

Court of Appeal No. [REDACTED]

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA [REDACTED]

[REDACTED]

Petitioner,

v.

[REDACTED]

Respondent,

v.

[REDACTED]

Appellant.

On Appeal from a Judgment in the
Superior Court for [REDACTED]

Case No. [REDACTED]

[REDACTED], Judge Presiding

**APPLICATION FOR LEAVE TO FILE BRIEF AS AMICI
CURIAE;**

**PROPOSED AMICUS BRIEF IN SUPPORT OF
APPELLANT [REDACTED]**

EQUAL JUSTICE SOCIETY

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS
CURIAE
INTERESTS OF AMICUS CURIAE APPLICANT

A **Safe Place** was founded in 1978 and serves the Oakland and larger East Bay populations. Its mission is to decrease domestic violence by providing victims, survivors, and their children with a safe shelter and resources to break the cycle of violence through outreach and education to at-risk populations and diverse communities. A Safe Place works to offer culturally responsive support to survivors from vulnerable populations. A Safe Place stands in solidarity with survivors of domestic violence who face discrimination due to implicit bias in the court system.

The mission of the **Center for the Pacific Asian Family** (CPAF) is to build healthy and safe communities by addressing the root causes and consequences of family violence and violence against women, with a focus on meeting the specific cultural and language needs of Asian and Pacific Islander women and their families. While located in Los Angeles metropolitan area, CPAF is a member of the Culturally Responsive Network to End Domestic Violence (CRDVN) and collectively serve marginalized communities in California. CPAF works in the community, the courts, and in other institutions and forums to advocate for and support survivors of domestic violence. CPAF takes a partnership approach, working with other communities toward the common goal of eradicating all forms of violence, including violence against Black people. CPAF thus has a strong interest

in ensuring that Black women survivors of domestic violence and all who seek protection, redress, and justice in family court proceedings and in the legal system in general, can do so in a system where implicit and other forms of bias are acknowledged and addressed to the fullest extent possible.

Equal Justice Society (“EJS”) is a national civil rights organization whose mission is to transform the nation’s consciousness on race through law, social science, and the arts. Through litigation and advocacy, EJS combats race and other forms of discrimination in the legal system, education system, and government. EJS trains extensively on implicit bias and coordinates the National Implicit Bias Network, which connects social scientists, lawyers, and activists to advance understanding of implicit bias and how it works on both an individual and structural level. Through its work, EJS sees daily how implicit bias disproportionately harms Black women and other groups who already face significant obstacles to family security and stability, fair opportunity, and justice. EJS has a strong interest in addressing these inequities by preserving and promoting statutory and other types of mechanisms that mitigate and minimize implicit bias in the legal system and throughout society.

My Sister’s House (MSH) is a Sacramento community-based organization whose mission is to serve Asian and Pacific Islander and other underserved women and children impacted by domestic violence, sexual assault, and human trafficking by providing a

culturally appropriate and responsive safe haven, job training, and community services. For over twenty years, My Sister's House has assisted survivors with outreach and education efforts to help prevent gender violence; a 24/7 multi-lingual help line which currently assists approximately 3000 survivors a year; an emergency shelter and transitional shelters, legal services, mental health services, and job training and other support in person for more than 500 survivors a year. MSH's culturally-responsive service focus naturally attracts many Black and African women; MSH started a Black survivors group earlier this year. Through this work MSH recognizes the unfortunate racial and gender bias that Black and African survivors face in our justice system and in our communities. Ultimately, this bias makes it difficult for these survivors to break the cycle of violence in their families. To varying degrees, this racial and gender bias is shared and experienced by survivors of a wide variety of ethnicities. My Sister's House has a strong interest in fair treatment and fair outcomes in the courts, especially when it comes to mothers/survivors seeking to end the cycle of violence that their children may experience and/or witness.

Young Women's Freedom Center (YWFC) was founded in 1993 to empower and inspire cis and trans young women, trans young men, and gender-expansive young people who have been disproportionately impacted by incarceration, racist and sexist policies, the juvenile and criminal justice systems, and/or the underground street economy, to create positive change in their lives and communities. YWFC has worked with a significant

number of young Black women and their children to challenge biased and unfair treatment in the criminal justice system and civil court system, including family court. YWFC works with individuals and communities to root out system biases that pathologize the basic needs of mothers and children. YWFC provides our members with education on their legal rights so that they can be advocates for themselves and their children. In cases where abuse and visitation have been major focal points for court involvement, YWFC has seen bias play out in ways that harm Black mothers and their children. YWFC's mission and work show its strong interest in supporting Black women and all those who are disproportionately harmed by bias to achieve justice in the courts and in all systems.

PURPOSE OF THE AMICUS CURIAE BRIEF

To the Presiding Justice, [REDACTED] and to the Associate Justices of the [REDACTED]:

The Equal Justice Society (EJS) requests leave to file the attached proposed brief as amicus curiae and counsel for amici A Safe Place, Center for the Pacific Asian Family, My Sister's House and Young Women's Freedom Center, in support of the appellant, [REDACTED]. (Cal. Rules of Court, rule 8.200 (c).)

