No. 16-866

# In the Supreme Court of the United States

STATE OF CONNECTICUT, PETITIONER

v.

ANDREW DICKSON

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

## BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND ELEVEN OTHER STATES IN SUPPORT OF PETITIONER


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## QUESTIONS PRESENTED

1. Whether, as the Connecticut Supreme Court held, the Due Process Clause requires judicial prescreening of first-time in-court eyewitness identifications in criminal trials.

2. Whether, as that court also held, the Due Process Clause requires trial judges to prescreen first-time in-court eyewitness identifications by categorically excluding them, regardless of reliability, unless the identity of the perpetrator or the ability of the eyewitness to identify the defendant is uncontested.

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## INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

Although the states have used first-time, in-court eyewitness identifications in criminal trials since before the Due Process Clause was written, the Connecticut Supreme Court has now held that such identifications are unduly suggestive as a general matter and must be excluded except where identity, or the ability of the witness to identify the defendant, is not contested. *State* v. *Dickson*, 141 A.3d 810, 827, 830, 835–37 (Conn. 2016). Its decision sets aside the historical role of juries as the arbiters of whether evidence is reliable and gives that role to courts by way of new, prophylactic rules of constitutional procedure.

The questions presented in Connecticut's petition warrant this Court's review for multiple reasons. First, Connecticut has identified two splits that require this Court's guidance: first, whether the Constitution requires courts to screen first-time in-court identifications for reliability before deciding whether to allow them; and second, whether such pre-screening effectively requires a per se rule of exclusion. But in addition to those splits, the jurisprudence on this issue is plagued by splits on virtually every sub-issue: courts do not agree whether first-time in-court identifications implicate special due-process concerns; they do not agree why such identifications should be admissible, if at all; and they do not agree on what, if anything, makes an in-court identification unduly suggestive. This Court's attention is now necessary.

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

Additionally, this issue is exceptionally important to the *amici* States. State attorneys general and other state prosecutors should be allowed to admit identification evidence that allows them to link the accused to the crime. By incorrectly equating in-court identifications that follow suggestive *pre-trial* identifications with *first-time* in-court identifications, courts have hampered prosecutors' ability to admit this relevant evidence, and in doing so have distorted the judicial system by encroaching on the role of the jury. And this encroachment is unnecessary: "Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Manson* v. *Brathwaite*, 432 U.S. 98, 116 (1977). Consistent with the respect our system of justice accords juries and the existence of adequate safeguards for defendants to challenge first-time in-court identifications, any question over the reliability of such identifications must go to weight and credibility, not admissibility.

And finally, the States have an interest in encouraging this Court to review decisions by lower courts that leave a State as a prevailing party with respect to the individual case, but that announce a rule that harms the State in every future similar case. Here, as the petition explains, the Connecticut Supreme Court's decision will constrain the future behavior of state officials on federal constitutional grounds, and it will be effectively unreviewable. The decision below fundamentally changes how the State may proceed in all criminal cases in which identity of the perpetrator is disputed; it "establish[es] controlling law." *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011). In such situations, this Court should grant review to prevailing States.

## ARGUMENT

### I. The state and federal courts are split on virtually every aspect of the questions presented.

As Connecticut explained in its petition, courts are split on basic questions about in-court identifications: whether due process requires prescreening of first-time in-court identifications and, if so, whether that prescreening requires exclusion in cases in which identity is disputed. These splits are substantial and should be resolved by this Court.

But a particularly striking feature of the splits is the bench's divergence on virtually every aspect of the analysis regarding first-time in-court identifications. Some courts conclude that such identifications present no special due-process concerns; others conclude the opposite. Courts holding that such identifications did not violate due process in particular cases have diverged widely on the rationale. And courts disagree on whether in-court identifications are always unduly suggestive, and on what circumstances should warrant a holding of undue suggestion in individual cases. Rather than reiterate the key splits that Connecticut identified, the *amici* States will highlight this lack of uniformity that exists at a more granular level and that permeates courts' analysis of in-court identifications.

