

Case No. C093475

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

NATOMAS UNIFIED SCHOOL DISTRICT,

Respondent,

vs.

SACRAMENTO COUNTY BOARD OF EDUCATION,

Appellant,

I.O., by and through his Guardian ad Litem, D.O.,

Real Party in Interest

Hon. Laurie M. Earl,

Judge of the Sacramento County Superior Court

Hon. Michael Jones,

Judge of the Placer County Superior Court

(sitting by designation per CAL. CIV. PROC. CODE § 394)

Case No. 34-2019-80003194

APPLICATION TO FILE AMICUS CURIAE BRIEF

and

**[PROPOSED] AMICI CURIAE BRIEF BY RACIAL JUSTICE
AMICI IN SUPPORT OF APPELLANT AND REAL PARTY IN
INTEREST**

Alexandra Santa Ana (SBN 317852)

asantaana@equaljusticesociety.org

Mona Tawatao (SBN 128779)

mtawatao@equaljusticesociety.org

EQUAL JUSTICE SOCIETY

1939 Harrison Street, Suite 818

Oakland, CA 94612

Telephone: (415) 288-8700

Facsimile: (415) 484-1530

Stephanie Horwitz (SBN 334824)

shorwitz@youthlaw.org

Michael Harris (SBN 118234)

mharris@youthlaw.org

NATIONAL CENTER FOR

YOUTH LAW

1212 Broadway, Suite 600

Oakland, CA 94612

Telephone: (510) 835-8098

Facsimile: (510) 835-8099

Attorneys for Racial Justice Amici

Additional counsel listed on next page

Victor Leung (SBN 268590)
vleung@aclusocal.org
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-5206
Facsimile: (213) 915-0219

Linnea Nelson (SBN 278960)
lnelson@aclunc.org
Brandon Greene (SBN 293783)
bgreene@aclunc.org
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm St
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

Jonathan Markovitz (SBN 301767)
jmarkovitz@aclu-sdic.org
Bardis Vakili (SBN 247783)
bvakili@aclu-sdic.org
ACLU FOUNDATION OF
SAN DIEGO & IMPERIAL
COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: (619) 232-2121
Facsimile: (619) 232-0036

Attorneys for Racial Justice Amici

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Sections 8.208(e) and 8.488 of the California Rules of Court (“Rule”), amici curiae certify that they know of no other person or entity that has a financial or other interest in this case.

Dated: August 19, 2022

/s/ Linnea Nelson

Linnea Nelson (SBN 278960)

Attorney for Racial Justice Amici

APPLICATION TO FILE AMICI CURIAE BRIEF

HON. RONALD B. ROBBIE, ACTING ADMINISTRATIVE
PRESIDING JUSTICE OF THE CALIFORNIA COURT OF APPEAL
FOR THE THIRD DISTRICT APPELLATE DISTRICT:

Pursuant to California Rules of Court, Rule 8.200(c), proposed amici curiae Equal Justice Society, National Center for Youth Law, American Civil Liberties Union (“ACLU”) of Southern California, ACLU of Northern California, ACLU of San Diego and Imperial Counties, Collective for Liberatory Lawyering, Inland Counties Legal Services, Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, Public Advocates Inc., and Youth Justice Education Clinic (collectively, “Racial Justice Amici”) respectfully request leave to file the accompanying [Proposed] Amicus Curiae Brief by Racial Justice Amici in Support of Appellants.

The Equal Justice Society (“EJS”) is a national civil rights organization that seeks to transform the nation’s consciousness on race through law, social science, and the arts. EJS focuses on restoring constitutional safeguards against discrimination with the goal of helping to achieve a society where race is no longer a barrier to opportunity. Our legal strategy aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using cognitive science, structural analysis, and real-life experience. Through litigation and advocacy, EJS combats racism and other forms of discrimination in education, the criminal justice system, and other institutions. A significant

part of EJS’s legal advocacy work involves addressing racially disproportionate rates of school discipline against Black and Latinx students. As an organization dedicated to fostering understanding of implicit bias and its effects on students of color, EJS has an interest in ensuring that youth are not further entrenched in the juvenile justice system due to racially discriminatory school practices.

The National Center for Youth Law (“NCYL”) is a non-profit law firm that works to build a future in which every child thrives and has a full and fair opportunity to achieve the future they envision for themselves. For five decades, NCYL has worked to protect the rights of low-income children of color to ensure they have the resources, support, and opportunities they need. One of NCYL’s priorities is to disrupt the school-to-prison pipeline by reducing the number of youth of color who are disproportionately subjected to harmful exclusionary discipline practices. NCYL has litigated to end discriminatory school exclusion in multiple states, and has advocated at the federal, state, and local levels to reduce reliance on punitive school discipline and improve children’s access to access a meaningful education. NCYL’s education advocacy seeks to ensure that students of color are treated in a non-discriminatory, non-exclusionary manner consistent with their peers.

The ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties (collectively, “ACLU of California Affiliates”) are regional affiliates of the ACLU, a national nonprofit, nonpartisan organization dedicated to

furthering the principles of liberty and equality embodied in the United States Constitution and this Nation’s civil rights laws. The ACLU works to advance the civil rights and civil liberties of Californians in the courts, in legislative and policy arenas, and in the community. The ACLU has participated in numerous prior cases, both as direct counsel and as amicus, that involve enforcing the state and federal constitutions’ guarantees of equal protection and due process, as well as statutory substantive civil rights protections and procedural safeguards. The ACLU of California Affiliates recognize that the educational system in the U.S. is built on a foundation of white supremacy, attempted cultural genocide, and racial capitalism. The organizations seek to reimagine, redesign, and reinvest in a substantially different education system where Black, Indigenous, and other students of color are authentically supported; their experiences, culture and history are reflected; and their needs are prioritized. Accordingly, the ACLU of California Affiliates have spent decades advocating for education equity, including ensuring the equal treatment of students in California’s education system based on protected characteristics, such as race, ethnicity, wealth, sexual orientation, gender identity, immigration status, and others.

The Collective for Liberatory Lawyering (“C4LL”) is a new movement lawyering collective based out of Los Angeles that serves movement partners in LA, San Bernardino, and the Central Valley. As a team, our movement lawyers have translated our long-term experience in direct education defense legal services and deep listening of community partners to create co-designed approaches to community investigations,

policy wins and implementation monitoring to end the school to prison pipeline in California. We work exclusively at the intersection of youth and family criminalization in schools, community and the carceral system. C4LL believes firmly that frames of safety rooted in white supremacy continue to limit the effectiveness of school climate and culture transformative systems such as Restorative Justice, Community Intervention, Community Schools and School-Wide Positive Behavior Interventions and Supports. C4LL humbly serves community-led organizing campaigns that are working to confront these core implicit biases in our schools and youth development systems.

Since its establishment 62 years ago, **Inland County Legal Services (“ICLS”)** has been providing free legal services in the Inland Empire. ICLS covers both San Bernardino and Riverside Counties and focuses on advancing access to justice for low-income households for a broad range of legal issues. ICLS believes that justice for all requires combating the bias, racism, and prejudice that many of its clients face. One area of emphasis is equal access to public education for students with special education needs. ICLS promotes the inclusion of all students, regardless of race, household income, or special needs, in our public education system and advocates for all students to have access to quality legal education. ICLS’s strategy for advancing the public education needs of all students is to advocate for and represent students starting at the Individual Education Plan stage through affirmative litigation filings. Through direct legal representation of students

who cannot afford private counsel, ICLS is preserving equal education opportunities for disadvantaged students.

As one of the oldest civil rights institutions on the West Coast, **the Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCRSF)** works to dismantle systems of oppression and racism, and to build an equitable and just society. Formed in 1968 to bridge the legal community and the Civil Rights Movement, LCCRSF advances the rights of people of color, immigrants, refugees and low-income individuals. LCCRSF is grounded in community and its legal services help identify the most pressing civil rights issues and informs its broader impact litigation and policy advocacy. LCCRSF's anti-discrimination work spans decades, including a landmark discrimination case for Black firefighters and winning protections for minority contractors. Its education work includes fighting discriminatory school discipline practices, enforcing education access for immigrant students and education equity for English Learner students, and preventing discriminatory school closures.

Public Advocates Inc. is a non-profit, public interest law firm and one of the oldest public interest law firms in the nation. The firm's mission has always been to challenge the systemic causes of poverty and discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity, and climate justice. Since 1971, Public Advocates has focused on "making rights real" across California by collaborating with grassroots groups representing people of color, immigrants, and low-income

individuals to achieve strategic policy reform, enforce civil rights, and support movement-building. One of our core values is to center and advance racial justice in our litigation, policy advocacy, and local power-building work, which includes challenging implicit bias in the application of laws and policies and challenging oppressive systems that disproportionately impact students of color. As such, Public Advocates has a strong interest in ensuring that youth of color are not subjected to discriminatory and exclusionary school discipline processes.

