

No. 10-8974

IN THE
Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW HAMPSHIRE SUPREME COURT

**BRIEF *AMICUS CURIAE* OF THE NATIONAL
DISTRICT ATTORNEYS ASSOCIATION
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*

The National District Attorneys Association (NDAA) is the world's oldest and largest professional organization representing prosecutors.¹ Its members—found in the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors—prosecute criminal violations in every State and territory of the United States. Founded in 1950, the NDAA has sought to provide local prosecutors with a national perspective on issues that appear and recur in their offices nationwide. The NDAA also advocates at the national level regarding those issues. The NDAA's underlying objective, like that of its individual members, is to see that justice is done under the rule of law.

To that end, the NDAA seeks to advance the criminal justice system by supporting efforts designed to preserve the honor and integrity of America's state and local prosecuting attorneys, improve and facilitate the administration of justice, and promote the study of law and the diffusion of knowledge of the law through the continuing education of prosecuting attorneys, lawyers, law-enforcement personnel, and other members of the interested public. It is vitally interested in enabling prosecutors to perform their duties to their utmost by most effectively using the limited resources entrusted to them.

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* National District Attorneys Association certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), the parties' letters so consenting have been filed with the Clerk.

It thus urges legislatures to adopt clear and practicable statutes in defining the duties and responsibilities of prosecutors, and courts to make clear and practicable interpretations in construing and applying statutory or constitutional texts.

The interests of the NDAA and its members are directly implicated by this case. Petitioner asks this Court to dramatically expand a criminal defendant's substantive due process right to exclude eyewitness identification testimony from trial. If the Court accepts that argument, NDAA's members' ability to use eyewitness testimony will be hampered and the courts will be faced with a flood of motions seeking the suppression of this crucial evidence notwithstanding the absence of any misconduct on the part of government officials. Petitioner's novel constitutional theory would, in practice, undermine the administration of justice and needlessly interfere with the NDAA's members' ability to perform the vital functions that the public has entrusted to their offices.

INTRODUCTION

The question presented by this case is whether the Fourteenth Amendment's Due Process Clause requires the exclusion from a criminal trial of "unreliable" eyewitness identification evidence even though it was not procured through "improper state action." Pet. Br. at i. That question accepts the premise that criminal defendants have a substantive "due process" right to "fundamental fairness" independent of the protections afforded by the Bill of Rights. *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941). As a matter of first principles, however, that premise is flawed.

Neither the Due Process Clause of the Fourteenth Amendment nor its Fifth Amendment counterpart created in the Constitution a substantive right to “fairness” under the rubric of due process. The right to “due process” is the right to a trial in accordance with the “law of the land” as that phrase was first used in the Magna Carta. *Murray’s Lessee v. The Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855). It includes the right to notice, an opportunity to be heard, and a trial in compliance with the laws as promulgated by the legislature. *See In re Winship*, 397 U.S. 358, 378-86 (1970) (Black, J., dissenting). But the Due Process Clause is not “a secret repository of substantive guarantees against ‘unfairness’” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting).

As a consequence, this Court’s holding that the Due Process Clause requires the exclusion from a criminal trial of eyewitness identification testimony that the government obtained under conditions “so unnecessarily suggestive and conducive to irreparable mistaken identification” that it cannot be considered reliable based on the “totality of the circumstances,” *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972), lacks constitutional foundation. Not only does this rule mistakenly depend on the heritage of substantive due process, but it relies on a judge’s notion of fairness under the particular circumstances of a case to make the legal determination. The Constitution does not empower judges to engage in a freewheeling inquiry of a given case’s circumstances to determine whether the defendant has been treated fairly. Whether eyewitness identification testimony is sufficiently reliable to warrant conviction “is not a question for the Court but for the jury, and does not raise a due process issue.” *Simmons v. United States*,

390 U.S. 377, 395 (1968) (Black, J., dissenting); *see also* *Stovall v. Denno*, 388 U.S. 293, 305-06 (1967) (Black, J., dissenting); *Foster v. California*, 394 U.S. 440, 447 (1969) (Black, J., dissenting).

