No. 99730-6

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

PALLA SUM,
Petitioner.

BRIEF OF AMICI CURIAE KING COUNTY DEPARTMENT OF PUBLIC DEFENSE, ACLU OF WASHINGTON, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AND WASHINGTON DEFENDER ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interests of Amici Curiae King County Department of Public Defense, The American Civil Liberty Union of Washington, Fred T. Korematsu Center for Law and Equality, and Washington Defender Association are set forth in the Motion for Leave to Participate as Amici Curiae, filed concurrently with this brief.

II. STATEMENT OF THE CASE

Amici adopt the Statement of the Case in Petitioner Sum's Petition for Review.

III. INTRODUCTION

The laws and rules that govern people's daily lives should reflect the reality of those lives. There can be no serious debate that law enforcement interacts with Black, Indigenous, and People of Color (BIPOC) in a way that is fundamentally different than how they interact with white people, and that this historical reality has

consequences. This is borne out not only by damning statistics,[1] but by the experience of generations of BIPOC. So entrenched is this reality that a conversation known as The Talk—in which BIPOC parents coach their children on how to navigate interactions with law enforcement safely—has become a critical survival skill for BIPOC community members.[2] This phenomenon is engrained

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[1] *See* Part IV.B, *infra*.

[2] A recent Eleventh Circuit concurrence describes The Talk:

> Generations of Black children are familiar with "The Talk." [] Generally, parents have "The Talk" with their kids about how to interact with law enforcement so no officer will have any reason to misperceive them as a threat and take harmful or fatal action against them. So for example, Black children are taught that, if stopped by an officer while in their car, they should roll down all car windows, place both hands open and in plain view (or on the steering wheel), keep their composure and be perfectly respectful even if they feel the officer is mistreating them, ask for permission before moving their hands, and comply with all the officer's requests.

United States v. Knights, 989 F.3d 1281, 1297 n.8 (11th Cir. 2021) (Rosenbaum, J., concurring) (internal citations omitted).

by history[3] and sustained by relentless examples of police violence against BIPOC to this day.[4] BIPOC parents often must initiate this conversation with their children while they are still in elementary school.[5]

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[3] As Bryan Stevenson explains:

> [T]hat history of violence, where [America] used terror and intimidation and lynching and then Jim Crow laws and then the police, created this presumption of dangerousness and guilt. It doesn't matter how hard you try, how educated you are, where you go in this country—if you are black, or you are brown, you are going to have to navigate that presumption, and that makes encounters with the police just rife with the potential for these specific outcomes which we have seen.

Isaac Chotiner, *Bryan Stevenson on the Frustration Behind the George Floyd Protests*, The New Yorker, June 1, 2020, available at https://www.newyorker.com/news/q-and-a/bryan-stevenson-on-the-frustration-behind-the-george-floyd-protests.

[4] *See, e.g.*, *Jamison v. McClendon*, 476 F. Supp. 3d 386, 390–91 (2020) (listing 19 innocuous activities BIPOC individuals were engaged in when they were killed by police, mostly recent).

[5] In 2014 the American Psychological Association published research finding that "Black boys as young as 10 may not be viewed in the same light of childhood innocence as their white peers, but are instead more likely to be mistaken as older, be perceived as guilty and face police violence if accused of a crime[.]" *Black Boys*

In contrast to this reality, the current standard to determine when a law enforcement contact amounts to a constitutional seizure employs an objective reasonable person standard, and pivots on the moment when such a fictitious individual would believe they were not free to terminate the encounter.[6] The nominally objective reasonable-person standard has been criticized for defining "reasonable" behavior as that of the protected, rule-making majority group, thereby perpetuating discrimination—and denial of the well documented racial disparities in policing—through a facially race-neutral standard.[7]

Viewed as Older, Less Innocent Than Whites, Research Finds, American Psychological Association, available at https://www.apa.org/news/press/releases/2014/03/black-boys-older.

[6] *See State v. Young*, 135 Wn.2d 498, 509–10, 957 P.2d 681 (1998) (a "seizure…under article I, section 7" occurs "when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave") (quoting *State v. Stroud*, 30 Wn. App. 392, 394–95, 634 P.2d 316 (1981)).