Founded in 2000, EJS is a national nonprofit civil rights organization based in Oakland, California. Its mission is to

transform the nation's consciousness on race through law, social science, and the arts. Through federal and state litigation and advocacy, EJS combats race and other forms of discrimination and promotes equity and fairness in the legal system, education system, and government.

EJS is dedicated to ensuring that our U.S. and California constitutions and all our civil laws work fairly for people of color, women, and for all. A key component of EJS's work, to preserve and build upon civil rights law, is educating decision-makers and the public on the negative effects of implicit bias in our structures and institutions and the need to understand, analyze and redress these harmful effects. Working with academics and social scientists, EJS has developed expertise and provided numerous presentations, trainings, and seminars on implicit bias and how it can and should be redressed through law and policy. These include legal trainings for attorneys on established and developing jurisprudence on unconscious and implicit bias in which courts have recognized implicit bias and its effects regarding unlawful discrimination or have admitted and considered expert testimony on implicit bias such cases.

EJS has served as counsel for amici in U.S. Supreme Court and lower court cases in furtherance of jurisprudence that considers modern scientific understanding of the ways that race discrimination operates in our institutions. See, e.g. *Texas DCHA v. Inclusive Communities Project*, 137 S.Ct. 2507 (2015) (amicus brief submitted in support of respondent civil rights

organization on how implicit and unconscious bias operate in affordable housing and zoning decisions, Brief for Coalition of Sociologists, Social Psychologist, and Legal Scholars as Amici Curiae Supporting Respondents, Inclusive Communities, 135 S. Ct. 2507 (2015) (No. 13–1371), 2014 WL 740580; majority opinion recognized disparate impact liability’s role (under the Fair Housing Act) as “permit[ting] plaintiffs to counteract unconscious prejudices and disguised animus as disparate treatment.” (Opinion at 2522); *Grutter v. Bollinger*, Brief for Coalition for Economic Equity et al. as Amici Curiae Supporting Respondents, 593 U.S. 306 (2003) (No. 02–241), 2003 WL 398358 (Court upheld the race-conscious admissions policy at the University of Michigan Law School); and *Yu v. Idaho State University*, 15 F.4th 1236 (9th Cir. 2021), Brief of Amici Curiae Equal Justice Society, et al., 2020 WL 7701235 (C.A.9) (brief on social science and jurisprudence on the probative value of implicit bias evidence in Title VI and Title VII discrimination cases.)

Appellant [REDACTED] seeks reversal of the trial court’s ruling that effectively granted Respondent joint custody of the parties’ minor child despite Respondent’s documented abuse of the child and, as the trial court acknowledges in its restraining order against Respondent, of Appellant. As established through scientific studies and as now broadly accepted by California courts and other courts, implicit or unconscious bias is pervasive in our institutions and can create an especially daunting barrier

to justice for Black women litigants like ██████████, irrespective of a decision-maker's intentions or wishes.

But there are mechanisms and “checks” that can help mitigate such bias. According to a study by the National Center for State Courts, a particularly helpful strategy for mitigating bias is to ensure that decision makers, including judges and jurors, write out their reasons for a decision before rendering it. See, *Helping Courts Address Implicit Bias: Addressing Implicit Bias in the Courts*, National Center for State Courts, available at https://www.nccourts.gov/assets/inline-files/public-trust-12-15-15-IB_Summary_033012.pdf?q_DMMIVv0v_eDJUa1ADxtw59Zt_svP

g. A primary issue in the instant case is the absence of a statement of decision which, based on the language of Family Code section 3022.3, Appellant and amici assert are required in cases such as this. A statement of decision is a written explanation of a court's rationale for a decision and, as the aforementioned study highlights, can function as a check against implicit bias. Statements of decision are thus especially critical in cases involving litigants like ██████████ who are particularly prone to implicit bias and its ill effects.

Amici, collectively, are organizations dedicated to justice and safety for domestic violence survivors and to the equitable treatment of Black women and other women of color in family court proceedings and the broader legal system. The proposed brief contains discussion and analysis of implicit bias, its potential harmful effects in cases like the instant case, and the

important potential of mechanisms like Family Code section 3022.3 to help reduce bias—considerations which amici believe are important to this appeal.

No party, nor counsel for any party in this appeal has authored any part of the accompanying proposed amicus curiae brief. EJS attorneys Christina Alvernaz, Mona Tawatao, and Eva Paterson, with the research assistance of EJS law clerks Bradan Litzinger, Derrick Luster, and Maeve Estrada, are the only authors of this brief. Further, no person or entity has made any monetary contributions to fund the preparation or submission of this brief.

CONCLUSION

Based on the foregoing, amici respectfully request leave to file the attached proposed brief as amicus curiae and amici counsel in this matter.

DATED: November 22, 2021

Respectfully submitted,

By: ___/s/_____

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AMICUS CURIAE BRIEF

INTRODUCTION

Amici curiae submit this brief in support of Appellant [REDACTED], a Black mother and survivor of domestic violence perpetrated by Respondent, [REDACTED]. [REDACTED] seeks sole custody of the parties' child in the interest of the child's safety. She appeals the trial court's decision to permit joint custody despite Respondent's documented repeated physical and verbal abuse of the child. The trial court rendered its decision without written explanation or reasoning. An issue central to this appeal is whether the court erred in declining [REDACTED]'s request, made pursuant to Family Code section 3022.3, for a statement of decision that explains the factual and legal basis for the court's ruling.