In an appropriate case, the Court should reconsider this line of decisions. At a bare minimum, however, the Court should reject Petitioner’s request to radically expand the scope of this suspect constitutional rule by divorcing it from the improper state-action requirement. As its text makes plain, the Fourteenth Amendment is directed at the State—not private individuals. *See NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). In evaluating whether a conviction has been unconstitutionally obtained, the Court’s first question therefore must be (and has always been) whether the State engaged in misconduct so egregious that it rises to the level of a due process violation. *See Lisenba*, 314 U.S. at 237; *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935). *Stovall* and its progeny follow directly from this reasoning: these decisions hold that it may be fundamentally unfair, and thus a due process violation, to allow the government to profit from eyewitness identification testimony that it improperly secured. *See* Resp. Br. at 28-43.

Only *after* determining that the government acted improperly has the Court then considered whether to exclude the evidence from trial; it is at that juncture that the Court has taken into account the “reliability” of the eyewitness identification testimony evidence under the “totality of the circumstances.” *Manson v. Braithwaite*, 432 U.S. 98, 113-14 (1977). Thus, Petitioner’s contention that reliability—and not improper state action—has been the centerpiece of this doctrine—is misleading. Time and again, this Court has explained that in the absence

of a finding of government misconduct, there is no due process violation; the alleged unreliability of evidence, standing alone, is not a substitute for that finding. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Petitioner thus does not seek to vindicate his substantive due process rights; he seeks the wholesale creation of a new one from which he would like to benefit. “As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). This case is not an occasion to depart from that sensible tradition.

Indeed, there are especially strong reasons here to resist Petitioner’s request to create a new substantive due process right. The Constitution, principally through the Sixth Amendment, already guarantees that criminal trials are conducted fairly and that the defendant is permitted to test the reliability of the prosecution’s evidence. *See, e.g., Washington v. Texas*, 388 U.S. 14, 18 (1967); *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968); *Nix v. Williams*, 467 U.S. 431, 446 (1984); *Crawford v. Washington*, 541 U.S. 36, 55-62 (2004). Evidentiary law also provides measurable protection against the use of questionable eyewitness testimony to unfairly secure a conviction. *See, e.g., Fed. R. Evid. 403; N.H. R. Evid. 403*. And should these constitutional and statutory protections prove insufficient, Congress and the States are fully capable of filling the void legislatively. Given these ample protections, there is no justification—constitutional or otherwise—for transferring oversight from the legislatures to the judiciary. *See, e.g., District Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009).

Moreover, adopting Petitioner's novel rule would not serve one of the principal constitutional justifications for excluding evidence from a criminal trial: deterrence. There is no deterrent effect from a rule that is divorced from the requirement of improper state action as exclusion of eyewitness identification evidence obtained without state misconduct would have no influence on police behavior. And, in any event, this Court has wisely found that, absent constitutional necessity, the jury is better equipped to weigh and evaluate evidence than a judge. Indeed, with the benefit of collective wisdom, and especially when guided by sound instructions from the trial court, juries are best positioned to resolve reliability issues. As this Court has remarked, "evidence with some element of untrustworthiness is customary grist for the jury mill." *Brathwaite*, 432 U.S. at 116.

In sum, the rule Petitioner's urges would expand the Due Process Clause far beyond its original meaning and create an entirely new substantive due process right without a constitutional or policy justification for doing so. Accordingly, Petitioner's novel claims should be rejected, and the decision of the New Hampshire Supreme Court should be affirmed.

ARGUMENT**I. THE NEW HAMPSHIRE SUPREME COURT CORRECTLY HELD THAT PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED.****A. The Court Has Misinterpreted The Due Process Clause To Limit The Use Of Eyewitness Identification Testimony During Criminal Trials.**

This Court has held that “[a]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.” *Lisenba*, 314 U.S. at 236. Applying this rule, the Court has further held that the Constitution requires the exclusion from trial of eyewitness identification testimony where the “totality of the circumstances” shows that the government procured it under conditions “so unnecessarily suggestive and conducive to irreparable mistaken identification that [the criminal defendant] was denied due process of law.” *Stovall*, 388 U.S. at 301-02. Both the background constitutional rule and its application to this setting are mistaken as a matter of first principles.