[7] Professor Devon Carbado explains:

Protection of BIPOC's right against unlawful seizure requires a meaningful, reality-based determination of when an individual is truly seized. Such a determination must account for the fact that law enforcement target and treat BIPOC communities differently than white communities. The "totality of the circumstances" test can and must account for this reality.[8]

> Because, for example, whites and African Americans are not similarly situated with respect to how their racial identity might affect this sense of constraint [in the course of a law enforcement contact], the Court's failure to consider race is not race-neutral. It creates a racial preference in the seizure doctrine for people who are not racially vulnerable to, or who do not experience a sense of racial constraint in the context of, interactions with the police.

Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 142 (2016).

[8] It must be noted that this "objective" standard dates back to *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), more than 40 years ago. *See Young*, 135 Wn.2d at 509 ("Previous Washington cases adopted the *Mendenhall* test of a seizure to analyze a disturbance of a person's private affairs under article I, section 7."). To say that our appreciation of implicit and explicit bias within the criminal legal system has evolved over those four decades is an understatement. The law too must evolve.

In recent years this Court has taken direct action to modernize long-existing standards where those standards "[did] not sufficiently address the issue of race discrimination."[9] Indeed, precisely as Petitioner and Amici ask here, this Court has elsewhere defined an "average reasonable person" as one "who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways."[10] The Court should act here as it has in other areas such as jury selection and review of jury deliberations, and recognize that the unique role of race in our history, our criminal legal system, and policing must be considered when analyzing a contact between an individual and law enforcement as well.[11] Specifically, this Court should adopt a seizure standard which analyzes the law enforcement contact in light of the known history

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9 *State v. Jefferson*, 192 Wn.2d 225, 239, 429 P.3d 467 (2018).
10 *Id*. at 249–50.
11 *See* Part IV.C, *infra*.

of racialized policing in America, and its impact on individuals and communities of color.

In analogous circumstances, the United States Supreme Court has explained that a standard for determining whether a person has been seized can remain objective while accounting for known, directly relevant dynamics.[12] Applying the same considerations, this Court can provide BIPOC the full constitutional protections to which they are entitled, without departing from the current objective standard.

IV. ARGUMENT

A. As Presently Applied, the Objective, Totality-of-the-Circumstances Standard to Determine Whether One Is Seized by Law Enforcement Fails to Account for Generations of Disparate Policing of BIPOC Communities

As currently applied, "a seizure occurs [] under article I, section 7, when considering all the circumstances, an individual's

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[12] *See J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).

freedom of movement is restrained and the individual would not believe [they are] free to leave or decline a request due to an officer's use of force or display of authority."[13] As the Court of Appeals below explained, "whether a seizure has occurred" requires consideration of the "totality of the circumstances" as "viewed from the perspective of a reasonable person[.]"[14]

But by failing to recognize the direct relationship our history of racialized policing has on communities of color and in turn a person's reasonable belief that they might freely and safely terminate a law enforcement contact, this facially race-neutral standard perpetuates existing disparities in the criminal legal system.[15] Applying the current standard below, the Court of

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[13] *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citing *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)).

[14] *State v. Sum*, 17 Wn. App. 2d 1009, 2021 WL 1382608 at *3 (2021) (unreported) (citing *Rankin*, 151 Wn.2d at 695 and *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009)).

[15] The failure of the law to recognize that race impacts how one experiences law enforcement will also continue to erode confidence in the law. In a 2019 study by the Pew Research Center,

Appeals failed to consider how our history of racialized policing could have affected Mr. Sum's reasonable understanding of whether he could simply drive away when Officer "Rickerson knocked on the driver's side window," awoke Mr. Sum, and immediately began investigative questioning.[16] Given what we know about the policing of communities of color and its impact on

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respondents were asked whether Black individuals "are treated less fairly than whites" in a variety of settings, including employment, lending, voting, and the provision of medical care. The *only* categories for which a majority of white respondents agreed that Black people are treated less fairly were "In dealing with the police" (63%) and "By the criminal justice system" (61%). By contrast just over a third (37%) of white respondents agreed Black people face discrimination in places of public accommodation, like "stores or restaurants." Even those members of the public who have not experienced discrimination in policing recognize that it exists. Of course, as reflected by the ubiquity of The Talk, Black respondents overwhelmingly recognized that Black people are treated less fairly by the police (84%) and in the criminal legal system (87%). Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America*, Pew Research Center, April 9, 2019, available at https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/#majorities-of-black-and-white-adults-say-blacks-are-treated-less-fairly-than-whites-in-dealing-with-police-and-by-the-criminal-justice-system.