As a Black woman, mother, and survivor of domestic violence, [REDACTED] faces multiple harmful statistical disadvantages that arise from unchecked implicit biases recognized by the California judiciary and many courts across the country. "Implicit bias" refers to unconsciously held thought patterns and associations towards members of certain groups, most often in reference to race or gender. Social science research, including court studies, shows that implicit biases toward Black litigants, women, and victims of domestic violence enter the courtroom when those biases are unexamined or unchecked by routine decision-making procedures that can mitigate such bias. This research also includes studies showing that decision-makers hold

biases that result in unfair or harmful outcomes for women like [REDACTED] whose children are victims of abuse. Amici curiae A Safe Place, Center for the Pacific Asian Family, Equal Justice Society, My Sister’s House and Young Women’s Freedom Center request that the Court consider [REDACTED]’s appeal with this research and the availability of bias-reducing measures in mind. Such consideration is particularly important in cases like [REDACTED] [REDACTED]’s given that court studies have shown that mechanisms that require triers of fact to explain the basis and reasoning for their decisions before they are made, as with section 3022.3, can be effective in reducing bias. Courts have made critical strides to eliminate explicit racial and gender bias from the courtroom, and [REDACTED] is precisely the type of litigant that the California courts have acknowledged to be uniquely vulnerable to *implicit* race and gender biases in the courtroom as well. The circumstances of this appeal underscore the very reasons that the California judiciary has chosen to implement trainings and other checks on courtroom bias to ensure equitable outcomes for litigants.

ARGUMENT

I. Implicit Bias Is Pervasive in Society Among Individuals and Across Institutions.

Nelson Mandela, one of the most influential anti-racists in history, once wrote that he experienced feeling “panic” when he noticed that the flight that he boarded on a trip to Ethiopia in the early days of the anti-apartheid movement was piloted by a Black

man. Catching himself in this unconscious thought pattern, he lamented: “I had fallen into the apartheid mindset, thinking Africans were inferior and that flying was a white man’s job. I sat back in my seat and chided myself for such thoughts.” (Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (1994) p. 46.) This anecdote is illustrative of the reality that even those who actively work to combat racist stereotypes will struggle when those stereotypes inevitably surface as we go about our lives. If left unexamined, these stereotypes will subconsciously drive our decision-making processes. The vast amount of research accumulated across several decades supports this fact: that the implicit bias we each have is ubiquitous, warping decisions that call for objectivity and integrity. (Bornstein, *Reckless Discrimination* (2017) 105 Cal. L. Rev. 1055, 1095–96.); see also *Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity* (1995) 47 Stan. L. Rev. 1161, 1187-1218 (citing and summarizing in detail the social science on implicit bias).)

The term implicit bias refers to socially entrenched stereotypes of, and attitudes toward, historically marginalized groups that affect our perception of individuals within those groups, without our conscious knowledge. (*Implicit Bias Explained*, (2021) Perception Institute <https://perception.org/research/implicit-bias/> [as of Sep 1, 2021].) We now understand that the stereotypes we hold about others based on membership within a particular group (for example, race, gender, or nationality) can be negative,

positive, or neutral, and that we act upon these stereotypes automatically. *Id.* Stereotyping can be characterized as a sorting mechanism within our brains, which helps to explain why knee-jerk associations occur without conscious forethought. (Bornstein, *Reckless Discrimination* (2017) 105 Cal. L. Rev. 1095-96.) Today, it is broadly accepted that implicit bias exists in just about everyone, and it is widespread across our institutions: in the employment realm, in healthcare, in academia, in the courtroom, and in day-to-day life.

While implicit bias is a form of bias or racism, unacknowledged implicit bias is not the same as overt or explicit racism. People who are overtly racist knowingly hold the belief that people of color are inferior or “less than” in all or some aspects of life. (Daumeyer, et al., *Consequences of attributing discrimination to implicit vs. explicit bias* (2019) *Journal of Experimental Social Psychology* 84, p. 1.) Explicit racism comes with conscious awareness that one’s attitude about a particular group does or may affect their behavior towards members of that group. *Id.* Implicit biases, on the other hand, are initially developed “from the mental schemas all humans develop in learning to process the complexity of the world,” and therefore all people develop such biases to some extent. (Biwer, *Implicit Bias in the Judiciary: Confronting the Problem Through Normalization* (2019) 7 Ind. J. L. & Soc. Equal. 264, 267.) Most often these schemas are developed in adolescence. The nature of implicit biases and associations means that, if left unexamined or unacknowledged, otherwise egalitarian-minded people may “act

in ways that perpetuate bias and inequality” that are at odds with an egalitarian worldview. (Kristof, *Opinion, Is Everyone a Little Bit Racist?*, N.Y. Times (Aug. 27, 2014)

<https://nyti.ms/2kavMcg>.) Studies have shown that human behavior often conflicts with expressly held attitudes and values in this way; because this process is subconscious, it makes sense that we find the resulting harms caused by unexamined implicit bias across the board. (Meissner, et al., *Predicting Behavior with Implicit Measures: Disillusioning Findings, Reasonable Explanations, and Sophisticated Solutions* (2019) Front. Psychol. <https://doi.org/10.3389/fpsyg.2019.02483>.)