The Youth Justice Education Clinic ("YJEC") at Loyola Law School's Center for Juvenile Law and Policy represents system-involved young people with disabilities in special education and school discipline proceedings in Los Angeles County. Many of YJEC's clients, who are primarily Black and Latinx, are subjected to exclusionary discipline, including suspensions, expulsions, and involuntary transfers, when they are actually in need of positive, therapeutic, and restorative supports that will support their youth development. YJEC frequently advocates for the use of alternative means of correction, such as restorative or transformative justice, positive behavioral interventions and strategies, and evidence-based behavioral interventions in lieu of harmful exclusionary discipline. YJEC has argued extensively in front of school district and County panels to keep young people in school and obtain the appropriate support they need to thrive educationally. As a law school clinic, YJEC also teaches law students and provides trainings to a variety of audiences about the role of implicit bias in perpetuating the school-prison nexus. Lastly, it works on

various statewide coalitions to decrease exclusionary school discipline throughout California. YJEC has a strong interest in ensuring that school districts throughout California are encouraged to implement more restorative interventions to keep Black and Latinx students in school, as the Legislature intended.

Racial Justice Amici are nonprofit organizations with an interest in ensuring equal opportunity for students to access public education institutions free from discrimination. Racial Justice Amici assert that the attached brief will assist this Court by providing further analysis about the role of racial bias in school disciplinary decision-making, including at school districts such as Natomas Unified School District; how California's public policies aim to reduce implicit bias against students of color; and why the lower court's judgment should be reversed. As such, Racial Justice Amici respectfully request leave to submit the attached [Proposed] Amicus Curiae Brief by Racial Justice Amici in Support of Appellants to present additional discussion in support of Appellants' arguments on these issues.

This application is timely under Rule 8.200(c)(1) of the California Rules of Court.

In accordance with California Rules of Court, Rule 8.200(c)(3), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending appeal made a monetary contribution intended to fund the brief's preparation or submission. No person or entity other than counsel for the

proposed Racial Justice Amici made a monetary contribution intended to fund the preparation or submission of this brief.

For all of the reasons set forth above, Racial Justice Amici respectfully request that they be granted leave to file the accompanying amicus curiae brief.

Dated: August 19, 2022

/s/ Linnea Nelson

Linnea Nelson (SBN 278960)

Brandon Greene (SBN 293783)

AMERICAN CIVIL LIBERTIES

UNION FOUNDATION OF

NORTHERN CALIFORNIA

Stephanie Horwitz (SBN 334824)

Michael Harris (SBN 118234)

NATIONAL CENTER FOR

YOUTH LAW

Alexandra Santa Ana (SBN 317852)

Mona Tawatao (SBN 128779)

EQUAL JUSTICE SOCIETY

Victor Leung (SBN 268590)

AMERICAN CIVIL LIBERTIES

UNION FOUNDATION OF

SOUTHERN CALIFORNIA

Attorneys for Racial Justice Amici Curiae

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	3
APPLICATION TO FILE AMICI CURIAE BRIEF	4
TABLE OF CONTENTS	12
TABLE OF AUTHORITIES.....	13
INTRODUCTION.....	14
ARGUMENT	17
I. IMPLICIT BIAS IS PERVASIVE AND INFLUENCES DECISION-MAKING OF ALL PEOPLE, INCLUDING IN CALIFORNIA SCHOOLS.....	17
II. STUDENTS OF COLOR FACE DISPROPORTIONATE SCHOOL DISCIPLINE BECAUSE OF IMPLICIT AND EXPLICIT BIAS IN THE EDUCATION SYSTEM.....	26
III. CALIFORNIA PUBLIC POLICY DEMANDS THAT SCHOOL DISTRICTS AND COUNTY OFFICES OF EDUCATION WORK TO REDUCE EXCLUSIONARY DISCIPLINE AND THE RACIAL BIAS THAT CAUSES DISPROPORTIONATE DISCIPLINE OF BLACK AND LATINX STUDENTS.....	30
IV. CALIFORNIA SCHOOL DISTRICTS PERPETUATE ADVERSE RACIAL IMPACTS ON STUDENTS BY ROUTINELY FAILING TO FOLLOW EXPULSION LAW AS IT PERTAINS TO ALTERNATIVE MEANS OF CORRECTION FOR IMITATION FIREARMS.	35
CONCLUSION	41
CERTIFICATE OF WORD COUNT	42
PROOF OF SERVICE	43

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Butt v. State</i> , 4 Cal. 4th 668 (1992).....	14, 30
<i>Collins v. Thurmond</i> , 41 Cal. App. 5th 879 (2019).....	14, 30
<i>Serrano v. Priest</i> , 18 Cal. 3d 728 (1976).....	14
Statutes	
42 U.S.C. § 2000c.....	14, 30
42 U.S.C. § 2000d	14, 30
CAL. BUS. & PROF. CODE § 6070.5	19
CAL. CIV. CODE § 51	14, 30
CAL. CONST. art. I, § 7(a)	14, 30
CAL. CONST. art. IV, § 16(a)	14, 30
CAL. EDUC. CODE § 200.....	14, 30
CAL. EDUC. CODE § 48900.....	36
CAL. EDUC. CODE § 48900.5.....	36, 37
CAL. EDUC. CODE § 48915.....	39
CAL. GOV'T CODE § 11135	14, 30
Rules	
Cal. R. Ct. 8.200	4, 10

INTRODUCTION

Longstanding constitutional and civil rights laws protect California students’ rights to equal educational opportunity regardless of race or ethnicity.¹ However, the promise of equal opportunity in California classrooms is too often unfulfilled because implicit racial bias² improperly infects decisions about how students are disciplined. The result of that implicit bias—demonstrated repeatedly in research and data analysis—is that students of color, like I.O.,³ are far more likely than white students to be excluded from school through expulsion and suspension (“school exclusion”).⁴ This results in a significant loss in learning time for Black and

¹ CAL. CONST. art. I, § 7(a); CAL. CONST. art. IV, § 16(a); *Butt v. State*, 4 Cal. 4th 668, 681 (1992) (observing that, under the state constitution, the State is required to take steps to correct disparities “even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents”); *Collins v. Thurmond*, 41 Cal. App. 5th 879, 896–897 (2019); *Serrano v. Priest*, 18 Cal. 3d 728, 766 n.45 (1976) (*Serrano II*); CAL. EDUC. CODE § 200 *et seq.*; Unruh Civil Rights Act, CAL. CIV. CODE § 51 (2015); CAL. GOV’T CODE § 11135 (2011); Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.*; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

² Implicit bias refers to “attitudes or stereotypes that affect our understanding, decision-making, and behavior.” Jerry Kang ET AL., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012), available at: <https://law.ucla.edu/sites/default/files/PDFs/Academics/%2BwWQYDRt.pdf>.

³ Appellant I.O. Opening Br. 36 (Jan. 26, 2022) (noting that I.O. is a student of color).

⁴ Tony Thurmond, *State Guidance for New Laws on Discipline*, CAL. DEP’T OF JUST. (Aug. 19, 2021), available at: <https://www.cde.ca.gov/nr/el/le/yr21ltr0819.asp> (noting that “Sending a student home from school does not address the root cause of a student’s behavior; it removes students from the learning environment; and it has a disproportionate impact on African American students and students with disabilities, among other marginalized groups.”).

Brown students,⁵ who miss millions of days of instruction that contribute to substantial racial disparities in learning opportunities and school performance.⁶ Beyond shorter-term missed learning time, school exclusion is also associated with longer-term negative life outcomes, such as juvenile and criminal justice system involvement and decreased likelihood of economic success as adults.⁷

Over the last decade, the California Legislature has acted courageously to protect students' fundamental right to education by limiting the use of school exclusion where racial bias is most likely to lead to unjust outcomes. The Legislature strongly encourages school districts, like Natomas Unified School District ("Natomas Unified" or "District"), to use alternative means of correction rather than suspending or expelling a student. In 2012, the Legislature passed AB 1729 to strengthen the requirement that school districts use other means of correction before

⁵ This [Proposed] Amicus Curiae Brief use the term "Black and Brown" students to mean Black, Latinx, Native American, and Asian American sub-groups with less access to educational and economic resources, including, but not limited, to Hmong and Filipino students. The brief uses the term "white" to mean white/Non-Hispanic individuals, and the gender-neutral term "Latinx" to refer to "Hispanic" and "Latino" individuals.