[16] *Sum*, 17 Wn. App. 2d 1009, 2021 WL 1382608 at *1 (unreported).

those communities, this suspicionless investigation of Mr. Sum violated his right to be free in his private affairs.

B. BIPOC Experience and Expect Violence from Police

By virtually every conceivable measure, BIPOC have more adverse experiences with law enforcement than white people. BIPOC are contacted more frequently than white individuals by law enforcement.[17] Those contacts are more likely to result in the threat or use of force by law enforcement against BIPOC than against white people.[18] Those contacts are more likely to result in

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[17] Discussing a study of Seattle residents, the National Institute of Health reported that "African American teens are almost twice as likely as Whites to report having had a police contact." Robert D. Crutchfield, et al, *Racial Disparity in Police Contacts*, (Dec. 2013), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3868476/pdf/nihms477348.pdf

[18] A recent report revealed that Black and Hispanic individuals "experienced nonfatal threats or use of force during contacts with police" at more than twice the rate of white people. *Contacts Between Police and the Public, 2018* at 5, Table 3, Bureau of Justice Statistics, December 2020, available at https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf.

the killing of BIPOC.[19] This is true even though Black people killed by police are more likely to be unarmed than white people.[20] Black boys fare almost incomprehensibly badly; those between the ages of 15 and 19 are a staggering "21 times more likely than their white counterparts" to be killed by police.[21] These disparities exist not only nationally, but right here in Washington.[22]

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[19] A study by researchers from the Harvard School of Public Health found that "during police contact…Black people were 3.23 times more likely to be killed compared to white people." Gabriel Schwartz and Jaquelyn Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013-2017*, June 24, 2020, available at https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0229686#references.

[20] Sarah DeGue, Katherine Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement*, 51 AM. J. PREVENTATIVE MED. 173, 173 (2016) (reporting that 14.8 percent of black victims killed by police were unarmed, compared to than 9.4 percent of white victims).

[21] *See Knights*, 989 F.3d at 1296 (Rosenbaum, J., concurring).

[22] Based on available data, Black people in Washington are 4 times more likely than white people to be stopped by police, between 4 and 10 times more likely to be subject to the use of force by police, and more than 3 times more likely to be killed by police. *See Race and Washington's Criminal Justice System: 2021 Report to the*

In light of the experience of generations of communities of color, it is a fact that BIPOC "often tread more carefully around law enforcement than the Court's hypothetical reasonable person does because of the grave awareness that a misstep or discerned disrespectful word may cause the officer to misperceive a threat and escalate an encounter into a physical one."[23] A recent study showed that "Black adolescent males exposed to nationally publicized cases of police killings through the media disclosed fear of police and a serious concern for their personal safety and mortality in the presence of police officers."[24] Directly relevant to

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Washington Supreme Court, Task Force 2.0, Fred T. Korematsu Center for Law and Equality (2021), at 11–13 (available at https://digitalcommons.law.seattleu.edu/korematsu_center/116).

[23] *Knights*, 989 F.3d at 1297.

[24] Jocelyn R. Smith Lee & Michael A. Robinson, *"That's My Number One Fear in Life. It's the Police": Examining Young Black Men's Exposures to Trauma and Loss Resulting From Police Violence and Police Killings*, 45 J. OF BLACK PSYCHOLOGY 143, 146 (2019) (citing R. Staggers-Hakim, *The Nation's Unprotected Children and the Ghost of Mike Brown, or the Impact of National Police Killings on the Health and Social Development of African American Boys*. 26 J. HUMAN BEHAVIOR IN THE SOCIAL ENVIRONMENT 390 (2016)).

the constitutional question, this means that BIPOC "are likely to feel seized earlier in a police interaction than whites, likely to feel 'more' seized in any given moment, and less likely to…feel empowered to exercise their rights."[25]

C. This Court Should Adopt a Standard That Incorporates Awareness of Our History and That History's Impact, as It Has Elsewhere to Combat Racial Disparity

In recent years this Court has taken action in multiple ways to address systemic racism within the legal system. Both in its judicial decisions and through its rulemaking power, the Court has updated long existing standards in recognition that those standards perpetuated racial disparities in the legal system.[26] Indeed, precisely as Petitioner and Amici ask here, this Court has elsewhere defined an "average reasonable person" as one "who is aware of the history of explicit race discrimination in America and aware of how

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[25] Carbado, *supra* n.7 at 142.