The Fourteenth Amendment provides that “No State shall ... deprive any person of life, liberty, or property, without due process of law[.]” U.S. Const. amend. XIV, § 1. By this amendment, the Constitution required the States to afford to the People the same “due process” rights that the Fifth Amendment already demanded of the national government. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002); *Hurtado v. California*, 110 U.S. 516, 534-35 (1884); Raoul Berger, *Government by Judiciary*:

The Transformation of the Fourteenth Amendment 200-03 (1977). As an original matter, then, the established phrase “due process of law” could bear only one meaning: the public understanding of it at the time of the Fifth Amendment’s ratification. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3063 (2010) (Thomas, J., concurring in part and concurring in the judgment).

At that time, there was broad consensus that the right to “due process of law” was synonymous with the Magna Carta’s promise of a trial according to the “law of the land.”² *Murray’s Lessee*, 59 U.S. (18 How.) at 276 (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in Magna Charta.”). English Parliament used the terms interchangeably as far back as the Fourteenth Century. *Compare* 25 Edw. 3, stat. 5, c. IV (“Whereas it is contained in the Great Charter of the Franchises of England, that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land.”), *with* 28 Edw. 3, c. III (“That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.”).

2. The Magna Carta provides: “No Freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any otherwise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land.” 1 William Penn & William Bradford, *The Excellent Priviledge of Liberty and Property* 32-33 (1897) (citation omitted) (translating the Magna Carta).

Lord Edward Coke thus concluded that, under English common law, “due process of law” referred to the same rights and protections as the “law of the land.” 2 Edward Coke, *Institutes of the Laws of England* ch. 29, at 50; *see also Murray’s Lessee*, 59 U.S. (18 How.) at 276.

This common understanding of “due process of law” extended to the Colonies; indeed, it formed part of the basis for the break from England. *See* Rodney L. Mott, *Due Process of Law* § 51, at 133-34 (1926) (“The colonists rested their case on the fundamental rights of Englishmen according to the British Constitution ... and looked upon the protections of the Great Charter as one of its chief parts, the cornerstone of which was the ‘law of the land’ article.”). And it was later included in many of the state constitutions in the aftermath of the Revolutionary War. *See* Md. Const. Declaration of Rights § 21 (1776) (“[N]o freeman ought to be taken or imprisoned, or disseized of his freehold, liberties or privileges ... but by the judgment of his peers, or by the law of the land.”); N.C. Const. Declaration of Rights art. 12 (1776) (“That no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed, or exiled ... or deprived of his life, liberty, or property, but by the law of the land.”); N.Y. Const. art. 13 (1777) (“[T]his convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers.”); Va. Declaration of Rights § 8 (1776) (“[T]hat no man be deprived of his liberty, except by the law of the land or the judgment of his peers.”). The United States, in Congress assembled under the Articles

of Confederation, also drew from the Magna Carta in drafting Article 2 of the Northwest Ordinance, which provided that “No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land.”

At the time of the Fifth Amendment’s ratification, therefore, both its drafters and the public understood “due process of law” to bear the same meaning as “law of the land” did in England. *See* Berger, *supra*, at 194 (“No statement to the contrary will be found in any of the constitutional conventions, in the First Congress, nor in the 1866 debates.”); *Stovall*, 388 U.S. at 305 (Black, J., dissenting) (“No one has ever been able to point to a word in our constitutional history that shows the Framers ever intended [a different interpretation of the Due Process Clause].”).

Importantly, this right to trial in accordance with “the law of the land” or “due process of law” imposed only procedural limits on the King’s authority. *See* 1 William Blackstone, *Commentaries* 137-38 (“The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law.”). In other words, “due process of law” required that “[n]o man be put to answer without presentment before justices, or thing of record, or by due proces[s], or by writ original[], according to the old law of the land.” 2 Coke, *supra*, at 50. But it did not dictate the substance of the legal protections that the criminal justice system must afford to the accused. Parliament retained the sole authority to articulate the “law of the land” and, in turn, “justice is directed to be done according to the law of the land: and what that law is, every subject

knows; or may know if he pleases: for it depends not on the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by authority of parliament.” 1 Blackstone, *supra*, at 137.