⁶ See Daniel J. Losen & Amir Whitaker, *11 Million Days Lost: Race, Discipline, and Safety at U.S. Public Schools*, CTR. FOR CIV. RTS. REMEDIES & ACLU OF S. CAL. 3-4 (2018), available at: https://www.aclu.org/sites/default/files/field_document/final_11-million-days_ucla_aclu.pdf.

⁷ Russell J. Skiba, ET AL., *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47:4 EQUITY & EXCELLENCE IN EDUC. 546, 547, 552-554 (Nov. 14, 2014), available at: <https://www.tandfonline.com/doi/abs/10.1080/10665684.2014.958965>; Alyssa Rafa, *The Status of School Discipline in State Policy*, EDUC. COMM'N OF THE STATES (Jan. 2019), available at: <https://www.ecs.org/wp-content/uploads/The-Status-of-School-Discipline-in-State-Policy.pdf>.

suspending or expelling students.⁸ That same year, the Legislature passed AB 2537 to clarify that expulsion is *not* required where a student is found to be in possession of an imitation firearm at school.⁹ More recently, the Legislature banned expulsion for “willful defiance” in recognition that Black and Brown students, alongside other vulnerable student groups, are more likely to be discriminatorily disciplined and excluded from school for perceived violations of that subjective offense.¹⁰ But for these measures to work to alleviate racial injustice, school districts like Natomas Unified must implement them with fidelity. Student I.O.’s case exemplifies the reasons for these crucial reforms and the injustice that occurs when school districts disregard them. Natomas Unified rushed to expel I.O., a young student of color with good grades and no significant disciplinary record, for making a foolish mistake for which he immediately apologized and expressed strong remorse.¹¹ The District did not have to expel I.O. and, consistent with

⁸ Pupil rights: suspension or expulsion alternatives and other means of correction, AB 1729 (2012), available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1729 (requirement that all forms of suspension be imposed *only* when other means of correction fail to bring about proper conduct).

⁹ Pupil discipline: suspensions and expulsions, AB 2537 (2012), available at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB2537 (specifies that the act of possessing an imitation firearm, as defined, is not an offense for which suspension or expulsion is mandatory).

¹⁰ Thurmond, *supra* n.4.

¹¹ Besides one minor incident, I.O. had no history of behavior issues; he received good grades and hardly ever missed school. Administrative R. 8 (July 10, 2020). School district leadership refused to consider alternative means of correction indicating rush to expel. *Id* at 220-221. The only one who was truly scared was I.O. He was the one crying and being yelled at and pushed by a stranger. *Id.* at 84. I.O. expressed remorse. *Id.* at 52.

California public policy, should have instead used alternative, more effective means to correct I.O.’s behavior while keeping him in school and on track academically. Tragically for I.O. and his family, the District has instead repeatedly misused its discretion and resources to try to exclude I.O. from his school and derail his academic progress.

Fortunately, the Sacramento County Board of Education (“Board”) recognized this injustice and asserted its authority to overturn I.O.’s expulsion, taking into account the legislative reforms designed to mitigate racial bias by designating expulsion as a last resort. For all of these reasons, Racial Justice Amici strongly urge this Court to recognize the deference owed to the Board’s decision to reinstate I.O. in his school; to overturn the lower court’s judgment; and to reinstate the Board’s decision to reverse I.O.’s expulsion and expunge the expulsion from I.O.’s record.

ARGUMENT

I. Implicit Bias Is Pervasive and Influences the Decision-Making of All People, Including in California Schools.

Implicit bias refers to the unconscious “attitudes or stereotypes that affect our understanding, decision-making, and behavior.”¹² Because implicit biases are unconscious, they can influence our behavior without our being aware of them. This contrasts with explicit bias, which refers to attitudes or stereotypes that are “consciously accessible through introspection.”¹³ Unconscious or implicit biases are based on mental schemas that all people develop, starting at a young age, and are driven by

¹² Kang, *supra* n.2, at 1126.

¹³ *Id.* at 1129.

societal stereotypes of, and attitudes toward, people from different social groups.¹⁴

We are all exposed, directly and indirectly, to messages and stereotypes through the media, our early life experiences, and from our communities; thus, we are all susceptible to implicit biases.¹⁵ The associations we make unconsciously influence how we interact with others based on their race, gender, age, or appearance.¹⁶ The implicit biases we develop usually favor our own ingroups, and tend to be more negative towards people we consider to be outside of our social group.¹⁷ Since implicit biases occur automatically and without our awareness, they are not necessarily connected to our conscious beliefs and attitudes. This means a person can believe in racial equality yet act on implicitly held racist attitudes and beliefs without being aware of them.¹⁸

¹⁴ Cheryl Staats, *Implicit Racial Bias and School Discipline Disparities: Exploring the Connection*, KIRWAN INST. 7 (May 2014), available at: <https://kirwaninstitute.osu.edu/sites/default/files/pdf/ki-ib-argument-piece03.pdf>; see Kang, *supra* n.2, at 1132-1133; see also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94:4 Cal. L. Rev. 945, 950-51 (July 2006), available at: <https://www.jstor.org/stable/20439056>.

¹⁵ KIRWAN INST., *Understanding Implicit Bias* (May 29, 2012), available at: <https://kirwaninstitute.osu.edu/article/understanding-implicit-bias>.

¹⁶ Tom Rudd, *Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated*, KIRWAN INST. 3 (Feb. 5, 2014), available at: <https://kirwaninstitute.osu.edu/article/racial-disproportionality-school-discipline-implicit-bias-heavily-implicated>.

¹⁷ Cheryl Staats, *2014 State of the Science: Implicit Bias Review*, KIRWAN INST. 17 (Mar. 2014), available at: <https://kirwaninstitute.osu.edu/sites/default/files/2014-03//2014-implicit-bias.pdf>.

¹⁸ Kang, *supra* n.2, at 1129.

Even Nelson Mandela, who sacrificed his freedom in the fight against the violent racism of apartheid, was not immune. Mandela once wrote about a trip he took to Ethiopia in the early days of the anti-apartheid movement and his feelings of panic when he realized that the flight he boarded was piloted by a Black man. He remarked,

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.¹⁹

This is just one example of how even those who consciously believe in the falsity of racist stereotypes can unconsciously adopt them. Further, it illustrates the power of examining such thoughts as a way to prevent them from affecting decision-making processes.

As implicit bias has become more widely understood, organizations have taken affirmative steps to address it. For example, recognizing the critical implications of implicit bias, the Judicial Council of California has made implicit bias training mandatory for state judges. The American Bar Association developed an implicit bias toolkit for attorneys and judges recognizing the role implicit bias can play in our justice system.²⁰ The California State Bar has also made training on implicit bias and bias reduction strategies a requirement for licensed attorneys.²¹

¹⁹ Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* 46 (1994).

²⁰ AM. BAR ASS'N, *Implicit Bias Videos and Toolkit*, available at: <https://www.americanbar.org/groups/diversity/resources/implicit-bias/> (last accessed June 7, 2022).

²¹ CAL. BUS. & PROF. CODE § 6070.5; CAL. DEP'T OF EDUC., *State Superintendent Tony Thurmond Announces Multi-Pronged Partnerships*,

This attention is warranted because implicit bias can affect decision-making in a wide variety of settings and situations. In the employment and hiring context, one study found that white employers viewed white job applicants with criminal records more favorably than Black job applicants with no criminal records.²² In a study of health care providers, primary care physicians were assessed for implicit biases toward Black and Latinx people using the Implicit Association Test,²³ and results indicated the physicians held implicit biases against both groups despite explicitly reporting no racist attitudes.²⁴ Judges have also been shown to exhibit implicit bias in their decision-making; in one study, judges were found to have the same rates of implicit bias as the general public.²⁵ Studies using

Initiatives to Address Implicit Bias and Racism (June 4, 2020), available at: <https://www.cde.ca.gov/nr/ne/yr20/yr20rel41.asp>.

²² Devah Pager, *The Mark of a Criminal Record*, 108:5 AM. J. OF SOCIO. 937, 958 (2003), available at: https://scholar.harvard.edu/files/pager/files/pager_ajs.pdf; see also, Lincoln Quillian ET AL., *Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years*, HARVARD BUSINESS REV. (Oct. 11, 2018), available at: <https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years>.

²³ The Implicit Association Test (“IAT”) measures the strength of closely held associations between concepts. Staats, *supra* n.17; PROJECT IMPLICIT, *About the IAT*, available at: <https://implicit.harvard.edu/implicit/iatdetails.html> (last accessed June 7, 2022).