#### A. Courts are split on whether first-time, in-court identifications implicate special due-process concerns.

The courts are split on the basic question of whether in-court identifications present special due-

process concerns even when they were not preceded by an impermissibly suggestive pre-trial identification procedure. In *Byrd* v. *State*, for example, the Delaware Supreme Court explained that "[t]he inherent suggestiveness in the normal trial setting does not rise to the level of constitutional concern." 25 A.3d 761, 766–67 (Del. 2011); accord *State* v. *King*, 934 A.2d 556, 561 (N.H. 2007) (same). And in *Hogan* v. *State*, the Wyoming Supreme Court concluded that, " 'without more, the mere exposure of the accused to a witness in the suggestive setting of a criminal trial does not amount to the sort of impermissible confrontation with which the due process clause is concerned.' " 908 P.2d 925, 929 (Wyo. 1995) (quoting *State* v. *Smith*, 512 A.2d 189, 193 (Conn. 1986)); accord *Middleton* v. *United States*, 401 A.2d 109, 132–33 (D.C. 1979) (same).

These courts have largely declined to pre-screen such identifications under the reliability factors this Court set out in *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972), before allowing them to be admitted. *Byrd*, 25 A.3d at 767 (Del.); *King*, 934 A.2d at 561 (N.H.); *Middleton*, 401 A.2d at 132 & n.6 (D.C.). Some, though, appear to have applied a reliability-focused analysis, despite concluding that such identifications present no special due-process concerns. *Hogan*, 908 P.2d at 929 (Wyo.) (concluding that in-court identification was not unnecessarily suggestive); *State* v. *Hickman*, 330 P.3d 551, 567–72 (Or. 2014) (applying a *Biggers*-style reliability analysis under state evidence law).

Other courts, as Connecticut identified, conclude that first-time in-court identifications do present spe-

cial due-process concerns and require those identifications to be prescreened—that is, to examine the identifications' reliability before admitting the identifications. In *United States* v. *Hill*, for example, the Sixth Circuit held that "[t]he due process concerns are identical" for first-time in-court identifications and for in-court identifications preceded by an unduly suggestive out-of-court identification, and that "any attempt to draw a line based on the time the allegedly suggestive identification technique takes place seems arbitrary." 967 F.2d 226, 232 (6th Cir. 1992); Pet. 16–17 (citing additional cases requiring reliability prescreening).

### B. Courts that admit first-time, in-court identifications diverge widely on the rationale.

Courts that do admit first-time in-court identifications diverge widely on the rationale. As indicated above, multiple courts have held that first-time, in-court identifications simply do not have special due-process implications, and these courts admit the identifications without further analysis.

Other courts have reached a similar outcome by holding that any due-process concerns arising from the inherent suggestiveness of the courtroom setting are addressed through existing rules that protect defendants during trial, including vigorous cross examination. In *State* v. *Drew*, for example, the Louisiana Supreme Court upheld an in-court identification where the defendant was one of two African-American men in the courtroom, and the only African-American man seated at counsel table. 360 So. 2d 500, 516 (La. 1978). The court reasoned that defendant "had ample

opportunity to extensively cross-examine the victim" and that any question regarding reliability is for the jury. *Id.*; accord *State* v. *Lewis*, 609 S.E.2d 515, 518 (S.C. 2005) (extra constitutional safeguards applicable to *out-of-court* identifications not applicable to first-time *in-court* identifications "because the witness' testimony is subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial"); *Ralston* v. *State*, 309 S.E.2d 135, 136–37 (Ga. 1983) (same); *Middleton*, 401 A.2d at 132 & n.6 (D.C.) (explaining that "the suggestivity inherent in the trial process is . . . subject to the ameliorative scrutiny of court and counsel").

Other courts that have upheld first-time in-court identifications have reasoned that there is no constitutional right to an in-court lineup. E.g., *Hogan*, 908 P.2d at 928 (Wyo.); *United States* v. *Bennett*, 675 F.2d 596, 598 (4th Cir. 1982).

Still other courts admit first-time in-court identifications only after applying a *Biggers* reliability analysis, asking whether the in-court identification was unduly suggestive and, if so, whether it was otherwise reliable. E.g., *United States* v. *Davis*, 103 F.3d 660, 670 (8th Cir. 1996); *State* v. *Clausell*, 580 A.2d 221, 235 (N.J. 1990); *Hill*, 967 F.2d at 232 (6th Cir.); see also Pet. 16–17 (citing cases); Cf. *Hickman*, 330 P.3d at 555–71 (Or.) (applying a reliability analysis under state evidence law); *State* v. *Boettcher*, 338 So. 2d 1356, 1360–61 (La. 1976) (noting broad discretion of trial courts to order a pre-trial lineup when in the interests of fairness, despite that defendants lack a constitutional right to one); *State* v. *Coleman*, 548 So. 2d 1214, 1214 (La. 1989) (ordering trial court to "conduct

a hearing before trial to determine whether defendant is entitled to a physical lineup").