There are discernible patterns that reveal the role of implicit bias in virtually every sphere of life. In the healthcare field, healthcare providers’ implicit biases have resulted in fewer or different recommendations for treatment of Black patients than for similarly situated white patients. One study found that medical residents with greater levels of implicit racial bias were actually less likely to recommend a particular chest treatment for a Black patient than for a white patient with identical symptoms. (Zestcott, Blair and Stone, *Examining the presence, consequences, and reduction of implicit bias in health care: a narrative review* (2016) 19 Group Process Intergroup Relat. 528–42; see also Hall, et al., *Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review* (Dec. 2015) 105 (12) Am J Public Health e60–e76.) Racial discrepancies in healthcare provision have led to the morbid fact that expecting mothers in the United States who are

Black are *three times* as likely to die from pregnancy-related complications as white expecting mothers.¹

In the employment realm, hiring managers are expected to be, and often think they are, unbiased and fair in their employment decisions, but statistics reveal that Black employees are often victims of employment decisions based empirically—though typically not explicitly nor admittedly—on race. (Biwer, *Implicit Bias in the Judiciary*, 7 Ind. J. L. & Soc. Equal. at 270-71; see also Rooth, *Implicit Discrimination in Hiring: Real World Evidence*, Inst. for the Study of Lab. Discussion Paper No. 2764 (2007).) A 2003 study found that during the hiring process, employers tended to favor white candidates with criminal records over Black candidates with no such history. (Pager, *The Mark of a Criminal Record* (2003) 108 American Journal of Sociology 5, 937, 958.)

In housing, Black and Latinx people face much higher rejection rates for mortgage loans when attempting to purchase a home as compared to similarly situated white borrowers. In Baltimore, a city where Black residents outnumber white residents two-to-one, one study found that banks granted mortgages to white residents twice as many times as to Black residents. (Love, *Study: Racial*

¹ In California, while the state’s overall maternal death rate has decreased during the last decade, the death rates for Black women and women of color remain disproportionately high. (*Infographic: Racial/Ethnic Disparities in Pregnancy-Related Deaths — United States, 2007–2016* | CDC (2021) CDC.gov <https://www.cdc.gov/reproductivehealth/maternal-mortality/disparities-pregnancy-related-deaths/infographic.html> (as of Nov 11, 2021). See also California Maternal Quality Care Collaborative, CA-PAMR (Maternal Mortality Review) <https://www.cmqcc.org/research/ca-pamr-maternal-mortality-review>.)

Discrimination In Mortgage Lending Continues To Impact African Americans, With A ‘Black’ Name Lowering One’s Credit Score By 71 Points (Jan. 31, 2016)
<https://atlantablackstar.com/2016/01/31/study-racial-discrimination-in-mortgage-lending-continues-to-impact-african-americans-with-a-black-name-lowering-ones-credit-score-by-71-points/> [as of Nov. 11, 2021].)

In education, bias leads to the over-discipline—and often, the outright exclusion via school expulsions and transfers—of Black and Latinx children in K-12 schools. In California, while overall suspension rates for children have decreased significantly over the past decade, the egregiously disproportionate suspension rates remain for Black students in comparison to white students for the same or similar behavior. (See, e.g., Losen, et al., *Closing the School Discipline Gap in California: Signs of Progress*, (Nov. 2015) The Center for Civil Rights Remedies; see also Frausto, et al., *Stopping the School-to-Prison Pipeline: An Institutional Approach* (2017) The Systemic Justice Project, Harvard Law School.) Each of these issues has proved difficult to overcome because of the “implicit” nature of the many individual biases that ultimately caused the many and wide-ranging impacts

discussed here. These biases may have been hidden before, but now that we know they exist, we must act accordingly.

II. The California Judiciary Recognizes Implicit Bias and the Importance of Training and Other Measures to Address it in the Courtroom.

Impartiality is a maxim of the judiciary. But we now understand that unexamined biases are the door through which extrajudicial stereotypes and attitudes based on race, gender, and other marginalized identities enter the courtroom. (Kang, *Implicit Bias: A Primer for Courts* (Aug. 2009)

https://www.courts.ca.gov/documents/BTB_XXII_WEDF_3.pdf.)

One study administered Implicit Association Tests² with 133 judges from three different regions of the United States, finding that judges tend to harbor implicit bias at the same levels as the rest of the country. (Rachlinski, et al., *Does Unconscious Racial Bias Affect Trial Judges?* (2009) 84 Notre Dame L. Rev. 1195, 1221.) Another study, however, found that most federal and magistrate judges believed themselves to be “in the top 25% of respective colleagues in their ability to make decisions free from

² The Implicit Association Test (IAT) is a bias measuring tool created by researchers at Harvard’s Project Implicit. The IAT captures closely held associations between concepts (e.g., Black people or gay people) and evaluations (e.g., good or bad) or stereotypes (e.g., athleticism, clumsiness) by measuring the reaction time it takes for an individual to associate those concepts. Given the unconscious nature of implicit bias, measuring such biases can be a difficult task, but the IAT’s method of measuring reaction times utilizes a method that has been used in psychology for over a century. (About the IAT, implicit.harvard.edu (2011), <https://implicit.harvard.edu/implicit/iatdetails.html> [as of Nov. 17, 2021]; see also Biwer, *Implicit Bias in the Judiciary*, 7 Ind. J. L. & Soc. Equal. at 268.)