²⁴ Irene V. Blair ET AL., *Assessment of Biases Against Latinxs and African Americans Among Primary Care Providers and Community Members*, 103 AM. J. PUB. HEALTH 92, 95 (2013).

²⁵ Jeffrey J. Rachlinski ET AL., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009), available at: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1691&context=facpub>; see also Mark Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L. J. 391, 397 (Jan. 31, 2017), available at:

mock juries have also revealed that people are more likely to consider Black defendants to be guilty of a crime when compared to white defendants.²⁶

Negative stereotypes in our society about people of color and other marginalized groups are commonplace in many different contexts. Unconscious beliefs that people of color are more violent, angry, lazy, and less intelligent can influence how others treat people of color.²⁷

<https://www.yalelawjournal.org/forum/the-implicit-racial-bias-in-sentencing>.

²⁶ Danielle M. Young ET AL., *Innocent until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence*, 9 PLOS ONE 1 (Mar. 18, 2014), available at: <https://doi.org/10.1371/journal.pone.0092365>; Levinson ET AL, *Guilty by Implicit Bias*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010) (finding that participants held an implicit association between “Black” and “guilty”); Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C.D. L. REV. 745, 802 (2018) (noting “substantial evidence that most Whites presume Black defendants are guilty in criminal cases, thus subverting the presumption of innocence” due to deeply rooted stereotyping of Black people as criminal, violent, and dangerous).

²⁷ David S. March & Reiko Graham, *Exploring Implicit Ingroup and Outgroup Bias Toward Hispanics*, GROUP PROCESSES AND INTERGROUP RELATIONS 9 (2014), available at: https://www.researchgate.net/publication/266023210_Exploring_implicit_ingroup_and_outgroup_bias_toward_Hispanics; Rachel D. Godsil & Alexis McGill Johnson, *Transforming Perception: Black Men and Boys*, AM. VALUES INST. 6-7, 9-10 (Mar. 2013), available at: <http://perception.org/wp-content/uploads/2014/11/Transforming-Perception.pdf>; La Vonne I. Neal ET AL., *The Effects of African American Movement Styles on Teachers' Perceptions and Reactions*, 37 J. OF SPECIAL EDUC. 49, 50 (Jan. 2003), available at: <http://web.pdx.edu/~jhumn/Neal%20et.%20al.pdf>; Jennifer L. Eberhardt ET AL., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. OF PERSONALITY AND SOC. PSYCH. 876 (2004), available at: <https://web.stanford.edu/~eberhard/downloads/2004-SeeingBlackRaceCrimeandVisualProcessing.pdf>; Rachel D. Godsil ET AL., *The Science of Equality, Volume 1: Addressing Implicit Bias, Racial*

Unfortunately, these stereotypes extend to children and the school setting as well. Even at the elementary school level, boys of color are more likely to be described by teachers as disrespectful, more likely to misbehave, and more likely to skip school.²⁸ Psychologist Dr. Phillip Atiba Goff has also found that people overestimate the age of Black and Latino boys, while the same is not true of white children.²⁹ This bias can lead to disparate disciplinary consequences in response to similar or identical behavior, as described in more detail below. Perceptions that boys of color are more adult-like have harmful consequences and can “reduce prohibitions against targeting children for harsh or adult treatment.”³⁰

While school staff generally want the best for the students in their

Anxiety, and Stereotype Threat in Education and Health Care, PERCEPTION INST. 22 (Nov. 2014), available at: <http://perception.org/wp-content/uploads/2014/11/Science-of-Equality.pdf>; Melody Sadler ET AL., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68:2 J. OF SOC. ISSUES 286, 307 (2012), available at: [http://psych.colorado.edu/~jclab/pdfs/Sadler%20et%20al.%20\(2012\).pdf](http://psych.colorado.edu/~jclab/pdfs/Sadler%20et%20al.%20(2012).pdf); Ted Chiricos & Sarah Eschholz, *The Racial and Ethnic Typification of Crime and the Criminal Typification of Race and Ethnicity in Local Television News*, 39 J. RES. IN CRIME & DELINQ. 400 (2002); see Jerry Kang, *Trojan Horses of Race*, 118:5 HARVARD L. REV. 1489, 1563, (Mar. 2005), available at: https://www.brown.edu/Departments/Economics/Faculty/Glenn_Loury/louryhomepage/teaching/EC%20137/Kang%20Trojan%20Horse%20of%20Race.pdf.

²⁸ Vincent Basile ET AL., *Who is the One Being Disrespectful? Understanding and Deconstructing the Criminalization of Elementary School Boys of Color*, URBAN EDUC. 18-21 (2019).

²⁹ Goff ET AL., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106:4 J. OF PERSONALITY AND SOCIAL PSYCH. 536, 527 (2014), available at: <https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf>.

³⁰ *Ibid.*

schools, teachers hold implicit and explicit racial biases similar to the general population.³¹ A student's race or ethnicity can shape school staff's perceptions of student behavior and how they respond to that perceived behavior.³² One study found that teachers are more likely to falsely interpret Black children's expressions as "angry" as compared to the facial expressions of white children.³³ Teachers have also been shown to have lower expectations of Latinx and Black students compared to their white peers in terms of quality of work.³⁴ Another study found that white second-

³¹ John G. Starck, *Teachers Are People Too: Examining the Racial Bias of Teachers Compared to Other American Adults*, 49:4 EDUC. RESEARCHER 273, 281 (2020); see also Rudd, *supra* n.16, at 3.

³² Staats, *supra* n.14, at 8; Anagha Srikanth, *Black students with identical transcripts to their peers are less likely to be recommended for AP classes: study*, CHANGING AM. (Feb. 4, 2021), available at: <https://thehill.com/changing-america/enrichment/education/537365-black-students-with-identical-transcripts-to-their>; Evan Soltas, *Reviewers will find more spelling errors in your writing if they think you're black*, VOX (Apr. 21, 2014), available at: <https://www.vox.com/2014/4/21/5637068/reviewers-will-find-more-spelling-errors-in-your-writing-if-they>; Ross Brenneman, *Teacher bias devalues math skills of girls and students of color, USC research finds*, USC NEWS (Dec. 12, 2019), available at: <https://news.usc.edu/164120/teacher-bias-math-skills-girls-students-of-color/> (finding that teachers showed implicit bias toward white-sounding names when evaluating mathematical ability); see also Fisher ET AL., *Protecting the Flock or Policing the Sheep? Differences in School Resource Officers' Perceptions of Threats by School Racial Composition*, 69:2 SOCIAL PROBLEMS 316, 317(May 2020).

³³ Amy G. Halberstadt ET AL., *Racialized Emotion Recognition Accuracy and Anger Bias of Children's Faces*, AM. PSYCH. ASS'N (2020), available at: <https://www.apa.org/pubs/journals/releases/emo-emo0000756.pdf> (finding in a study of racialized emotion recognition accuracy where 178 prospective teachers were asked to evaluate 72 children's facial expressions that "[b]oth Black boys and Black girls were falsely seen as angry more often than White boys and White girls.").

³⁴ See Rudd, *supra* n.16, at 3.

grade teachers gave harsher feedback on a written assignment when they were given clues that the student was Black.³⁵ The effect of teacher implicit bias is particularly strong when the teacher comes from a different background or culture from their students.³⁶ This is especially problematic in California, where the racial demographics for teachers do not match those of their student populations. In the 2018-2019 school year, white teachers comprised 61.2 percent of teachers in California public schools.³⁷ That same year, white students accounted for 22.9 percent of public-school students, while students of color accounted for over 72 percent of students.³⁸

Implicit bias towards students also extends to their families in ways that affect students' experiences with school and school discipline. Social science research shows that parents of color have very different experiences with school staff than white parents do. And these differences result in additional harm to students of color, given the extensive research showing how important parent involvement is to their children's academic success.³⁹ While white parents may feel empowered to take an active role in their children's education, Black parents who attempt to interact directly with

³⁵ Jill Barshay, *Proof Points: White and female teachers show racial bias in evaluating second grade writing*, THE HECHINGER REPORT (Nov. 2, 2020), available at: <https://hechingerreport.org/white-and-female-teachers-show-racial-bias-in-evaluating-second-grade-writing/>.

³⁶ Staats, *supra* n.14, at 8.

³⁷ ED DATA, *California Public Schools*, available at <https://www.ed-data.org/state/CA> (last accessed June 7, 2022).