But other courts have offered different, and sometimes divergent rationales for upholding in-court identifications. In *Davis*, for example, the Eighth Circuit offered a mix of rationales. First, it applied the *Biggers* test that identification testimony should be suppressed only if the procedure was so impermissibly suggestive as to create "a very substantial likelihood of irreparable misidentification," and concluded that the courtroom setting was not impermissibly suggestive and that the identification was otherwise reliable. *Davis*, 103 F.3d at 670 (8th Cir.); *Biggers*, 409 U.S. at 198. The court then held that the district court did not abuse its discretion in allowing the identification "because our review of the record convinces us that the government's questions were not suggestive" and the identification was "vigorously attacked on cross-examination[.]" 103 F.3d at 670 (8th Cir.). The court further noted that, because another eyewitness had also identified the defendant, the case "did not rest solely on the reliability of" the disputed witness's identification. *Id*. at 670–71. In the same breath, the court concluded that "given the total circumstances, the arguably suggestive nature of the in-court identification was not so impermissibly suggestive as to create a 'very substantial likelihood of irreparable misidentification.' " *Id*. at 671 (quoting *Simmons* v. *United States*, 390 U.S. 377, 384 (1968)). While unclear, the court's language suggests that it may have viewed the weight of other evidence identifying the defendant as significant in its due-process analysis, rather than limiting the analysis to whether the particular in-court identification at issue was reliable.

In *United States* v. *Domina*, the Ninth Circuit also appeared to consider the strength of other identification evidence in its due-process analysis. 784 F.2d 1361, 1367–68 (9th Cir. 1986). In that case, the court declined to apply the *Biggers* "impermissibly suggestive" test to initial in-court identifications, explaining at length why such identifications pose fewer dangers than suggestive out-of-court identifications. *Id.* at 1367–68. But like the Eighth Circuit, the court suggested that the strength of the other evidence identifying the defendant may play a role in the analysis. *Id.* at 1369. Noting its prior holding that when guilt "hangs entirely on the reliability and accuracy of the in-court identification," such identification "should be as lacking in inherent suggestiveness as possible," the court noted that "[t]his is not such a case" due to "a great deal of other evidence linking Domina to the crimes." *Id.* Thus, "[u]nder the circumstances of this case," the court held that it was not an abuse of discretion to deny the defendant an in-court line-up. *Id.*

The Tenth Circuit similarly considered the strength of the other identification evidence in *United States* v. *Thompson*, as well as "the court's efforts to lessen the suggestiveness" of the identification procedure. 524 F.3d 1126, 1135–36 (10th Cir. 2008). In that case, which involved an in-court identification by the jury, not a witness, the court held that the identification was not unconstitutionally suggestive where the initial identification occurred in court, "in light of the evidence of Mr. Thompson's defendant's guilt" and the fact that the trial court had offered the defendant the opportunity to stage his own in-court line-up and gave a cautionary instruction to the jury. *Id.* It is not clear what weight the court accorded these different factors,

or if any was dispositive, though the court noted that the defendant was not constitutionally entitled to an in-court line-up. *Id.* at 1136.

While it appears somewhat common for courts to weigh other evidence of guilt in assessing the admissibility of an in-court identification, other circuits have reasoned that the strength of other evidence should have no bearing on the question of whether an identification is admissible. E.g., *Kennaugh* v. *Miller*, 289 F.3d 36, 41 (2d Cir. 2002) (noting that Second Circuit has "rejected" "look[ing] to the existence of corroborating evidence of guilt in assessing the reliability of identification testimony"); *United States* v. *Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995) (noting inconsistency with *Brathwaite*, 432 U.S. at 114, and cautioning that "[i]ndependent evidence of culpability will not cure a tainted identification procedure").