racial bias”—a statistical impossibility. (Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier* (2017) 126 Yale L.J.F. 391, 397.) This data reflects an understandable desire among judges to decide cases impartially, free from any implicit biases accumulated throughout life. This is especially true for those who have worked hard to eliminate any explicit bias and assume that they no longer allow prejudice to affect their decision-making. (*Addressing Implicit Bias in the Courts* (2012) National Center for State Courts https://www.nccourts.gov/assets/inline-files/public-trust-12-15-15-IB_Summary_033012.pdf?q_DMMIVv0v_eDJUa1ADxtw59Zt_svPg [as of Nov 15, 2021].) But we also know from decades of research that the mere desire to reduce bias does not in fact reduce bias. *Id.* To employ a spiritual phrase, the spirit is willing, but the flesh is weak.

The California judiciary has recognized that implicit bias can and does affect judicial decision-making processes and has committed itself to reducing the impact of implicit bias in its courtrooms. California courts have incorporated implicit bias presentations and trainings into court meetings. (See, e.g., *Access, Fairness, and Diversity: Toolkit of Educational Resources for California Courts* (2016) <https://www.courts.ca.gov/partners/documents/Access-Fairness-and-Diversity-Toolkit-for-Courts.pdf>; see also National Implicit Bias Network, <https://implicitbias.net/training> [as of Aug. 1, 2021] (showing list of past implicit bias trainings).) The California Rules of Court expressly require all judges and judicial

officers to “participate in education on unconscious bias, as well as the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct” at least once during each three-year continuing education period. (Cal. Rules of Court, rule 10.469(e)(2).) The Judicial Council of California’s Center for Judicial Education and Research provides a number of bias reduction resources curated specifically for California’s approximately 2,500 justices, judges, and subordinate judicial officers and nearly 20,000 court staff. (*Fact Sheet: Center for Judicial Education and Research* (2019) Judicial Council of California

<https://www.courts.ca.gov/documents/trainingedu.pdf>.)³

Similarly for attorneys, the California State Bar will require that the Mandatory Continuing Legal Education curriculum for all licensees includes training on implicit bias and promotion of bias-reducing strategies beginning on January 1, 2022. (Cal. Bus. & Prof. Code § 6070.5.)

Assembly Bill 242, legislation the Judicial Council supported, authorizes the Judicial Council to develop implicit bias trainings for all public-facing court staff, effective at the start of 2021. The

³ See also Bench Handbook on Fairness and Access <http://www2.courtinfo.ca.gov/protem/pubs/Fairness&Access.pdf>; Kang, *Implicit Bias: A Primer for Courts*, (Aug. 2009) https://www.courts.ca.gov/documents/BTB_XXII_WEDF_3.pdf; *The Neuroscience and Psychology of Decisionmaking, Part 3: Dismantling and Overriding Bias* (video) <http://www2.courtinfo.ca.gov/cjer/judicial/1015.htm>; *Keeping Kids in School and Out of Court Initiative* (program addressing racial and ethnic disparities in California schools and courts) <http://www.courts.ca.gov/23902.htm>; *From Oscar Grant to Trayvon Martin—A Dialogue about Race, Public Trust, and Confidence in the Justice System* <http://www2.courtinfo.ca.gov/cjer/judicial/1916.htm>.

bill text describes implicit bias as disfavoring members of marginalized groups and recognizes that “judges and lawyers harbor the same kinds of implicit biases as others.” (Assem. Bill No. 242 (2019-2020 Reg. Sess.) § 1.) The law is intended to address injustices in the courtroom that often result where biases remain unacknowledged. In introducing AB 242, the bill’s author Assemblymember Sydney Kamlager-Dove explained the importance of acknowledging and codifying the impacts of implicit bias in a way that provides for

training regarding the history and present consequences of the implicit biases that judges and subordinate judicial officers may hold on issues such as sentencing of a defendant that may result in unacceptable disparities treatment towards people of color, as well as the strategies for how to reduce the impact of these biases on disadvantaged people of color who come before the court.

(Assem. Com. on Judiciary, AB 242, 116 Cong. 7-11, (2019).)

Accordingly, with AB 242’s passage, the state legislature has formally recognized the social science research and data on implicit bias and its real-world impact in the courtroom, “even when seemingly ‘race neutral’ policies are applied.” *Id.*

While the results of implicit bias research and the real-world consequences they predict are disturbing, particularly for those who do not want any negative subconscious biases to infect their decision-making, there is also evidence that implicit biases are malleable. (Dasgupta and Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals* (2001) *Journal of Personality and Social Psychology*, Vol. 81. No. 5, 800-01.). The

California judiciary also recognizes that implicit bias can be reduced, given its commitment to reducing courtroom bias through acknowledgement and training. Such recognition is not to be taken lightly, as the judiciary has made clear that education and toolkits aimed at bias reduction are critically important to ensure fair, impartial decision-making. Furthermore, this recognition is critical not just for those who uphold the judiciary's integrity, but for those members of historically marginalized communities who are so often adversely impacted by the same biases we seek to counteract.