³⁸ *See Id.*

³⁹ Hua-Yu Cherng, *Is All Classroom Conduct Equal? Teacher Contact with Parents of Racial/Ethnic Minority and Immigrant Adolescents*, 118:11 TCHRS. COLL. REC. 2 (2016).

teachers are more likely to be viewed as threatening and combative.⁴⁰ A 2016 study showed that teachers are more likely to communicate with parents of Black and Latinx students over their student's perceived misbehavior than they were to communicate with parents of white students about similar concerns.⁴¹ Despite the fact that parents of color hold high expectations for their children with regard to education, teachers and administrators are more likely to view Black and Latinx parents as having low expectations.⁴²

Fortunately, an individual's implicit biases are malleable and can be changed.⁴³ Additionally, the external factors that exacerbate the influence of implicit bias on decision-making can be mitigated. For example, decision-makers are more likely to rely on their unconscious biases in situations in which they have a limited time to make decisions or in which they are experiencing highly emotional states.⁴⁴ Likewise, a lack of accountability and high levels of discretion create conditions ripe for

⁴⁰ Annette Lareau & Erin McNamara Horvat, *Moments of Social Inclusion and Exclusion Race, Class, and Cultural Capital in Family-School Relationships*, 72:1 SOC. OF EDUC. 37, 43 (Jan. 1999), available at: <https://faculty.washington.edu/rsoder/EDUC310/310lareauhorvatmomentssocialinclusion.pdf>.

⁴¹ Cherng, *supra* n.39, at 26-27.

⁴² *Id.* at 8; Hannah Miller ET AL., *Is the Feeling Mutual? Examining Parent-Teacher Relationships in Low-Income, Predominantly Latino Schools*, 123 AM. J. OF EDUC. 39 (Oct. 7, 2016), available at: <https://www.journals.uchicago.edu/doi/full/10.1086/688167>; Laurel Puchner & Linda Markowitz., *Do Black Families Value Education? White Teachers, Institutional Cultural Narratives, & Beliefs about African Americans*, 23: 1 MULTICULTURAL EDUC. 9, 13 (2015), available at: <https://files.eric.ed.gov/fulltext/EJ1090572.pdf>.

⁴³ Staats, *supra* n.17, at 17.

⁴⁴ Kang, *supra* n.2, at 1177.

implicitly racist attitudes and stereotypes to influence behavior and decisions.⁴⁵ Measures can be taken to ensure decisions are taken with sufficient time to reduce implicit bias, reduce discretionary decision-making, and increase accountability for decision-makers in situations known to be particularly susceptible to bias.

II. Students of Color Face Disproportionate School Discipline Because of Implicit and Explicit Bias in the Education System.

A recognition and understanding of racial bias, both implicit and explicit, and the manner in which it impacts students are crucial to interrogating the underlying dynamics in the instant case. Schools must have clear and unbiased discipline processes to ensure all students are afforded due process and the fundamental right to a public education. The proper functioning of these systems in school districts such as Natomas Unified is critical to protect students of color who, because of implicit and explicit bias, are disproportionately disciplined for similar or identical behavior by white students,⁴⁶ and are thus at higher risk of being pushed

⁴⁵ *Id.*, at 1178; NAT. CTR. FOR STATE CTS., *Strategies to Reduce the Influence of Implicit Bias 2* (Mar. 30, 2012), available at: https://horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf; Staats, *supra* n.17, at 21.

⁴⁶ See Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26:5 PSYCH. SCI. 617, 622 (Apr. 8, 2015); Asseret Frausto ET AL., *Stopping the School-to-Prison Pipeline an Institutional Approach* 14 (2017); Rudd, *supra* n.16, at 3; DEP'T OF JUST. & DEP'T OF EDUC., *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* 4 (Jan. 8, 2014), available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (advising school districts that the “subjective exercise of unguided discretion in which racial biases or stereotypes may be manifested” is of concern in ensuring students of color are not discriminated against).

out of school and into the juvenile and criminal justice systems.⁴⁷ The statistics on discipline for students of color demonstrate the reality of this targeting. Starting as young as preschool, students of color across the country disproportionately experience school exclusion.⁴⁸ These national trends continue throughout K-12 schooling.⁴⁹ In the state of California, although policymakers have taken steps to decrease school exclusion, Black, Latinx, Pacific Islander, Indigenous and multiracial students all still remain more likely to be suspended than their white counterparts.⁵⁰

⁴⁷ See Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868 (2009), available at: https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1360&context=fac_articles_chapters; Catherine Y. Kim ET AL., *The School-to-Prison Pipeline: Structuring Legal Reform* 1-4 (2010).

⁴⁸ Black preschool students accounted for 18.2% of total preschool enrollment but received 43.3% of one or more out of school suspensions, more than double their enrollment. Multiracial pre-school students accounted for 4.1% of total preschool enrollment but received 6.5% of one or more out of school suspensions. Black preschool students were expelled at rates that were more than twice their share (38.2%) of total preschool enrollment (18.2%). Office for Civ. Rights, *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-18 School Year*, U.S. DEP'T OF EDUC. (June 2021), available at: <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf>.

⁴⁹ Black students, who accounted for 15.1% of total student enrollment, were expelled at rates that were more than twice their share of total student enrollment—38.8% of expulsions with educational services and 33.3% of expulsions without educational services. Hispanic or Latinx students, who accounted for less than 15% of total student enrollment, accounted for 22.1% of expulsions with educational services and 18.6% of expulsions without educational services. *Id.*

⁵⁰ David Washburn & Daniel J. Willis, *School suspensions continue downward trend in California, new data show*, EDSOURCE (Dec. 11, 2018), available at: <https://edsources.org/2018/school-suspensions-continue-downward-trend-in-california-new-data-show/605946> (finding that, during the 2017-18 school year, schools were most likely to suspend Black

Although some repeat the misconception that these student experience higher rates of discipline because they are more likely to misbehave or engage in dangerous behavior, empirical research controlling for other factors reveals no such differences.⁵¹ Rather, due to racial bias, students of color are both more likely to be punished for behavior that is subjective and more likely to receive harsher school punishments.⁵² Indeed, many Black and Brown students experience harmful policies and practices at an early age;⁵³ face an accretion of “increasingly punitive and isolating” experiences as they progress through school; and, as a result, are more likely to have decreased academic performance and higher rates of drop out.⁵⁴ The short-

students and more than 33,000 Latinx students were suspended for “defiant” or “disruptive” behavior); Data Quest, *2017-18 Suspension Rate State Report: Disaggregated by Ethnicity*, CAL. DEP’T OF EDUC, available at: <https://dq.cde.ca.gov/dataquest/dqCensus/DisSuspRate.aspx?year=2017-18&aggllevel=State&cds=00> (last accessed June 7, 2022) (showing schools are most likely to suspend Black students); Data Quest, *2017-18 Suspension Count by Most Serious Offense Category State Report: Disaggregated by Ethnicity*, CAL. DEP’T OF EDUC., available at: <https://dq.cde.ca.gov/dataquest/dqCensus/DisSuspCount.aspx?year=2017-18&aggllevel=State&cds=00> (last accessed June 7, 2022) (showing over 33,000 Latinx students were suspended for defiance).

⁵¹ Godsil, *supra* n.27, at 35; Russell J. Skiba ET AL., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40:1 SCH. PSYCH. REV. 85, 101-102 (2011), available at: <https://www.justice4all.org/wp-content/uploads/2016/04/Race-is-Not-Neutral-A-National-Investigation-of-African-American-and-Latino-Disproportionality-in-School-Discipline.pdf>; DEP’T OF JUSTICE & DEP’T OF EDUC., *supra* n.46, at 4.

⁵² Skiba, *supra* n.51, at 102.

⁵³ Council on School Health, *Out-of-school suspension and expulsion*, 131 AM. ACAD. OF PEDIATRICS 1000 (May 30, 2013), available at: <https://www.ncsl.org/documents/fsl/aap-out-of-school-suspension-and-expulsion.pdf>.

⁵⁴ See Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 11

term impacts of suspension and expulsion, such as school disengagement and lower academic achievement, are associated with negative school and life outcomes such as juvenile and criminal justice system involvement.⁵⁵ In California, in 2019, the incarceration rate for Latinx youth was 2.4 times the rate for white youth;⁵⁶ for youth who are members of Tribal nations, the rate of incarceration was 4.4 times the rate for white youth;⁵⁷ and the rate for Black youth was 9 times the rate for white youth.⁵⁸

This general pattern of racially-biased disciplinary consequences is found in Natomas Unified as well, where students of color such as I.O. are more likely to be expelled.⁵⁹ In the 2018-2019 school year, Natomas Unified suspended a significantly higher percentage of Latinx children than both the percentage of white students who are suspended by the District

(2003), available at: <https://www.ojp.gov/ncjrs/virtual-library/abstracts/defining-and-redirecting-school-prison-pipeline>; Rafa, *supra* n.7.