[26] *See Jefferson*, 192 Wn.2d at 243 ("This court adopted GR 37 in order to address [] problems with the *Batson* test."); *see also Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

that impacts our current decision making in nonexplicit, or implicit, unstated, ways."[27]

Just as racial bias and racial disparity concerns called the Court to action in those circumstances, the historic racially disparate policing of communities of color calls for this Court's action. The Court should similarly update Article I Section 7's seizure standard to include consideration of "the history of explicit race discrimination in America" and its effects.

1. The Court updated the historic "no-impeachment" rule surrounding jury deliberations in order to remedy racial disparity.

This Court elsewhere has recognized that rules and standards must evolve where the rule or standard "does not sufficiently address the issue of race discrimination."[28] In *State v. Berhe* the Court "addresse[d] the standards and procedures that apply when trial courts must determine whether an evidentiary hearing is

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[27] *Jefferson*, 192 Wn.2d at 249–250.

[28] *Id.* at 239.

necessary on a motion for a new trial based on allegations that jury deliberations were tainted by racial bias."[29] Despite the fact that the secrecy of jury deliberations historically has been held sacrosanct,[30] the Court concluded that "[b]ecause racial bias raises unique concerns, the no-impeachment rule must yield to allegations that racial bias was a factor in the verdict."[31]

While accepting the "general rule that 'a trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct,'"[32] the Court explained that "there

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[29] *State v. Berhe*, 193 Wn.2d 647, 649, 444 P.3d 1172 (2019).

[30] *See Long v. Brusco Tug & Barge, Inc.*, 185 Wn.2d 127, 131, 368 P.3d 478 (2016) ("Central to our jury system is the secrecy of jury deliberations. Courts are appropriately forbidden from receiving information to impeach a verdict based on revealing the details of the jury's deliberations.").

[31] *Berhe*, 193 Wn.2d at 657. The "no impeachment rule" provides that "what considerations entered into [the jury's] deliberations or controlled its action[s]" ordinarily may not be divulged. *Id*. (quoting *Long*, 185 Wn.2d at 132).

[32] *Id*. at 661 (quoting *Turner v. Stime*, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009)).

are limits to that discretion, *particularly in* cases of alleged racial bias[.]"[33] The Court found it necessary to craft a unique standard because racial bias is not simply ordinary legal error, but rather "a common and pervasive evil that causes systemic harm to the administration of justice."[34]

Even though "identifying the influence of racial bias generally, and implicit racial bias specifically, presents unique challenges," this Court held that trial courts "*must account* for all of these considerations when confronted with allegations that explicit or implicit racial bias was a factor in the jury's verdict."[35]

This Court's announcement of an evolved, racially-aware standard in *Berhe* was compelled because "racial bias in jury deliberations is 'a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of

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[33] *Id*. at 649.

[34] *Id*. at 657.

[35] *Id*. (emphasis added).

justice.'"[36] The same is true of our nation's history of the policing of BIPOC and communities of color.[37] As the Court did in *Berhe*, in order to mitigate known systemic bias in the criminal legal system, the Court should announce the evolution of the Article I Section 7 seizure standard to include consideration of our history of racial disparities in policing and police violence.

2. The Court updated the outdated *Batson* standard through its adoption and implementation of GR 37.

The evolution of standards around race and jury selection provides a powerful example of how longstanding rules can and must be updated to mitigate racial disparities in the criminal legal system. Mapping almost precisely to Petitioner and Amici's call for an evolved, race-aware seizure standard, the Court in the area

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[36] *Id*. at 659.

[37] Our "system of policing and incarceration [has] evolved in a way to maintain racial hierarchy after the Civil War. We will eliminate the scourge of police violence and abuse only if we address the centrality of racial injustice and inequality in America." *Policing in America*, Equal Justice Initiative, available at https://eji.org/issues/policing-in-america/.

of jury selection has defined an "average reasonable person" as one "who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways."[38]

While in recent years this Court has undertaken to protect the right to an impartial jury meaningfully, for a half-century Washington's BIPOC residents were subject first to a standard which imposed upon them a "crippling burden of proof"[39] and later to one which the Court has acknowledged did "very little to make juries more diverse or to prevent prosecutors from exercising race-based challenges," ultimately "fail[ing] to eliminate race discrimination in jury selection."[40]

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38 *Id*. at 249–50.