III. Black Women Face Implicit Race and Gender Biases and the Intersection of the Two in the Courtroom and Related Institutions.

Black women face a unique set of negative assumptions about their competence based on both their race and their gender. One study by social psychologists found that Black women are evaluated “more harshly when things go awry than either [B]lack men or white women.” (Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality* (2014) 37 Harv. J. L. & Gender 185, 195-96 (citing a study by Rosette and Livingston, *Failure is Not an Option for Black Women: Effects of Performance on Leaders with Single Versus Dual-Subordinate Identities* (2012) 48 J. Experimental Soc. Psychol. 1162, 1165-66).) As a growing

number of advocates and judges understand today, an intersectional theory of bias is crucial in that it

reveals that [B]lack women suffer the combined effects of racism and sexism and therefore have experiences that are different from those of both white women and [B]lack men. This perspective enables us to analyze how structures of privilege and disadvantage, such as gender, race, and class, interact in the lives of all people, depending on their particular identities and social positions.

(Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers* (2012) 59 UCLA L. Rev. 1474, 1491.) When race and gender biases are compounded, Black women are uniquely impacted, and unfortunately are more vulnerable to negative outcomes in court proceedings including racially charged prosecutorial summations, disproportionate sentencing in criminal proceedings, and the use of peremptory challenges in jury selection. (Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response* (2018) 86 Fordham L. Rev. 667, 3103-04 (citing racially charged prosecutorial summations); Hinton, Henderson, and Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (2018) New York: Vera Institute of Justice, p. 8 (citing disproportionate sentencing); and Assem. Bill No. 3070 (2019-2020) (citing peremptory challenges disproportionately used against racial minorities).)

Collectively, these examples of obstacles that Black women face in the justice system show that race and gender bias can have a negative and unfair impact at each stage of both criminal and

civil trial proceedings, underscoring once again the importance of both recognizing and working to mitigate the influence of such bias in the courtroom.

A. Unchecked Implicit Bias Harms Individuals, Families, and Children in the Family Court System.

Family courts make decisions about child custody, visitation schedules, adoption, child and spousal support, divorce, child welfare, and the termination of parental rights. In these proceedings particularly, as is the case more widely, studies have shown the decisions of judges, like decisions of all members of our society, are affected by implicit bias. (Recall Mr. Nelson Mandela and his internal reaction to an African pilot.) In response, the Judicial Council for Child Support Commissioners and Facilitators offers a series of conferences on implicit bias for child support commissioners, who act as temporary judges and are responsible for hearing paternity and child support actions, evaluating evidence, and entering judgments and orders. (Conferences & Trainings, CAL. CTS.

<https://www.courts.ca.gov/7873.htm> (as of Aug. 3, 2021).)

The child welfare system offers unique insight because of how closely it is intertwined with the family court system. In the child welfare system, race and socioeconomic status unfortunately often impact decisions at every stage of the process from reporting, to foster care placements, to termination of parental rights. (Ellis, *Race and Poverty Bias in the Child*

Welfare System: Strategies for Child Practitioners (Dec. 17, 2019) Child Law Practice Today, American Bar Association Center on Children and the Law, January – December 2019.) One study exploring how Black families fare in the legal system when neglect and abuse are at issue found that “the differential response to children and families of color at important decision points in the child welfare system by professionals is often traced back to [explicit and implicit] racial bias.” (Weaver, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases* (2008) Berkeley Journal of African-American Law & Policy, Vol. 10, No. 2, 109, 116.)

Similarly, biases against women in custody cases are well documented. (See generally Meier & Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation* (2017) 35 Minn. J.L. & Inequality 311) (providing a literature review of scholarship on parental alienation and gender effects in child custody proceedings).) Implicit bias based on gender norms and stereotypes that appear in family court proceedings frequently disadvantage mothers. (Breger, *The (In)Visibility of Motherhood in Family Court Proceedings* (2012) 36 N.Y.U. Rev. L. & Soc. Change 555, 556). This “motherhood bias” contributes to much of the disproportionate statistical data against mothers in family courts nationally. *Id.* In fact, mothers are overrepresented in family court proceedings because of gendered stereotypes that punish mothers for failing to meet the “mythical ideal mother” standard.

Id. Karen Swift, in a study examining perceptions of motherhood in child neglect hearings, argued that mothers are often scapegoats because of the “structure and priorities of the current child welfare system” that targets primary caretakers using standards very few can meet. (Swift, *Manufacturing “Bad Mothers”*: *A Critical Perspective on Child Neglect* (1995), p. 120.)