The scope of due process under our Constitution is the same. *See* 9 The Papers of Alexander Hamilton 35 (H.C. Syrett & J. E. Cooke eds., 1962) (“Lord Coke ... in his comment upon a similar clause in [the] Magna Charta, interprets the law of the land to mean presentment and indictment.... The words ‘due process’ have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.”). Indeed, given the phrase’s settled meaning, it should come as no surprise that the Fourteenth Amendment’s framers do not appear to have debated the issue: “The lawyers who framed the Fourteenth Amendment undoubtedly were familiar with this association of due process with judicial procedure.” Berger, *supra*, at 200. In light of its evident procedural focus, the right to “due process of law” thus entitled criminal defendants to notice, an opportunity to be heard, *see In re Oliver*, 333 U.S. 257, 273 (1948), and, most importantly for present purposes, a trial “according to written constitutional and statutory provisions as interpreted by court decisions,” *In re Winship*, 397 U.S. at 382 (Black, J., dissenting); *see also Masonic Grand Chapter of Order of Eastern Star v. Sweatt*, 329 S.W.2d 334, 337 (Tex. Civ. App. 1959) (“The term ‘due process of law’ is synonymous with ‘the law of the land,’ and its essential elements are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case.”).

It does not entitle them, however, to any particular set of procedures or special protection against unfair trials. *See Rogers v. Peck*, 199 U.S. 425, 435 (1905) (“Due process of law ... does not require the state to adopt a particular form of procedure.”); *Hurtado*, 110 U.S. at 535 (“Due process of law ... [i]n the Fourteenth Amendment ... refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state.”). To be sure, the Due Process Clause ensures “that our governments are governments of law and constitutionally bound to act only according to law.” *In re Winship*, 397 U.S. at 382 (Black, J., dissenting). But it neither dictates the substance of those laws nor empowers judges to shape criminal trials to meet their peculiar sense of fundamental fairness. *See BMW*, 517 U.S. at 598-99 (Scalia, J., dissenting).

The Court’s introduction of this substantive fairness requirement betrays not only the amendment’s text and history, it turns a noble contribution into “an oxymoron.” *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment). “When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends the majority’s own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the ‘law of the land’ and instead becomes one governed ultimately by the ‘law of the judges.’” *In re Winship*, 397 U.S. at 384 (Black, J., dissenting). In other words, it is the judicially-fashioned notion of substantive due process—and not its absence from constitutional doctrine—that is at war with “the concept of ordered liberty.” *Palko v. Connecticut*,

302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).³

The line of decisions at issue here illustrate the problem. Not only do they use substantive due process as a governor on the admissibility of evidence, but each inappropriately looks to the “‘totality of the circumstances’ of a particular case to determine ... whether they comport with the Court’s notion of decency, fairness, and fundamental justice, and, if not, declares they are forbidden by the Constitution.” *Stovall*, 383 U.S. at 305 (Black, J., dissenting). The Constitution does not vest the judiciary with “wideranging, uncontrollable power” to compel procedures that meet their subjective standard for “fairness” according to the “totality of the circumstances” in a particular case. *Simmons*, 390 U.S. at 395 (Black, J., dissenting). As Justice Black explained, “[s]uch a constitutional formula substitutes this Court’s judgment

3. The fact that the Due Process Clause does not have an independent substantive component does not necessarily resolve whether it requires the States to abide other amendments to the Constitution. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470-471 (1993) (“I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights—however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*–era cases the plurality relies upon.”) (Scalia, J., concurring in the judgment); compare *McDonald*, 130 S. Ct. at 3058-88 (Thomas, J., concurring in part and concurring in the judgment), with *Adamson v. California*, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting).

of what is right for what the Constitution declares shall be the supreme law of the land.” *Stovall*, 383 U.S. at 305 (Black, J., dissenting). “A trial according to due process of law is a trial according to the ‘law of the land’—the law as enacted by the Constitution or the Legislative Branch of Government, and not ‘laws’ formulated by the courts according to the ‘totality of the circumstances.’” *Simmons*, 390 U.S. at 396 (Black, J. dissenting).

As a result, the prosecution’s use of eyewitness identification testimony does not raise a due process issue. Whether the government procured eyewitness evidence in an “unfair” manner does not deprive the defendant of his constitutional right to notice, an opportunity to be heard, or trial in accordance with extant law. And whether these “unfair” circumstances make the evidence “unreliable” adds nothing to the constitutional inquiry. That the issue involves the reliability of evidence indicates that, if anything, the Framers anticipated that it would be resolved by the jury—not judges. *See Ewing’s Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 51 (1837) (explaining that it is the jury’s “province to judge of the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the court could not interfere.”); *Brown v. Louisiana*, 447 U.S. 323, 334 (1980) (“[I]t is the jury to whom we have entrusted the responsibility for making [determinations of truth] in serious criminal cases.” (citation omitted)); *see also Foster*, 394 U.S. at 447 (Black, J., dissenting) (“[I]t is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine facts.”). Relying on “unreliable” eyewitness evidence in attempt to secure a conviction does not violate the criminal defendant’s

due process rights; it instead goes to the “weight of the testimony given by the identifying witnesses.” *Simmons*, 390 U.S. at 395 (Black, J., dissenting).