39 *See Batson*, 476 U.S. at 92–93 (1985) (discussing unworkable "purposeful discrimination" test of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (internal citations omitted)).

40 *Jefferson*, 192 Wn.2d at 240 (citing *Miller-El v. Dretke*, 545 U.S. 231, 270, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (Breyer, J., concurring) (noting twenty years after *Batson* that "the use of race-

More than 30 years after *Batson*, and in light of the failures noted above, "[i]n 2017, [the Court]…adopted the bright-line rule...that trial courts must recognize a prima facie case of discriminatory purpose in violation of *Batson* and the equal protection clause when the sole remaining member of a racially cognizable group is struck from the jury with a peremptory challenge."[41] Despite this progress, however, the Court recognized

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and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.").

Under the *Batson* framework:

> [T]he defendant must first establish a prima facie case that "gives rise to an inference of discriminatory purpose."… Second, "the burden shifts to the State to come forward with a [race-]neutral explanation for [the challenge]."…If the State meets its burden at step two, then third, "[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination."

Id. at 231–32 (internal citations omitted).

41 *Id.* at 241 (citing *City of Seattle v. Erickson,* 188 Wn.2d 721, 732, 398 P.3d 1124 (2017)).

that it "did not address the ongoing concerns of unconscious bias…or the best way to approach *Batson*'s third step."[42]

The Court continued this evolution with the creation and implementation of GR 37 in 2018.[43] The rule's explicit purpose is "to eliminate the unfair exclusion of potential jurors based on race or ethnicity."[44] The rule employs an objective reasonable-person standard, but in service of the rule's purpose this objective observer is explicitly one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[45] As the Court later explained, GR 37 was intentionally created to serve as "[a]s a prophylactic measure to ensure" constitutional protections.[46]

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[42] *Id*. at 241–42.
[43] *See id*. at 243 ("GR 37 was adopted on April 5, 2018.").
[44] GR 37(a).
[45] GR 37(f)
[46] *See Jefferson*, 192 Wn.2d at 242–43.

The Court also created a list of reasons commonly used to justify peremptory challenges against people of color and deemed them "presumptively invalid" because "historically [those defenses] have been associated with improper discrimination in jury selection in Washington State."[47]

This evolution has resulted in meaningful protection of BIPOC's constitutional rights. In *State* v. *Jefferson,* for example, the Court found that a prosecutor's use of a peremptory strike that would have survived challenge under the *Batson* framework was reversible error under the new, race-aware standard.[48] The Court reached that conclusion by applying its new, updated test:

> In order to meet the goals of *Batson,* we must modify the current test…[W]e hold that the question at the third step of the *Batson* framework is *not* whether the proponent of the peremptory strike is acting out of

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[47] GR 37(h).

[48] *See Jefferson*, 192 Wn.2d at 239 ("[U]nder *Batson, the question for us is…*whether the trial court's conclusion that this did not amount to purposeful race discrimination was clearly erroneous. Based on this record, the answer is no."); 250–51 (finding under the new standard that "race could be viewed as a factor in the peremptory strike" and reversing and remanding).

> purposeful discrimination. Instead, the relevant question is whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." If so, then the peremptory strike shall be denied.[49]

Applying the GR 37 standard and making this determination from the perspective of one "who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated ways,"[50] the Court concluded:

> [O]ur current *Batson* standard fails to adequately address the pervasive problem of race discrimination in jury selection. Based on the history of inadequate protections against race discrimination under the current standard and our own authority to strengthen those protections, we hold that step three of the *Batson* inquiry must change: at step three, trial courts must ask if an objective observer could view race as a factor in the use of the peremptory challenge. In this case, an objective observer could view race as a factor in the [challenged] peremptory strike.[51]

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[49] *Id.* at 249.

[50] *Id.* at 249–50.

[51] *Id.* at 252.

Where standards which are meant to protect constitutional rights fail to do so, this Court can and must intervene. Because "our current [seizure] standard fails to adequately address the pervasive problem of race discrimination in [the policing of people of color]," this Court must "strengthen those protections."[52]

D. The Objective Standard Can Be Applied in a Way that Reflects the Reality of Race and Law Enforcement

The Court can better protect BIPOCs right to be free of unconstitutional seizure by clarifying that the existing totality-of-the-circumstances standard requires awareness of America's history of racially disparate policing and police violence and what effect that history could reasonably have on a person's understanding of whether they are free to terminate a law enforcement encounter. This is consistent with the standard's plain language and better reflects reality. Further, the United States

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[52] *Id.*

Supreme Court has approved analogous considerations in a closely related context.