B. Survivors of Domestic Violence in Family Court Face Bias About Abuse.

Women who have experienced domestic violence or whose children have been abused by a partner face societal and institutional blame for staying in the abusive relationship, with the troubling result that the woman’s abuse accusations are frequently denied and disbelieved. (Von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses* (1999) 27 W. State U. L. Rev. 111, 131.) Stereotypes about victims of domestic violence are behind the common impulse to immediately question the victim’s credibility, even before questioning the accused—questions that range from whether the abuse is a continuing problem if the victim has left their abuser, to questioning the victim’s judgment if they choose to stay with or return to the abuser. (Breger, *Reforming by Re-Norming: How the Legal System Has the Potential to Change A Toxic Culture of Domestic Violence* (2017) 44 J. Legis. 170, 180.) Even though such stereotypes tend to be misconceptions otherwise not rooted in the reality of the specific relationship in

question, “they often permeate societal views of why domestic violence continues in the home.” *Id.* In the courtroom, placing undue weight on the victim’s response to the abuse—rather than on the abuser’s actions and the harm the abuser caused to the victim(s)—makes it more likely that the victim may lose custody or be forced to share custody of their children with an abuser who may then transfer that abuse to the child. (Von Talge, *Victimization Dynamics* at 132.) This bias exists even among family and loved ones; domestic violence perpetrators’ parents often blame the victim for their child’s violent behavior. (Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color* (2000) 33 U.C. Davis L. Rev. 1009, 1026, fn. 65.)

Additionally, when there are claims that the male partner has been abusive, the male may still be seen as more credible “because his actions are more consistent with implicit behavioral expectations.” This helps to explain “why men are often granted joint parenting responsibilities—even when allegations of abuse exist.” (Struffolino, *The Devil You Don’t Know: Implicit Bias Keeps Women in Their Place* (2018) 38 Pace L. Rev. 260, 291.) Studies further demonstrate that “men who abuse their partners contest custody *at least twice as often* as non-batterer fathers.” (Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts*

Can Put a Stop to It (2017) 24 UCLA Women's L.J. 41, 58
(emphasis added).)

Bias against domestic violence victims is particularly strong when the victim in question is a Black woman seeking custody of a child. In instances where Black women have fought back against their abusers, jurors have “believed that the woman was to blame for her battering and the death of her partner.” (Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome* (1995) 1995 Wis. L. Rev. 1003, 1071.) By placing blame on Black mothers for their partner's abuse and other systemic deprivations in their children's lives, the legal system avoids “confronting the racism in the child welfare system and in the broader society” all while ignoring the harm to children that may result from separation from their mothers. (Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers* (2012) 59 UCLA L. Rev. 1474, 1489-90 (further stating that “[t]he child welfare system blames and punishes battered mothers for exposing their children to violence, just as it blames and punishes mothers for other family problems caused by systemic deprivations beyond their control.”).)

As a Black woman, [REDACTED] lives at the intersection of each of the biases and statistical disadvantages discussed. Her experience fighting for custody of her son—a battle inherently tied to finding safety for herself and her child, who are both victims of repeated, documented verbal and physical abuse—

must be considered along with the trial court's failure to apply to the instant case both the Family Code section 3044 presumption against granting joint custody to domestic abusers and the section 3022.3 statement of decision requirement. ■■■■■ ■■■■■ is precisely the type of litigant that the California judiciary has acknowledged is uniquely vulnerable to implicit race and gender biases in the courtroom, and an example of the reason that the judiciary has implemented checks on courtroom bias in various forms to ensure fairness across the board of litigants in California's court system.

IV. There are Existing Mechanisms that have been Shown to Reduce or Mitigate Implicit Bias in Institutional Processes.

“Not only do we need intelligent laws in place through legislation to combat domestic violence, but we then need to ensure that courts are effectively applying such laws in the courtroom to continue to work against unhealthy norms.” (Breger, *Reforming by Re-Norming*, 44 J. Legis. at 198.) In recent decades, researchers have tested and recommended many tools and mechanisms with the intent to reduce the effects of implicit bias in the courtroom. Relevant studies show that the ability to articulate reasoning behind decision-making is key to reducing implicit bias. (*Helping Courts Address Implicit Bias: Addressing Implicit Bias in the Courts*, National Center for State Courts, <https://www.nccourts.gov/assets/inline-files/public-trust-12-15-15->

In a project brief prepared by the National Center for State Courts (NCSC) and Race & Ethnic Fairness in Courts, several strategies designed to reduce implicit bias in state courts are explored for their uses and efficacy. *Id.* at 4. A common thread running through many of these tools is the emphasis placed upon a judge's ability to articulate her thinking and reasoning before making decisions. *Id.* at 7.

The first two strategies discussed in the NCSC brief involve staff trainings. The first is awareness training—to educate individuals on the concept and effects of implicit bias with the goal of inspiring change in the individuals who receive it. *Id.* at 4. The NCSC project indicates that this method is a good starting point to use in conjunction with other methods, recognizing that awareness that implicit bias exists alone is typically not enough to catalyze more equal outcomes. The second strategy the brief highlights is the provision of staff diversity trainings. *Id.* at 6. The project brief's authors suggest that employers should target leadership first for such trainings, because when leadership in the judiciary actively supports multiculturalism, for example, others will be influenced to follow. *Id.* As detailed above, the California judiciary and courts, among others, have largely adopted these strategies in some form.

The other bias-mitigating strategies or methods the study delineates include ensuring that judges be given more time to

slow down in cases involving disadvantaged group members. *Id.* at 8. Courts might additionally consider assessing stressors on judges, including time pressure, heavy caseloads, distractions, and even environmental concerns, such as loud construction near courthouses that may lead to rushed or poorly rendered decisions and in turn, bias. The study further suggests that courts adopt a peer review process, involving review of court transcripts, rulings, and other materials from past cases and provide feedback and suggestions for helpful tools. *Id.* at 11.