The Seventh Circuit likewise considered a mix of factors in upholding the in-court identification in *United States* v. *Bush*, 749 F.2d 1227 (7th Cir. 1984). There, the court noted its general view that identification testimony is for the jury to weigh—absent a substantial likelihood of irreparable misidentification—and that this deference to the jury is "even more appropriate" for first-time, in-court identifications. *Id.* at 1231. But in upholding the first-time in-court identification in that case, the court highlighted several facts. First, the witness testified only that the defendant "resembled" one of the robbers, which the court noted was not likely to have as much impact as traditional identification testimony. *Id.* at 1232. The court also distinguished the case from two others—one in which the prosecutor had pointed to the defendant in

front of the jury, and one in which the defendant was the only African-American male in the courtroom. *Id.* In contrast to those cases, the only suggestive circumstance in *Bush* was that the defendant sat at counsel table, which the court explained was not alone enough to constitute a due-process violation. *Id.* Finally, the court noted that the witness's failure to definitively identify the defendant as the perpetrator, after the prosecutor had predicted in his opening statement that she would, further deflated the defendant's claim that the in-court procedure was suggestive. *Id.* at 1232–33. From this analysis, it is unclear what, if any, conclusions the court drew regarding first-time in-court identifications as a category.

### C. Courts are split on what circumstances should warrant a holding that an in-court identification is unduly suggestive.

Most courts acknowledge that the courtroom setting at trial has some suggestive qualities when it comes to first-time in-court identifications. E.g., *Perry* v. *New Hampshire*, 565 U.S. 228, 244 (2012) (all in-court identifications "involve some element of suggestion"); *Domina*, 784 F.2d at 1368 (9th Cir.) ("[T]here can be little doubt that the initial in-court identification is suggestive."); *Hickman*, 330 P.3d at 567 (Or.) (noting "inherently suggestive circumstances" of an in-court identification). The defendant is, after all, generally seated at the defense table, next to defense counsel, so that he can exercise his rights to confront witnesses and to assist in his defense.

But courts part ways on whether in-court identifications are "unnecessarily" or impermissibly suggestive—*i.e.*, the first step of the *Biggers* test, for those

courts that apply it. Like the Connecticut Supreme Court's decision below, *Dickson*, 141 A.3d at 827, 830, 835–37, some courts have held that first-time in-court identifications are unduly suggestive because most witnesses will know based on seating who the defendant is.

In *United States* v. *Rogers*, for example, the Fifth Circuit held that "it is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant," and that "concern about suggestiveness is heightened" when the defendant is a different race than the witness. 126 F.3d 655, 658 (5th Cir. 1997). From these facts, the court concluded that the "unnecessarily suggestive" prong of the *Biggers* test was met. *Id*. And in *United States* v. *Archibald*, the Second Circuit held that where the defendant was seated next to counsel at the defense table, "[t]he in-court identification procedure . . . was so clearly suggestive as to be impermissible, however traditional it may be." 734 F.2d 938, 942–43 (2d Cir.), modified, 756 F.2d 223 (2d Cir. 1984). While the court agreed with the trial court that "there was no obligation to stage a lineup," it held that there "was, however, an obligation to ensure that the in-court procedure [ ] did not simply amount to a show-up." *Id*. at 941 (quotations omitted). (The Second Circuit now evaluates first-time in-court identifications for reliability. E.g., *Kennaugh*, 289 F.3d at 46–49.)

On the other end of the spectrum, the Seventh Circuit has held that the mere presence of the defendant at counsel table is not enough to render the in-court identification unduly suggestive. *Bush*, 749 F.2d at

1232 (7th Cir.). Similarly, the highest District of Columbia court has held that an in-court identification was not unduly suggestive where the witness did not recognize the defendant until a lunch recess, when the only other persons in the courtroom were the defendant and counsel. *Middleton*, 401 A.2d at 131–32 & n.46 (D.C.). And the First Circuit held in *United States* v. *Oreto* that the in-court identifications in that case were not impermissibly suggestive, even where the prosecution staged the identifications and instructed the witness whom to point to, given that the defense was able to cross examine the witnesses and the court gave curative instructions. 37 F.3d 739, 744–45 (1st Cir. 1994).

