant risk of unfair

26
27 ¹³ “Racially discriminatory language” is defined as “language that, to an objective observer, explicitly or
28 implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded
language, language that compares the defendant to an animal, or language that references the
defendant’s physical appearance, culture, ethnicity, or national origin.” (*Id.*, § 745, subd. (h)(4).)

1 prejudice when rap lyrics are introduced into evidence.” (AB 2799, § 1, subd. (a).) The Legislature’s
2 analysis reflected a deep concern about rap lyrics being used as “racialized character evidence” and a
3 worry that rap artists are, in effect, denied artistic license because their lyrics are construed as
4 autobiographical and literal, rather than as, for example, metaphorical.¹⁴

5 Accordingly, the Decriminalizing Artistic Expression Act is intended “to provide a framework
6 by which courts can ensure that the use of an accused person’s creative expression will not be used to
7 introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence.”
8 (AB 2799, § 1, subd. (b).) The act declares that “the use of rap lyrics and other creative expression as
9 circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial
10 evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.” (*Ibid.*)

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

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

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

21 (2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will,
22 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.

23 (Evid. Code, § 352.2, subd. (a).)

24 In sum, while the Decriminalizing Artistic Expression Act acknowledges that rap lyrics and
25 songs can, at times, be probative of their literal truth, it cautions that the introduction of rap evidence is
26 very likely to inject racial bias into criminal proceedings and be unduly prejudicial. (*See People v.*

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28 ¹⁴ AB 2799 Assembly Floor Analysis, Aug. 19, 2022, *available at*
https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB2799#.

1 *Venable* (2023) 88 Cal.App.5th 445, 448, 455-56, review granted May 17, 2023, S279081 [opining that
2 Evidence Code section 352.2 “make[s] it more likely that rap lyric evidence will be excluded . . .” and
3 further concluding that the provision applies retroactively to “cases that are not yet final”]; *but see*
4 *People v. Ramos* (2023) 90 Cal.App.5th 578, 595, review granted July 12, 2023, S280073 [concluding
5 AB 2799 is not retroactive].)¹⁵

6 **C. The Admission of Rap Lyrics at Trial Contravened Constitutional Protections,**
7 **Infected the Proceedings with Racial Bias, and Unduly Prejudiced Mr. Louvier**

8 The prosecution’s use of rap in this case provides a textbook example of the harm that
9 constitutional protections, as well as the Legislature’s recent efforts to combat racial bias, were designed
10 to prevent. The rap lyrics introduced into evidence were highly inflammatory and unfairly prejudicial.
11 (See, e.g., *People v. Coneal*, *supra*, 41 Cal.App.5th at pp. 967-68 [finding that corroborating evidence
12 had rendered the admitted rap lyrics and videos cumulative, adding no probative value while being
13 “extremely prejudicial”].) In particular, the gang expert was asked about lyrics portraying the
14 protagonist as “a fuckin’ hungry bear,” and opined that Mr. Louvier “explains himself as a beast, a
15 predator,” presenting the lyrics as otherwise straightforward autobiographical confessions about a series
16 of violent acts. (22 RT 2801-2804.)

17 If one were to apply the new balancing test at Evidence section 352.2 to these rap lyrics, it is
18 challenging to see how they would have been admitted. While the lyrics do reference a “Glock 9,”
19 which was the type of weapon used in the shooting, that type of gun is quite popular. The lyrics do not
20 otherwise bear a “sufficient level of similarity” to the shooting, or include “factual detail not otherwise
21 publicly available.” (Cf. Evid. Code, § 352.2, subd. (a).) Instead, the premise for introducing them was
22 precisely the (erroneous) assumption that rap lyrics have unquestionable probative value for literal truth
23 or as truthful narrative. Indeed, the prosecution’s purported gang expert insisted that there was “nothing
24 artistic” about them. (23 RT 2853-54.) And the court’s dismissal of the possibility of understanding the
25 rap lyrics as a form of art (22 RT 2800) opened the door to the prosecutor’s closing argument, in which

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27 ¹⁵ Regardless of whether the California Supreme Court determines AB 2799 to itself be retroactive, its
28 legislative findings that rap lyrics can be used in a racially biased manner against Black defendants
provides helpful context to the analysis of Mr. Louvier’s request for a new trial under the Racial Justice
Act, which is retroactive.

1 he ridiculed the notion that the lyrics should be understood as “just gangster rap” or “entertainment”
2 while portraying Mr. Louvier as an animal “preying on the weak.” (27 RT 3990.)