By converting this issue into a question for the judge, this rule thus interferes with the jury’s function under our constitutional plan. *See Foster*, 394 U.S. at 447 (Black, J., dissenting) (“[T]he jury must, if we keep faith with the Constitution, be allowed to hear eyewitnesses and decide for itself whether it can recognize the truth and whether they are telling the truth.”). Indeed, this Court has recognized the fundamental nature of the right to a jury trial in criminal cases, *see Duncan*, 391 U.S. at 149-53, and has emphasized the essential protections that juries provide to criminal defendants, *see id.* at 151-53; *see also Williams v. Florida*, 399 U.S. 78, 87 (1970) (“[H]istory reveal[s] a long tradition attaching great importance to the concept of relying on a body of one’s peers to determine guilt or innocence as a safeguard against arbitrary law enforcement.”). The underlying rule reduces the fact-finding power of the jury and “rob[s] [the jury] of the responsibility to perform the precise functions the Founders most wanted it to perform.” *Foster*, 394 U.S. at 447 (Black, J., dissenting); *see also Ewing’s Lessee*, 36 U.S. (11 Pet.) at 51.

“Rules of evidence are designed in the interests of fair trials.” *United States v. Augenblick*, 393 U.S. 348, 352 (1969). “[U]nfairness in result,” however, “is no sure measure of unconstitutionality.” *Id.* The Due Process Clause mandates that criminal trials be conducted according to the rules and procedures set forth in the Constitution and formulated by the responsible legislative body. However, it “leaves to the States and to the people

all these questions concerning the various advantages and disadvantages of admitting certain types of evidence.” *Foster*, 394 U.S. at 449 (Black, J., dissenting); *see also Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). The Due Process Clause does not authorize the judiciary to substitute its views of fairness for that of the People.

B. At A Minimum, The Due Process Clause Requires “Improper State Action” Before Eyewitness Identification Evidence Can Be Excluded From A Criminal Trial.

Although this Court has not been asked to revisit the legitimacy of this substantive due process rule here, it should do so in an appropriate case. In light of the rule’s weak foundation, however, the Court should not extend it, per Petitioner’s request, to bar the admission of “unreliable” eyewitness identification testimony absent improper state action. By its terms, the Fourteenth Amendment provides that “No State shall” violate its command. U.S. Const. amend. XIV, § 1. But it “erects no shield against merely private conduct, however ... wrongful.” *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (quotation omitted); *see also Tarkanian*, 488 U.S. at 191. This limitation extends fully to the criminal arena. *See Connelly*, 479 U.S. at 165.

Accordingly, when this Court has explained that the Due Process Clause guarantees a criminal defendant “[t]he right to a fair trial,” it has been equally clear that this right “imposes on *States* certain duties consistent with their sovereign obligation to ensure that justice shall be done in all criminal prosecutions.” *Cone v. Bell*, 129 S. Ct. 1769, 1772 (2009) (emphasis added and quotation

omitted). Private conduct does not suffice—even “[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.” *Connelly*, 479 U.S. at 165. Thus, the first question in any due process challenge to a criminal conviction has always been whether the State engaged in misconduct, i.e., “improper state action” as the New Hampshire Supreme Court described it, App. 10a (quotation omitted); *see, e.g., Connelly*, 479 U.S. at 167 (“[C]oercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment”). Absent state misconduct, “there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.” *Id.* at 164; *see also Lisenba*, 314 U.S. at 237 (“If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction he has been denied due process of law.”). The necessity of state misconduct fulfills “[t]he aim of the requirement of due process,” which “is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.” *Lisenba*, 314 U.S. at 236.