Aside from whether merely being seated at counsel table is unduly suggestive, the courts also disagree on whether details such as the defendant's race, or hair or clothing style, render an in-court identification unduly suggestive. In *Thompson*, for example, the Tenth Circuit held that an identification was not unduly suggestive where the court made the defendant, the only African-American man in the courtroom, don sunglasses worn by the African-American perpetrator. 524 F.3d at 1135–36 (10th Cir.). Likewise, in *Hogan*, the Wyoming Supreme Court held that an identification was not unnecessarily suggestive where the defendant was the only African-American man seated at the defense table. 908 P.2d at 927–29 (Wyo.). The Eighth Circuit similarly rejected a claim of impermissible suggestiveness in *Davis*, where the defendant was the only African-American male seated at the defense table, and one of only two African-American individuals present in the courtroom. 103 F.3d at 670–71 (8th Cir.); accord *Drew*, 360 So. 2d at 516 (La.). And

in *Byrd*, the Delaware Supreme Court held that inherent courtroom suggestiveness was not of constitutional concern and declined to apply *Biggers* in a case where the defendant was the only African-American male wearing cornrows in the courtroom. 25 A3d at 764–67 (Del.).

Other courts have reached a different conclusion. In *Bush*, for example, the Seventh Circuit held that the mere fact that the defendant was seated at counsel table was not, by itself, so suggestive as to violate due process, but it left open the possibility that an in-court identification may be too suggestive if "the defendant stood out physically from others in the courtroom." 749 F.2d at 1232 (7th Cir.). The Fifth Circuit shared this concern in *Rogers*, holding that "concern about suggestiveness is heightened" when the defendant is of a different race than the witness. 126 F.3d at 658 (5th Cir.). Based on this and defendant's presence at counsel table, the court concluded that the "unnecessarily suggestive" prong of the *Biggers* test was satisfied. *Id*. And in *Archibald*, the Second Circuit held an in-court identification impermissibly suggestive in part based on the trial court's denial of the defendant's request "to be seated with five or six other black men who looked reasonably like him." 734 F.2d at 941–43 (2d Cir.).

Sowing even more confusion, some courts have apparently conflated the terms "suggestive" and "unnecessarily suggestive," concluding from the fact that the courtroom atmosphere is suggestive that it is *unnecessarily* so. In *United States* v. *Greene*, for example, the Fourth Circuit explained that "[a] procedure is *unnecessarily* suggestive if a positive identification is

likely to result from factors other than the witness's own recollection of the crime." 704 F.3d 298, 305–06 (4th Cir. 2013) (emphasis added). While that may be an accurate description of a suggestive procedure, it does not account for whether the procedure is *unnecessarily* suggestive. The court ultimately concluded that the circumstances of the in-court identification in that case "present[ed] a suggestive situation" in which it was "not clear whether the witness's own recollections, or outside pressures, [were] driving the testimony," apparently concluding from this fact that the procedure was "therefore . . . unnecessarily suggestive." *Id.* at 307; accord *Rogers*, 126 F.3d at 658 (5th Cir.) (*Biggers* "unnecessarily suggestive" prong satisfied where "it is clear who [in the courtroom] is the defendant" and the witness and defendant are different races).

## II. The petition presents questions of exceptional importance to the States.

The questions presented in Connecticut's petition are of exceptional importance to the States. Not only are eyewitness identifications highly probative, the jury's ability to witness the initial identification has real value. The rule of exclusion established by the Connecticut Supreme Court hampers prosecutors' ability to admit this relevant evidence, and it encroaches on the jury's constitutional role in circumstances under which such encroachment is not necessary.

### A. Absent evidence "so extremely unfair that its admission violates fundamental conceptions of justice," the Constitution entrusts questions of reliability to the jury.

Because first-time in-court identifications are not "so extremely unfair" that their admission "violates fundamental conceptions of justice," *Perry*, 565 U.S. at 237, the proper course is to entrust any questions about their reliability to the jury. As this Court has explained, the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Id.* Several constitutional safeguards are available to criminal defendants to counter the State's evidence, including the Sixth Amendment rights to counsel, compulsory process, and confrontation and cross-examination of witnesses. *Id.*

"Apart from these guarantees, . . . state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence[.]" *Id.* It is only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice" that this Court has "imposed a constraint tied to the Due Process Clause." *Id.* These precepts are consistent with the "profound respect" our system of justice accords to "the role of juries in the adjudicative process." *Hickman*, 330 P.3d at 564 (Or.). As courts "enlarge the domain of due process," it transfers to the judge the jury's traditional role in determining the reliability of evidence. *Perry*, 565 U.S. at 245.

As this Court has stated, "[w]e are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill." *Brathwaite*, 432 U.S. at 116. "Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id*.

### B. Suggestive *pre-trial* identifications, which occur outside the presence of the jury, pose a unique constitutional problem that first-time, in-court identifications do not.