⁵⁵ Skiba, *supra* n.7, at 557; Rafa, *supra* n.7.

⁵⁶ Josh Rovner, *Latinx Disparities in Youth Incarceration*, THE SENT'G PROJECT (July 15, 2021), available at: <https://www.sentencingproject.org/publications/latino-disparities-youth-incarceration/>.

⁵⁷ Josh Rovner, *Disparities in Tribal Youth Incarceration*, THE SENT'G PROJECT (July 15, 2021), available at: <https://www.sentencingproject.org/publications/native-disparities-youth-incarceration/>.

⁵⁸ Josh Rovner, *Black Disparities in Youth Incarceration*, THE SENT'G PROJECT (July 15, 2021), available at: <https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/>.

⁵⁹ ED DATA, *Natomas Unified*, available at: <https://www.ed-data.org/district/Sacramento/Natomas-Unified> (last accessed June 7, 2022) (data from suspension and expulsion tables by race/ethnicity); Appellant I.O. Opening Br. 36 (Jan. 26, 2022) (noting that I.O. is a student of color).

and the percentage of Latinx youth suspended statewide.⁶⁰ The District’s expulsion rate for Latinx students in the 2018-2019 school year was *twice that of white students*,⁶¹ and *twice the statewide expulsion rate for Latinx students*.⁶²

III. California Public Policy Demands that School Districts and County Offices of Education Work to Reduce Exclusionary Discipline and the Racial Bias that Causes Disproportionate Discipline of Black and Brown Students.

California school districts such as Natomas Unified have an obligation to identify and reduce racial bias in school discipline because constitutional and civil rights laws, racial equity, and justice demand it.⁶³

⁶⁰ ED DATA, *Natomas Unified: Suspension Rate by Race/Ethnicity*, available at: <https://www.ed-data.org/district/Sacramento/Natomas-Unified> (last accessed June 7, 2022) (finding that 4.7 percent of Latinx students in Natomas Unified were suspended at least once during the 2018-19 school year); ED DATA, *California Public Schools: Suspension Rate by Race/Ethnicity*, <https://www.ed-data.org/state/CA> (last accessed June 7, 2022) (finding that 3.6 percent of Latinx students statewide were suspended at least once).

⁶¹ ED DATA, *Natomas Unified: Expulsion Rate by Race/Ethnicity*, <https://www.ed-data.org/district/Sacramento/Natomas-Unified> (last accessed June 7, 2022) (finding that 0.2 percent of Latinx students in Natomas Unified were expelled in the 2018-2019 school year).

⁶² ED DATA, *California Public Schools: Expulsion Rate by Race/Ethnicity*, <https://www.ed-data.org/state/CA> (last accessed June 7, 2022) (finding that 0.1 percent of Latinx students statewide were expelled in the 2018-2019 school year).

⁶³ CAL. CONST. art. I, § 7(a); CAL. CONST. art. IV, § 16(a); *Butt*, 4 Cal. 4th at 681 (observing that, under the state constitution, the State is required to take steps to correct disparities “even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents”); *Collins*, 41 Cal. App. 5th at 896–897; CAL. EDUC. CODE § 200 *et seq.*; Unruh Civil Rights Act, CAL. CIV. CODE § 51 (2015); CAL. GOV’T CODE § 11135 (2011); Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.*; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

The District’s actions in this case conflict with California’s commitment to ensuring equal educational opportunity regardless of race and ethnicity, reducing school exclusion, and implementing restorative alternatives that support a safer school environment through student wellness and peer relationships.

The National Center on Safe Supporting Learning Environments, a division of the U.S. Department of Education, defines school safety as “schools and school-related activities where students are safe from violence, bullying, harassment, and substance use.”⁶⁴ This definition centers students’ physical *and* emotional safety. Research supports this expansive definition of school safety. Over time, the definition of “school safety” has evolved to include “school climate, feelings of school attachment/connectedness, and personal safety[.]”⁶⁵ “School climate,” defined as “the quality of school life,” is key to student and staff perceptions of school safety.⁶⁶ School climate factors, such as school organization and staff relationships, have been found to be as important to school safety as the physical layout and characteristics of the school.⁶⁷

⁶⁴ NAT. CTR. ON SAFE SUPPORTIVE LEARNING ENV’TS, *Safety*, available at: <https://safesupportivelearning.ed.gov/topic-research/safety> (last accessed June 7, 2022).

⁶⁵ Benjamin Kutsyuruba ET AL., *Relationships among school climate, school safety, and student achievement and well-being: a review of the literature*, 3 REV. OF EDUC. 103, 108 (June 2015).

⁶⁶ See Kris Bosworth ET AL., *School climate factors contributing to student and faculty perceptions of safety in select Arizona schools*, 81 J. OF SCH. HEALTH 194, 195 (Apr. 2011); SCHOOLSAFETY.GOV, *School Climate*, available at: <https://www.schoolsafety.gov/school-climate> (last accessed June 7, 2022).

⁶⁷ See Bosworth, *supra* n.66, at 196-197.

Research shows that harsh exclusionary approaches to discipline improve neither school safety nor student success.⁶⁸ In fact, schools with high rates of school exclusion have been shown to have poorer academic outcomes and school climates.⁶⁹ In turn, poor school climate can have a “significant impact” on students’ behavior.⁷⁰ In plain terms, school exclusion can harm the overall school environment and breed additional negative student behaviors, rather than improve students’ wellbeing and outcomes.

California policymakers have long recognized the importance of monitoring and improving school climate to create safer and more supportive learning environments for all students. Since 1997, the California Department of Education (“CDE”) has utilized the California School Climate, Health, and Learning Surveys (“CalSCHLS”) system to help school districts collect school climate-related data and improve student wellbeing.⁷¹ In 2014, the CDE began requiring that school districts use the Local Control and Accountability Plan (“LCAP”) planning process to

⁶⁸ See CAL. SCH. BDS. ASS’N, *Discipline/Suspension & Expulsion*, available at:

<https://www.csba.org/GovernanceAndPolicyResources/ConditionsOfChildren/SafeSupportiveSchlEnvironment/SuspensionAndExpulsion.aspx> (last accessed June 7, 2022); see also Kutsyuruba, *supra* n.65, at 117.

⁶⁹ Rhoda N. T. Nese ET AL., *Preliminary Analysis of an Instructional Alternative to Exclusionary Discipline*, 23 J. OF AT-RISK ISSUES 1 (2020), available at: <https://files.eric.ed.gov/fulltext/EJ1253864.pdf>.

⁷⁰ Christine W. Koth ET AL., *A Multilevel Study of Predictors of Student Perceptions of School Climate: The Effect of Classroom-Level Factors*, 100 J. OF EDUC. PSYCH. 96 (2008), available at: <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.460.8090&rep=rep1&type=pdf>.

⁷¹ CALSCHLS, *History and Purpose*, available at: <https://calschls.org/about/> (last accessed June 2, 2022).

measure school performance in multiple priority areas. In recognition of the importance of school environment for student performance, one of the LCAP priority areas is School Climate. The School Climate priority consists of both a state indicator (suspension rate) and a local indicator (school climate survey data). School districts are required to submit self-reflective information about their school climate data to the state as part of the School Climate local indicator.⁷² School districts that do not meet expectations for the state or local indicator may be required to participate in differentiated assistance, under the guidance of their county superintendent, the CDE, or the California Collaborative for Educational Excellence.⁷³

California policymakers have not only monitored and held school districts accountable for the measurable quality of their school climate; they have also taken actionable steps to ensure school districts improve school climate by reducing harmful school discipline. Knowing that guardrails can mitigate implicit bias in school discipline and the harm of school exclusion on marginalized students generally, including by reducing discretion in subjective decision-making and ensuring accountability measures, lawmakers enacted wide-ranging reforms to put those guardrails in place. The California Legislature has made clear that school districts must move away from “zero-tolerance” policies that mandate suspension or expulsion

⁷² CAL. DEP’T OF EDUC., *Dashboard Local Indicator FAQs* (Oct. 13, 2021), available at: <https://www.cde.ca.gov/ta/ac/cm/licadashboardfaq.asp>.