The Court’s eyewitness identification jurisprudence is not to the contrary. In no case has the Court dispensed with the required element of improper state action. *See, e.g., Manson*, 432 U.S. 98 (unnecessarily suggestive photographic identification); *Biggers*, 409 U.S. 188 (unnecessarily suggestive stationhouse showup); *Foster*, 394 U.S. 440 (lineup where accused was placed with considerably shorter men, followed by repeated showups after no positive identification had been made); *Simmons*,

390 U.S. 377 (affirming the propriety of the FBI's resort to photographic identification); *Stovall*, 388 U.S. 293 (considering propriety of hospital room show-up in which the accused was handcuffed to one of five police officers present and was the only African-American in the room); *Gilbert v. California*, 388 U.S. 263 (1967) (overly suggestive lineup arranged by federal and state officers).

All of these decisions make clear that Petitioner has taken out of context the Court's statement that "reliability is the linchpin" in determining admissibility in a due process challenge. *Brathwaite*, 432 U.S. at 114. Although reliability of the eyewitness identification evidence may ultimately determine admissibility, improper state action is necessary for the Due Process Clause to be implicated in the first place. Improper state action is the necessary link between unreliable eyewitness identification evidence and a due process violation. *See, e.g., Connelly*, 479 U.S. at 165 ("The [Colorado] court, however, concluded that sufficient state action was present by virtue of the admission of the confession into evidence in a court of the State. The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other."). As Petitioner concedes there was no improper state action, the New Hampshire Supreme Court correctly rejected his claim. *See Resp. Br.* at 43-48.

II. THERE IS NO JUSTIFICATION FOR DISPENSING WITH THE “IMPROPER STATE ACTION” REQUIREMENT IN THE CONTEXT OF EYEWITNESS IDENTIFICATION EVIDENCE.

Because the rule urged by Petitioner, which would dispense with the requirement of improper state action, finds no support in the Court’s decisions, he effectively argues for the overruling of *Stovall* and its progeny. *See* Resp. Br. at 35. But there is no reason for the Court to fashion a new rule of constitutional law that would eliminate the improper state action element from a due process challenge to eyewitness identification evidence and transform routine questions of reliability into an issue of constitutional magnitude. *See Harker Heights*, 503 U.S. at 125.

First, federal and state law already provide ample safeguards that protect against the admission of unreliable eyewitness identification evidence. Our Constitution wisely constructed an adversarial system containing several “time-tested mechanisms” for ensuring that a criminal verdict is “the product of fair procedure based upon reliable evidence.” Resp. Br. at 20-28. The principal protection of evidentiary reliability is the Confrontation Clause, which guarantees that all testimony will be subject to “testing in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61. Among other protections for the accused, the Constitution also guarantees the right to counsel and the right to trial by jury, both of which serve to ensure that verdicts are based upon reliable evidence. *See Nix*, 467 U.S. at 446 (“The Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered

evidence may be tested in cross-examination.”); *Herring v. New York*, 422 U.S. 853, 863 n.15 (1975) (“[T]he ‘collective judgment’ of the jury ‘tends to compensate for individual short-comings and furnishes some assurance of a reliable decision.’” (quoting Lewis Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 4 (1966))).

In addition to these constitutional safeguards, federal and state evidentiary rules serve to ensure verdicts based upon reliable evidence. As this Court has explained, reliability “is a matter to be governed by the evidentiary laws of the forum, ... and not by the Due Process Clause of the Fourteenth Amendment.” *Connelly*, 479 U.S. at 167 (citation omitted). Consistent with that design, Congress enacted the Federal Rules of Evidence so “that the truth may be ascertained and proceedings justly determined.” Fed. R. Evid. 102. Under the Federal Rules, any evidence (including eyewitness identification evidence) “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Fed. R. Evid. 403. The States—including New Hampshire—have similar evidentiary rules. *See* N.H. R. Evid. 403. As a result, there is no need to create a new rule under the Due Process Clause to address the reliability of eyewitness identification evidence obtained without improper state action. Congress and the States have responded to the concern.

Second, deterring state misconduct is the principal rationale for an exclusionary rule, *see Connelly*, 479 U.S. at 166 (“The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution.” (citing *United States v. Leon*, 468 U.S. 897, 906-913 (1984))), but unlike *Stovall*

and the decisions that followed it, Petitioner's preferred rule would not advance this. After all, where there is no requirement of improper state action, there is no state misconduct to deter. Exclusion of eyewitness identification evidence obtained without state misconduct would have *no* "influence on police behavior." *Brathwaite*, 432 U.S. at 112. To be sure, deterrence is not the only goal of the Court's jurisprudence in this arena; but it nonetheless is an important goal. *Id.* at 111-13 (highlighting the goals of deterrence of police misconduct, the reliability of eyewitness identification evidence and the administration of justice as "interests to be considered and taken into account").