Of course, in the narrow circumstance in which an in-court identification was preceded by an unnecessarily suggestive *out-of-court* identification, this Court has imposed, under the Due Process Clause, limits on the admission of both identifications at trial. *Biggers*, 409 U.S. 188.

But suggestive *pre-trial* identifications pose a unique constitutional danger that first-time in-court identifications do not: they occur outside the presence of the jury. Because of this, the jury cannot observe "[t]he certainty or hesitation of the witness when making the identification, the witness's facial expressions, voice inflection, body language, and the other normal observations one makes in everyday life when judging the reliability of a person's statements." *Domina*, 784 F.2d at 1368 (9th Cir.). Such identifications also are not tested in the crucible of immediate cross-examination, and are not made under oath. The concern, therefore, is that the witness "later

identifies the person in court, not from his or her recollection of observations at the time of the crime charged, but from the suggestive pretrial identification"—and "with much greater certainty expressed in court than initially." *Id*. (citing *United States* v. *Wade*, 388 U.S. 218, 229, 236 (1967)). Thus, there is a greater risk of irreparable misidentification in cases of suggestive pre-trial identifications. *Lewis*, 609 S.E.2d at 518.

These same concerns are not present when a witness identifies the defendant for the first time in the presence of the jury. In that scenario, "the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations." *Lewis*, 609 S.E.2d at 518 (S.C.); accord *Hickman*, 330 P.3d at 564 (Or.) (noting that "the fact-finder is better able to evaluate the reliability of the identification because he or she can observe the witness's demeanor and hear the witness's statements during the identification process"); *Thompson*, 524 F.3d at 1135 (10th Cir.).

### C. Connecticut's rule hampers prosecutors' ability to admit relevant evidence and unnecessarily encroaches on the role of the jury.

By equating in-court identifications that follow suggestive *pre-trial* identifications with *first-time* in-court identifications, the courts discussed above that require pre-screening—or even mandate a pre-trial lineup—have hampered prosecutors' ability to admit

relevant evidence and have unnecessarily encroached on the role of the jury.

Eyewitness identifications are highly relevant, and allowing a jury to observe live a witness's reaction during a first-time in-court identification has real value in uncovering the truth. But the rule adopted in Connecticut hampers prosecutors' ability to have a witness identify the defendant, for the first time, from the stand—a practice that has existed since the Constitution was written.

Requiring law enforcement to conduct a pre-trial line-up in every case in which identity is disputed also imposes extra costs that may be unnecessary for investigative purposes. The logistical and financial burden imposed by such a requirement is exemplified by the facts in *Thompson*, where the district court offered to allow the defendant "to use an in-court line-up or show the jury pictures of other black men of similar stature donning the same apparel[.]" 524 F.3d at 1136 (10th Cir.). But the defendant declined the opportunity, arguing that "it was unrealistic to find other men of similar appearance willing to participate in such a procedure so close to trial[.]" *Id.*

Pre-screening or excluding first-time in-court identifications also encroaches on the province of the jury unnecessarily, given the available trial safeguards that attach to such identifications. As discussed above, these identifications occur in the presence of the jurors, who are able to observe the witness's demeanor while making the identification for the first time.

Additionally, unlike suggestive *pre-trial* identifications, first-time in-court identifications are sworn testimony and are subject to immediate cross-examination. *Hickman*, 330 P.3d at 559 (Or.). The jury is not merely hearing testimony about a prior identification, and defense counsel is able to probe the live identification immediately, "test[ing] the perceptions, memory and bias of the witness, contemporaneously exposing weaknesses and adding perspective in order to lessen the hazards of undue weight or mistake." *Id.* at 564. Adept counsel may question the witness regarding his opportunity to view the perpetrator at the time of the crime, his degree of attention, the accuracy of his prior description of the perpetrator, and the length of time between the crime and the confrontation. *Brathwaite*, 432 U.S. at 114 (describing *Biggers* test for reliability). Counsel may also highlight in closing argument any doubts regarding the accuracy of the identification, "including reference to . . . any suggestibility in the identification procedure." *Byrd*, 25 A.3d at 766 (Del.) (quoting *Brathwaite*, 432 U.S. at 113–14 & n.14).

While some courts have suggested that cross-examination is not effective to test a witness's honestly held, but mistaken, belief, that argument defies the reality of trials. Cross-examination is routinely directed at exposing weaknesses in witness's erroneously but honestly held beliefs.