⁷³ CAL. DEP’T OF EDUC., *California’s System of Support* (Oct. 27, 2021), available at: [https://www.cde.ca.gov/sp/sw/t1/csss.asp#:~:text=Differentiated%20Assistance%20\(Level%202\)%3A,designed%20assistance%2C%20to%20address%20identified.](https://www.cde.ca.gov/sp/sw/t1/csss.asp#:~:text=Differentiated%20Assistance%20(Level%202)%3A,designed%20assistance%2C%20to%20address%20identified.)

for anything but the most serious offenses, as zero-tolerance practices have played a significant role in driving racial disparities in school discipline.⁷⁴ As discussed in more detail below, the Legislature passed AB 1729 a decade ago to strengthen the requirement that school districts use “alternative means of correction” before using discipline to exclude a student from school.⁷⁵ This change was explicitly intended to interrupt the rush to exclusionary discipline, which is more likely to be informed by unjust bias.⁷⁶

California public policy is thus to ensure that school discipline policies support safe, supportive, and equitable school environments, including by reducing or eliminating racial bias in school administrators’ decision making. These policies are of fundamental importance to individual students, families, and communities.

⁷⁴ Thurmond, *supra* n.4 (“Suspension does more harm than good ... legislation in recent years, reflecting extensive research, has sought to minimize the use and impact of suspension.”).

⁷⁵ AB 1729, *supra* n.8 (requirement that all forms of suspension be imposed only when other means of correction fail to bring about proper conduct, and authorization for the superintendent of a school district or principal to use his or her discretion to provide alternatives to suspension or expulsion that are age appropriate and designed to address and correct the pupil’s specific misbehavior).

⁷⁶ Kang, *supra* n.2, at 1176; AB 1729, *supra* n.8 (“According to the author, ‘Superintendents and principals deal with discipline almost exclusively through suspension or expulsion despite research which correlates exclusionary discipline with lower academic achievement, lower graduation rates and increased pupil dropout rates—all without making campuses safer.’”).

IV. California School Districts Perpetuate Adverse Racial Impacts on Students by Routinely Failing to Follow Expulsion Law as It Pertains to Alternative Means of Correction for Imitation Firearms.

While school discipline reforms in California have led to a reduction in suspensions and expulsions of all students, including students of color,⁷⁷ school districts must still do significant work to implement these much-needed public policies. School exclusion practices continue to be disproportionately imposed on students of color, students with disabilities, LGBTQ students, and other vulnerable student populations.⁷⁸

Ten years ago, the California Legislature passed two separate laws to attempt to reduce these disproportionalities. The Legislature enacted AB 1729 in 2013 to mitigate public schools' egregious overreliance on

⁷⁷ Washburn, *supra* n.50; Data Quest, *2011-12 Expulsion Rate State Report Disaggregated by Ethnicity*, CAL. DEP'T OF EDUC., available at: <https://dq.cde.ca.gov/dataquest/dqCensus/DisExpRate.aspx?year=2011-12&aggllevel=State&cds=00> (last accessed June 7, 2022) (showing expulsion rates for Black youth at 0.3%, Latinx youth at 0.2%); Data Quest, *2018-2019 Expulsion Rate State Report Disaggregated by Ethnicity*, CAL. DEP'T OF EDUC., available at: <https://dq.cde.ca.gov/dataquest/dqCensus/DisExpRate.aspx?year=2018-19&aggllevel=State&cds=00> (last accessed June 7, 2022) (showing a decrease in expulsion rates for Black youth at 0.2% and Latinx youth at 0.1%)

⁷⁸ "In California, a combination of statewide and local efforts has been implemented to reduce the use of punitive suspensions in public K-12 schools. Current state data trends reflect these efforts, showing that far fewer students were suspended during the 2018-19 school year than in 2011-12. However, the data trends also show that the decline in the use of suspensions has slowed at the state level in the last few years and that large racial disparities remain, although they have narrowed." Daniel J. Losen & Paul Martinez, *Is California Doing Enough to Close the School Discipline Gap?*, THE CIV. RTS. PROJECT (June 21, 2020), available at: <https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/is-california-doing-enough-to-close-the-school-discipline-gap>.

exclusionary discipline⁷⁹ and the fact that students of color in California are significantly more likely to be suspended or expelled.⁸⁰ The intention in passing AB 1729 was to “address the concerns and findings about punitive school discipline and to implement new statewide policies to do so” in light of legislative findings that:

California school suspensions are disproportionately imposed on pupils of color, pupils with disabilities, lesbian, gay, bisexual and transgender pupils, and other vulnerable pupil populations, and that nonpunitive classroom discipline is more effective and efficient for addressing pupil misconduct.⁸¹

As a result, the California Education Code now (1) requires that school administrators resort to suspending a student for most offenses only after other means of correction have been attempted and failed to bring about proper conduct and (2) encourages school administrators to avoid expulsion and instead attempt the same alternate means of correction.⁸²

Education Code section 48900.5 delineates numerous acceptable

⁷⁹ FIX SCHOOL DISCIPLINE, *Why are California schools suspending more students than they graduate?* (Sept. 5, 2012), available at: <http://www.fixschooldiscipline.org/2012/09/05/why-are-california-schools-suspending-more-students-than-they-graduate/> (citing to Data Quest, *12th Grade Graduates Completing all Courses Required for U.C. and/or C.S.U. Entrance*, CAL. DEP’T OF EDUC., available at: <https://dq.cde.ca.gov/dataquest/stgradnum.asp?cChoice=StGrdEth&cYear=2011-12&cLevel=State&cTopic=Graduates&myTimeFrame=S&submit1=Submit>, <https://dq.cde.ca.gov/dataquest/dqCensus/DisSuspRate.aspx?year=2011-12&aggllevel=State&cds=00> (last accessed June 7, 2022).

⁸⁰ *Id.*

⁸¹ AB 1729, *supra* n.8 (“This bill seeks to address the concerns and findings about punitive school discipline and to implement new statewide policies to do so ... California school suspensions are disproportionately imposed ...”).

⁸² CAL. EDUC. CODE § 48900(v); CAL. EDUC. CODE § 48900.5.

alternatives to school exclusion⁸³ intended to provide educators with age-appropriate activities to correct the pupil's misbehavior more effectively while keeping the student in school.⁸⁴ Additionally, other means of correction must now be documented in the student's pupil record.⁸⁵ These significant reforms allow for greater transparency and accountability as California schools work to address racial bias in school discipline practices. The California Legislature also affirmed that using alternatives to exclusionary discipline is essential to creating safe and successful schools. The Legislature declared that the public policy of the state is "to provide effective interventions," "avoid exclusion from school," and "ensure that school discipline policies and practices are implemented and enforced evenhandedly and are not disproportionately applied" to students of color.⁸⁶ And the reforms brought about by AB 1729 worked: within the year following its enactment, expulsions overall dropped by 12.3 percent and suspensions of Latinx students dropped by 10.2 percent.⁸⁷

⁸³ CAL. EDUC. CODE § 48900.5(b).

⁸⁴ AB 1729, *supra* n.8 (requirement that all forms of suspension be imposed only when other means of correction fail to bring about proper conduct, including an authorization for the superintendent of a school district or principal to use his or her discretion to provide alternatives to suspension or expulsion that are age appropriate and designed to address and correct the pupil's specific misbehavior).

⁸⁵ CAL. EDUC. CODE § 48900.5.

⁸⁶ AB 1729, *supra* n.8 (requires the provision of effective interventions for pupils who engage in acts of problematic behavior to help them change their behavior and avoid exclusion from school and ensures that school discipline policies and practices are implemented and enforced evenhandedly and are not disproportionately applied to any class or group of pupils.).

⁸⁷ Evie Blad, *California Schools See Drop in Suspensions, Expulsions*, EDUCATIONWEEK (Jan. 29, 2014), available at:

The same year that AB 1729 was enacted, AB 2537 was enacted with a similar aim: to restructure zero tolerance policies to grant districts greater authority to use alternative means of correction to address school conduct, depending on circumstance. Prior to AB 2537, “zero tolerance” state laws *required* educators to suspend, expel, or notify law enforcement about certain student offenses. The stringency with which zero-tolerance policies were applied across California had resulted in heightened rates of exclusionary discipline for low-level offenses, which disproportionately impacted students of color.⁸⁸ To address this disparity, AB 2537 explicitly provided that possession of an imitation firearm is not an offense that mandates suspension or expulsion. Rather, school districts have the authority to determine whether the specific situation warrants exclusionary discipline. The decision to expel must be based on a finding that other means of correction are not possible or have repeatedly failed to bring about the proper conduct, or due to the circumstance the presence of the pupil will cause a continuing danger to the physical safety of the student

<https://www.edweek.org/policy-politics/california-schools-see-drop-in-suspensions-expulsions/2014/01>.