Third, questions of evidentiary reliability are better left to the collective wisdom and common sense of the jury. This Court has so recognized: "We 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. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Brathwaite*, 432 U.S. at 116. Rather than invade the province of the jury by excluding what is undoubtedly relevant evidence, a court should employ appropriate jury instructions to assist the jury in making reliability determinations. *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) ("[T]he proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform. Indeed, as the cases before us demonstrate, the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence.").

The model criminal jury instructions outlined by the New Hampshire Bar Association (NHBA) offer a good example of how jury instructions assist a jury in resolving the type of reliability question at issue here. The NHBA model instruction on “Identification” is based upon the instruction set forth in *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972). See N.H. Bar Association, Criminal Jury Instructions, Drafting Committee Version, at 29 nn. 1, 3 (Sept. 2010), *available at* <http://www.nhbar.org/uploads/pdf/CJI.pdf>. The model instruction explains that “[t]he value of identification testimony depends on the opportunity the witness had to observe the person who committed the crime at the time of the crime and to make a reliable identification later.” *Id.* at 29. It then lists several factors that may be considered by the jury in evaluating identification evidence, including:

- “[t]he length of time available for the observation”;
- “[t]he distance between the witness and the person observed”;
- “[t]he lighting conditions”;
- “[t]he witness’s degree of attention to the person observed”;
- “[t]he accuracy of any prior description of the alleged perpetrator”;
- “the length of time that elapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant”;

- the fact “that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one that results from the presentation of the defendant alone to the witnesses”;
- whether “the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him or her for identification,”; and
- whether there was “any occasion in which the witness failed to make an identification of the defendant.”

Id. at 29-30.

Jury instructions like this easily can be modified to fit the facts of a particular case and thus aid the jury in making reliability determinations. Indeed, the factors listed in the NHBA model instruction more than account for the circumstances Petitioner highlighted in arguing that the eyewitness identification in this case was unreliable. *Compare id.* with Pet. Br. at 3-6 (the witness observed the suspect from the “second or third floor” at “approximately 2:30 a.m.” when the “parking lot was dark” and “did not provide any details as to the suspect’s features, clothing, facial hair, or any other identifying characteristics” and later “was unable to identify anyone” in “a photographic array containing [Petitioner’s] picture”; Petitioner “was standing with a uniformed officer in the parking lot where the crime occurred” and “was the only black male on the vicinity”). This illustrates both that the present case is an ordinary case and that there is no need for the new constitutional rule Petitioner urges.

The trial court in fact gave the jury a *Telfaire*-type instruction in this case. App. 399a-401a. And there is no indication that the jury failed to properly consider the evidence and render an appropriate verdict. Indeed, the jury apparently gave some of the State's proffered evidence more weight and some less, as it reached a split verdict, finding Petitioner guilty of theft, but acquitting him of the charge of criminal mischief.⁴

* * *

“By extending constitutional protection to an asserted right or liberty interest,” the Court “to a great extent, place[s] the matter outside the arena of public debate and legislative action. [The Court] must therefore exercise the utmost care whenever [it is] asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal quotation and citation omitted). The Court should be especially cautious where, as here, creating such a right would needlessly “thrust the Federal Judiciary into an area previously left to state courts and legislatures.” *Osborne*, 129 S. Ct. at 2322 n.4. Courts and legislatures have crafted rules that amply protect criminal defendants from the use of unreliable evidence and the Constitution safeguards their trial rights in myriad other ways. As a result, there is simply no reason to break new constitutional ground

4. Under New Hampshire law, “[a] person is guilty of criminal mischief who, having no right to do so nor any reasonable basis for belief of having such a right, purposely or recklessly damages property of another.” N.H. Rev. Stat. § 634:2(I) (2009).

here by creating a new substantive due process right to the exclusion of “unreliable” eyewitness identification evidence. The Court should adhere to its precedent and reject Petitioner’s novel constitutional claim.

CONCLUSION

For the reasons set forth herein, the judgment of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

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