What is more, the logical implication of the argument that an honestly held but mistaken view must be judged by the court and not the jury is untenable, as it encounters a line-drawing problem. As the Oregon Supreme Court explained in *Hickman*, "[a]ssume,

for example, that . . . factfinders tend to overvalue the testimony of law enforcement officials, spiritual leaders, school teachers, and other categories of witnesses who, by demeanor or resume, may be perceived to possess an exceptional gravitas or aura of credibility." 330 P.3d at 566. If social science studies then showed that, "despite appropriate admonitions, it is unduly difficult for juries to overcome such biases," "what do we do with that information?" *Id.* "Will the trial judge then have a heightened screening role to perform . . . with respect to the admissibility of that evidence as well?" *Id.* And that is setting aside the fact that "decision-making biases affect all people alike, including juries, advocates, social scientists, and, we daresay, judges acting as evidentiary gatekeepers." *Id.*

Establishing rules of constitutional procedure based on evolving social science poses an additional problem. Social science is "probabilistic," "meaning that it cannot demonstrate that any specific witness is right or wrong, reliable or unreliable, in his or her identification." *Id.* at 564–65. Social research is also constantly evolving. *Id.* ("We also recognize that, although there now exists a large body of scientific research regarding eyewitness identification, the research is ongoing.").

Shielding juries from first-time in-court identifications is also unnecessary because "other safeguards built into our adversary system" also "caution juries against placing undue weight on eyewitness testimony of questionable reliability." *Perry*, 565 U.S. at 245. In addition to the defendant's right to confront the eyewitness, the defendant is protected by: his

right to the effective assistance of an attorney; eyewitness-specific jury instructions; the requirement that the government prove the defendant's guilt beyond a reasonable doubt; and, "[i]n appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence." *Id.* at 246–47.

State and federal rules of evidence also protect defendants in individual cases. *Id.* A witness must have the personal knowledge necessary to make an identification, and the identification must be rationally based on that knowledge to be helpful to the jury. *Hickman*, 330 P.3d at 560 (Or.) (discussing state rules of evidence). Rules of evidence also permit trial judges to exclude relevant evidence in particular cases if, under the circumstances, its probative value is substantially outweighed by its prejudicial impact. *Perry*, 565 U.S. at 247.

Consistent with our respect for juries and the existence of adequate safeguards for defendants, any question over the reliability of first-time in-court identifications—which are not subject to the unique ossification concerns that attach to suggestive *pre-trial* identifications—must go to weight and credibility, not admissibility. *Domina*, 784 F.2d at 1367 (9th Cir.); *Middleton*, 401 A.2d at 133 (D.C.).

### D. At a minimum, any remedy must be more narrowly tailored.

At a minimum, the States have an interest in this Court's review to address the extreme remedy the

Connecticut Court has imposed, which extends far beyond any relief this Court has required even for unnecessarily suggestive *pre-trial* identifications.

Instead of requiring pre-screening for reliability under *Biggers*—the remedy this Court has imposed for identifications that follow suggestive pre-trial identifications—the highest court of Connecticut has issued a per se rule of exclusion for first-time in-court identifications except where identity, or the ability of the witness to identify the defendant, is not contested. *Dickson*, 141 A.3d at 827, 830, 835–37 (Conn.). But even aside from the fact that this Court has not extended such a remedy to first-time in-court identifications, it has held that even an *out-of-court* identification that is unnecessarily suggestive is still admissible if it is reliable under the totality of the circumstances. *Brathwaite*, 432 U.S. at 110. The contrary rule of automatic exclusion cannot be squared with this Court's precedent. See *Perry*, 565 U.S. at 239 (noting Court's declination to "mandate[e] a per se exclusionary rule").

### E. States' highest courts may not insulate federal constitutional rules from this Court's review.

Further, this Court should review decisions by state courts of last resort that grant a State a limited win in the case before it, but that announce a rule that harms the State in every future similar case. The Connecticut Supreme Court's decision does just that: it will govern state conduct based on federal constitutional grounds, and yet it will be effectively unreviewable. In these circumstances, the judgment is reviewable because it "establish[es] controlling law."

*Camreta* v. *Greene*, 563 U.S. at 704. In such situations, this Court should grant review to prevailing States.

## CONCLUSION

For the reasons stated above, this Court should grant Connecticut's petition for a writ of certiorari.

Respectfully submitted,

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