Perhaps the strategy most relevant to this appeal discussed in the NCSC study involves the implementation of routine checks throughout the decision-making process for possible biases. *Id.* at 7. Checks on bias can be applied in many ways. One tool for decision-making support is a formal note-taking process for judges and jurors to use while hearing cases to avoid relying on memory alone, which is known to be easily clouded by bias. *Id.* Indeed, the study stresses the importance of writing down and articulating one's reasoning while in the decision-making process, because this practice allows judges and jurors to clearly think through their own rationale before committing to a decision. This helps avoid a need to rationalize decisions post hoc. *Id.* Likewise, literal checklists and bench cards that spell out best practice questions or hypotheticals for judges and jurors to walk through provide court officials the ability to systematically reflect on their reasoning. *Id.*

A. The Family Code Section 3022.3 Statement of Decision Requirement Can Serve as a Bias Reduction Mechanism in Court Proceedings.

The strategy of checking for bias by writing out one's reasoning underscores the importance of adhering to Family Code section 3022.3, a statutory requirement central to the instant matter.

Section 3022.3 in its entirety provides:

Upon the trial of a question of fact in a proceeding to determine the custody of a minor child, the court *shall*, upon the request of either party, issue a statement of the decision explaining the factual and legal basis for its decision pursuant to Section 632 of the Code of Civil Procedure.

(Cal. Fam. Code § 3022.3 (emphasis added).) As evident from its plain language, section 3022.3 provides the very tool the NCSC study stresses as important to bias reduction—explaining in writing the basis and reason for one's decision. It can be an especially important potential statutory tool to help counter bias in cases involving litigants most likely to be harmed by race and gender bias like ██████████. Further, failure to adhere to section 3022.3 here and in similar cases frustrates the statute's purpose to ease the inherent strain on family law litigants and their children. (Off. of Assem. Floor Analyses, concurrence in Sen. Amendments of Assem. Bill No. 402 (2005-2006 Reg. Sess.) Aug. 28, 2006.)

The statement of decision provision was one of several changes to the California Family Code enacted in 2006 as part of the Collaborative Family Law Act. The Act's purpose was to allow

parties in family law disputes to “reach an agreement . . . without resorting to an adversarial posture” that would “put[] added strain on all parties, including any children of the marriage.” *Id.* The state’s enactment of this provision also reaffirmed the critical function of statements of decision in general—to require superior courts to explain the factual basis for decisions upon a party’s request, especially in family law court proceedings to determine custody. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 402 (2005-2006 Reg. Sess.) Aug. 30, 2006 (“This bill confirms current law by specifically stating that Code of Civil Procedure Section 632 applies to trials of a question of fact in a proceeding to determine the custody of a minor child.”).) This helps litigants to understand the court’s ruling and its impact on each party. (Sen. Rules Com., 3d reading analysis of Assem. Bill No. 402 (2005-2006 Reg. Sess.) Aug. 28, 2006 (stating that the Collaborative Family Law Act “seeks to ‘maximize settlement options for the benefit of both parties and children and to minimize or eliminate the negative economic, social and emotional consequences of litigation.’”).)⁴

Strict adherence to 3022.3 is critical when, as in this case, the potential for implicit or unconscious bias to adversely affect the

⁴ See also *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647, stating “[t]he code provision requiring written findings of fact is for the benefit of the court and the parties. To the court it gives an opportunity to place upon record, in definite written form, its view of the facts and the law of the case, and to make the case easily reviewable on appeal by exhibiting the exact grounds upon which the judgment rests. To the parties, it furnishes the means, in many instances, of having their cause reviewed without great expense. . . .” (citing *In re Marriage of Davis* (1983) 141 Cal.App.3d 71, 74–75).

involved parties is high. Amici ask that the Court consider this potential for harm, given the significant barriers implicit bias imposes on Black women litigants and domestic violence survivors like [REDACTED].

V. CONCLUSION

The information provided in this brief offers a context for [REDACTED] [REDACTED]'s experience in the courtroom as a Black mother and survivor of domestic violence. Due to the unconscious nature of implicit bias, it is imperative for Black women like [REDACTED] [REDACTED] that California courts follow applicable statutory procedures, such as those in Family Code section 3022.3, along with the judiciary's requirements and recommendations to check bias in recognition of the potential for harm that often results when implicit biases remain unchecked in cases involving litigants uniquely vulnerable to such biases. Amici therefore join Appellant in requesting that this Court reverse the trial court's ruling and remand with an order that the trial court grant [REDACTED] [REDACTED] sole legal and physical custody of her son and to determine a safe visitation order for her child. Amici further join Appellant in the alternative in requesting, at the minimum, that this Court grant [REDACTED]'s counsel the opportunity to seek a statement of decision on all relevant issues.

DATED: November 22, 2021

Respectfully submitted,

By: _____/s/_____
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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, pursuant to Rule 8.204(c)(1) of the Cal. Rules of Court, the enclosed proposed brief of amici curiae was produced using 13-point Roman type, including footnotes, and contains 5,743 words, based on the word count of the Microsoft Word word-processing program used to prepare this brief.

DATED: November 22, 2021

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CALIFORNIA STATE COURT PROOF OF SERVICE

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