In *J.D.B. v. North Carolina*,[53] the Court considered "whether the age of a child subjected to police questioning is relevant to the custody analysis" of the Fifth Amendment.[54] Like the current Article I, Section 7 standard discussed above, the Fifth Amendment custody test "is an objective inquiry" which asks "what were the circumstances surrounding the interrogation; and [] given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave."[55]

"Seeing no reason for police officers or courts to blind themselves to [] commonsense reality," the Court held "that a child's age properly informs the *[]* custody analysis."[56] In so holding, the Court believed "it clear that courts can account for []

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53 564 U.S. 261 (2011).
54 *Id.* at 264.
55 *Id.* at 270 (quoting *Thompson v. Keohane*, 516 U.S. 112, 116, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)).
56 *Id.* at 265, 277.

reality without doing any damage to the objective nature of the custody analysis."[57] The objective totality-of-the-circumstances inquiry can account for known dynamics, particularly when as here those dynamics "apply broadly…to a class,"[58] and "are self-evident."[59] The test remains objective even when accounting for the individual's age because "officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age."[60] Rather, they simply need "common sense."[61]

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57 *Id.* at 272.
58 *Id.*
59 *Id.*
60 *Id.* at 279–80.
61 *Id.* at 280.
Given our nation's history of racial infantilization, it must be stated that while both age and race should be considered in the free-to-leave analysis, this is not in any way intended to ascribe the limitations of youth to BIPOC. While the young must be protected because they lack experience and their physical brains and personal character are as yet undeveloped, making them less likely to know their rights and more susceptible to submit to the pressure of police

In short, the *J.D.B.* Court thus permitted consideration of age in the otherwise objective custody analysis because of its "objectively discernible relationship to a reasonable person's understanding of his freedom of action" to terminate a law enforcement contact.[62]

Likewise, there is an objectively discernable relationship between America's longstanding history of racially biased policing and police violence and BIPOC community members' assessment of their control of encounters with law enforcement and consequences of attempting to terminate a law enforcement contact.

Application of the law in a way that ignores this plain reality and essentially prohibits its consideration fails to consider fully the

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questioning, race must be considered because the historic brutalization of BIPOC by law enforcement has resulted in survival strategies of over-compliance with police within communities of color. The common denominator is that in each instance the relevant phenomenon "appl[ies] broadly" to the class and is "self-evident." *See id.* at 272.

62 *Id.* at 275.

"totality of the circumstances." This results in judicial findings that a "reasonable person" would have felt free to terminate a law enforcement encounter without having to consider how the history of racial disparities in policing and police violence may impact a person's determination of whether they were seized or not. This directly erodes the constitutional protections owed to the communities that racially biased policing and police violence have harmed and marginalized historically. Because the history of racially disproportionate policing and police violence has an "objectively discernible relationship to a reasonable person's understanding of his freedom of action" vis-à-vis law enforcement, the objective totality-of-the-circumstances test under Article I Section 7 must take race into consideration.

V. CONCLUSION

Centuries of violence and dehumanizing treatment of people of color have required BIPOC communities to develop survival strategies that demand over-compliance with law enforcement. For courts to continue to blind themselves to that reality when

evaluating the freedom an individual would feel to unilaterally terminate a law enforcement contact is to further enshrine existing racial disparities into the legal system. As it has elsewhere, this Court should update a standard that perpetuates racial disparities and announce that a seizure analysis under Article I, Section 7 must account for "the history of explicit race discrimination in America and…how that [history] impacts our current decision making in nonexplicit, or implicit, unstated ways."[63]

RESPECTFULLY SUBMITTED this 21st day of January 2022.

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63 *Id.* at 249–50.

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VI. CERTIFICATE OF COMPLIANCE WITH RAP 18.17

I certify that the word count for this brief, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 4,879.

RESPECTFULLY SUBMITTED this 21st day of January 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2022, I filed the foregoing brief via the Washington Court Appellate Portal, which will serve one copy of the foregoing document by email on all attorneys of record.

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