3 Put simply: this evidence was extremely prejudicial. By associating Mr. Louvier with violence
4 and predatory beasts, the prosecution pursued a “guilt by association” strategy and “primed” jurors to
5 connect Mr. Louvier to deeply held implicit biases that they might not have been aware they possessed.
6 This portrait of Mr. Louvier was likely to resonate with jurors because, as noted *supra*, studies show that
7 racist stereotypes are ubiquitous within American culture and have been for centuries. Even jurors who
8 may reject these stereotypes at a conscious level are likely to harbor them at a level beneath their
9 conscious awareness.¹⁶

10 Priming is particularly important for jurors who do *not* consciously believe in racist stereotypes
11 and who would *not* want to produce a racially-biased verdict. While—as the Legislature found—“most
12 people have an implicit bias that disfavors African Americans and favors Caucasian Americans” (AB
13 242, § (1), subd. (a)(3)), “something is needed to trigger the power of stereotype for people who do not
14 harbor explicit biases.”¹⁷

15 That trigger—as the Legislature also recognized—can occur when the prosecution relies on rap
16 evidence (AB 2799, § 1, subd. (b)) or compares a defendant to an animal in court (Pen. Code, 745, subd.
17 (h)(4)). Here, both issues infected Mr. Louvier’s trial. The admission of Mr. Louvier’s rap lyrics created
18 a risk of undue prejudice by introducing menacing stereotypes into the criminal proceedings and both
19 the prosecution and its expert witness encouraged the jury to see Mr. Louvier as a “gorilla,” a “hungry
20 bear,” a “lion,” and a predator who glorified violence and celebrated when mothers cry over the bodies
21 of their dead sons lying in the street. (27 RT 2801-02, 3988-3990.) This line of argument meets the
22 definition of “racially discriminatory language” under the Racial Justice Act. (Pen. Code, 745(h)(4).)

23 ¹⁶ See Rachlinski and Johnson, *Does Unconscious Racial Bias Affect Trial Judges?* (2009) 84 Notre
24 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”).

25 ¹⁷ “Priming” occurs when jurors’ implicit biases are tapped to subtly associate the defendant with
26 ingrained racial stereotypes. (Bowman, *Seeking Justice: Prosecution Strategies for Avoiding Racially*
27 *Biased Convictions* (2023) 32 S. Cal. Interdisc. L.J. 515, 526; *see also id.* at p. 527 [noting that
individuals who “consciously reject stereotypes . . . may nevertheless be influenced by them,” and that
28 “[o]ne way that happens is through use of ‘coded language,’ which invokes stereotypes . . . For
example, words like . . . ‘superpredator’ can invoke stereotypical associations between Black people and
animals.”].)

1 The goal of the new balancing test in Evidence Code section 352.2, subdivision (a), is to uphold
2 the principle that prosecutors must not inappropriately “prime” jurors to rely on their unconsciously held
3 racial stereotypes and implicit biases in their deliberations. Whether it intended to or not, the prosecution
4 violated that principle. And because the prosecutor introduced rap lyrics in a manner that encouraged
5 jurors to think of the material as truthful representations, jurors were also likely to “treat the expression
6 as evidence of [Mr. Louvier’s] propensity for violence or general criminal disposition,” contrary to step
7 2 of the Section 352.2(a) balancing test. The likelihood the jury did so is particularly pronounced
8 because, as has been discussed, social science research demonstrates that implicit biases associating rap
9 with Blackness and Blackness with violence and criminality have predisposed much of the population to
10 understand rap as autobiographical.¹⁸

11 The error here was not trivial. Given the conflicting evidence around Mr. Louvier’s alibi and the
12 testimony of other eyewitnesses who saw the shooting (*see, e.g.*, Mot. at pp. 6-7), there is a more than
13 reasonable probability that the jury assessed Mr. Louvier’s character and propensity for violence based
14 on the rap music before it.

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

20 III. CONCLUSION

21 For the foregoing reasons, *amici* respectfully urge this Court to conclude that Mr. Louvier is
22 entitled to a new trial under the Racial Justice Act.

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28 ¹⁸ *See, e.g., Dunbar et al., The Threatening Nature of “Rap” Music, supra*, 22 Psych. Pub. Pol’y & L. at
pp. 281, 288.

1 Dated: March 14, 2024

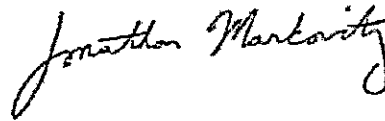
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