⁸⁸ AB 1729, *supra* n.8 (“School officials are currently mandated to automatically suspend and/or expel students for various broadly defined acts. These policies, known as ‘Zero Tolerance,’ were put in place over ten years ago as an effort to cut down on school violence. Although these policies were written with the best of intent, they have resulted in thousands of students being suspended and/or expelled for low level offenses ... A University of California, Los Angeles’ Civil Rights Project October 2011 brief titled ‘Discipline Policies, Successful Schools, and Racial Justice,’ report that data gathered by the U.S. Department of Education’s Office for Civil Rights shows disparity in suspensions and expulsions for Black students, especially males, and students with disabilities.”).

and others.⁸⁹

Ten years later, however, some school districts continue to resist implementing these equity reforms enacted by the Legislature. Across California, school districts like Natomas Unified routinely fail to use or document alternative means of correction. School exclusion, including expulsion, continues to be disproportionately used against students of color, highlighting the bias that prevails when districts refuse to use alternative means of correction.⁹⁰ As noted above, in Natomas Unified, students of color experience far higher rates of exclusionary discipline.⁹¹ The District's expulsion rate for Latinx students in the 2018-2019 school year was double the rate of white students in the District.⁹²

I.O.'s case illustrates what happens when school districts fail to confront bias in disciplinary decision making. Natomas Unified knew that it was not required to bring expulsion charges against I.O. for possession of an imitation firearm but chose to do so anyway.⁹³ Indeed, I.O. showed

⁸⁹ CAL. EDUC. CODE § 48915(b)(1)-(2).

⁹⁰ Data Quest, *2018-19 Expulsion Rate State Report Disaggregated by Ethnicity*, CAL. DEP'T OF EDUC., available at: <https://dq.cde.ca.gov/dataquest/dqCensus/DisExpRate.aspx?year=2018-19&agglevel=State&cds=00> (last accessed June 7, 2022); Thurmond, *supra* n.4 (noting that all California students, particularly African American students, are overrepresented in national suspension statistics).

⁹¹ *Natomas Unified*, *supra* n.59 (suspension and expulsion tables by race/ethnicity).

⁹² ED DATA, *Natomas Unified: Expulsion Rate by Race/Ethnicity*, available at: <https://www.ed-data.org/district/Sacramento/Natomas-Unified> (last accessed June 7, 2022) (finding that 0.2 percent of Latinx students in Natomas Unified were expelled in the 2018-2019 school year).

⁹³ Administrative R. 220-221 (July 10, 2020).

immediate remorse for the situation⁹⁴ and—as the Sacramento County Office of Education recognized⁹⁵—was not a continuing danger to the school.⁹⁶ Although he would have benefited greatly from the opportunity to correct his mistake without resorting to expulsion, the District refused to consider alternative means of correction.⁹⁷ At I.O.’s expulsion hearing, the District presented *no* evidence that it tried other means of correction let alone that such correction failed.⁹⁸ District Director of School Leadership and Support, Dr. Michelle Hamilton “... admitted that expulsion was not mandatory but [that the District] was not willing to consider alternatives.”⁹⁹ Disregarding the public policy and the intent behind AB 2573, the District

⁹⁴ *Id.* at 52.

⁹⁵ “... [T]he record *does not* support a finding that ‘due to the nature of the act,’ I.O.’s presence causes a ‘continuing danger’ to the physical safety of himself or others. The District’s secondary finding is *not* supported by I.O.’s past behavior or demeanor, the nature of the act, or any other substantial evidence presented at the hearing. There is *no* evidence and the District *does not* claim that I.O. acted in a threatening manner.” SACRAMENTO CNTY. BD. OF EDUC., *Expulsion Appeal Decision and Findings* (July 12, 2019) (Administrative R. 16-17 (July 10, 2020)) (emphasis added).

⁹⁶ Despite NUSD’s assertion in its expulsion hearing that I.O. was a continuing danger, Administrative R. at 162 (July 10, 2020), the actual evidence points to the contrary. I.O. was a young student, only eleven years old and in sixth grade, at the time he was expelled. There was *no* evidence to suggest that I.O. had any intention to harm anyone—the school itself informed parents that I.O. did not act in a threatening manner. *Id.* at 84. Besides one minor incident, I.O. had *no* history of behavior issues; he received good grades and hardly ever missed school. *Id.* at 162. Ms. Emmitt, the substitute teacher who searched I.O.’s backpack at the time of the incident, even stated at the expulsion hearing that she did not believe there was a safety concern. *Id.* at 16 She stated that she did not find I.O. to be threatening, and that I.O. seemed a little ignorant as to why bringing his BB guns to school was a bad choice. *Id.*

⁹⁷ *Id.* at 220-221.

⁹⁸ *Id.* at 188-249.

⁹⁹ *Id.* at 220-221.

instead chose to implement racially-biased exclusionary discipline practices.¹⁰⁰ I.O.’s case is thus *precisely* the type of case that the Legislature sought to address by passing AB 1729 and AB 2537—one that illustrates the need for more faithful implementation of these long-standing reforms to the Education Code.

CONCLUSION

For the reasons stated above, Racial Justice Amici respectfully request the Court to overturn the lower court’s judgment and direct the trial court to enter judgment denying Natomas Unified’s petition for writ of mandate and reinstating the decision of the Sacramento County Board of Education to reverse I.O.’s expulsion and expunge it from Natomas Unified’s records.

Dated: August 19, 2022

/s/ Linnea Nelson

Linnea Nelson (SBN 278960)
Brandon Greene (SBN 293783)
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
NORTHERN CALIFORNIA

Stephanie Horwitz (SBN 334824)
Michael Harris (SBN 118234)
NATIONAL CENTER FOR
YOUTH LAW

Alexandra Santa Ana (SBN 317852)
Mona Tawatao (SBN 128779)
EQUAL JUSTICE SOCIETY

Victor Leung (SBN 268590)
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
SOUTHERN CALIFORNIA

Attorneys for Racial Justice Amici Curiae

¹⁰⁰ *Ibid.*

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed Amici Curiae Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 7,637 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amici Curiae Brief required under Rule 8.200(c), this certificate, and the signature blocks. *See* Rule 8.204(c)(3).

Dated: August 19, 2022

/s/ Linnea Nelson
Linnea Nelson (SBN 278960)
Attorney for Amici Curiae

PROOF OF SERVICE

I, Angelina Alas, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is aalas@aclunc.org. On August 19, 2022, I served the attached,

1. **APPLICATION TO FILE AMICI CURIAE BRIEF**
2. **[PROPOSED] AMICI CURIAE BRIEF BY RACIAL JUSTICE AMICI IN SUPPORT OF APPELLANT AND REAL PARTY IN INTEREST**

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

Orbach, Huff + Henderson, LLP

Sarah Leilani Wanda Sutherland
3111 Camino Del Rio North, Suite 400
San Diego, CA 92108
Email: ssutherland@ohhlegal.com
Counsel for Natomas Unified School District, Plaintiff and Respondent

Sacramento County Office of Education

Teresa Stinson Salvini & Elizabeth Anne Linton
10474 Mather Boulevard
P.O. Box 269003
Sacramento, CA 95826
Email: tstinson@scoe.net, elinton@scoe.net
Counsel for Sacramento County Board of Education, Defendant and Appellant

Weintraub Tobin Chediak Coleman Grodin Law Corporation

Brendan J. Begley
400 Capitol Mall, 11th Floor
Sacramento, CA 95814
Email: bbegley@weintraub.com
Counsel for Sacramento County Board of Education, Defendant and Appellant

C. Athena Roussos

9630 Bruceville Road, Suite 106-386

Elk Grove, CA 95757

Email: athena@athenaroussoslaw.com

Counsel for I.O., a minor, etc., Real Party in Interest and Appellant

Mary Melody Sechser

2795 E. Bidwell Street, Suite 100-280

Folsom, CA 95630

Email: marysechser@gmail.com

Counsel for I.O., a minor, etc., Real Party in Interest and Appellant

BY MAIL: I mailed a copy of the document identified above by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid.

Clerk of the Superior Court, County of Placer

For: Hon. Michael Jones

Department 42

P.O. Box 619072

Roseville, CA 95661-9072

Clerk of the Superior Court, County of Sacramento

For: Hon. Michael Jones

(Sitting by designation per Cal. Civ. Proc. Code § 394)

720 9th Street, Room 102

Sacramento, CA 95814

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

Executed on August 19, 2022 in San Francisco, CA.

/s/ Angelina Alas

Angelina Alas

Declarant