Case No. S267429

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE D.P., A Person Coming Under the Juvenile Court Law

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

T.P.,

Defendant and Appellant.

From an Unpublished Decision by the Court of Appeal
Second Appellate District, Division Five, Case No. B301135
On Appeal from the
Los Angeles Superior Court, Case No. 19CCJP00973
The Honorable Craig S. Barnes

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

and

[PROPOSED] BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA & AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rules 8.208(e) of the California Rules of Court, Amici certify that they know of no other person or entity that has a financial or other interest in this case.

Dated: November 3, 2021

By: */s/ Minouche Kandel*

Minouche Kandel

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER T.P.

Pursuant to California Rules of Court, Rule 8.520(f), proposed amici curiae the American Civil Liberties Union ("ACLU") of Southern California, ACLU of Northern California, and ACLU of San Diego & Imperial Counties (collectively "ACLU of California Affiliates"), respectfully request leave to file the accompanying [Proposed] Amicus Curiae Brief in Support of Objector and Appellant T.P.

The 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 due process, as well as statutory substantive civil rights protections and procedural safeguards.

The ACLU of California Affiliates recognize that the family regulation system in the United States, otherwise known as the child welfare system, was built on a foundation of white supremacy and attempted cultural genocide. The organizations have an interest in protecting the due process rights of parents, guardians, and children who are Black, Indigenous, immigrants, LGBTQ, and people with disabilities as they navigate the family

regulation system. The ACLU of California Affiliates present this brief to provide analysis regarding the due process concerns raised under the U.S. and California Constitution by state determinations of child abuse or neglect, particularly where such determinations could result in the inclusion of the parents on the Child Abuse Central Index (CACI) under the Child Abuse and Neglect and Reporting Act (CANRA).

This application is timely under Rule 8.520(f)(2) of the California Rules of Court.

In accordance with California Rules of Court, Rule 8.520(f)(4), 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 amici made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Rule 8.520(f) of the California Rules of Court, the ACLU of California Affiliates respectfully request that they be granted leave to file the accompanying amicus curiae brief.

Dated: November 3, 2021

ACLU Foundation of Southern California

ACLU Foundation of Northern California

ACLU Foundation of San Diego & Imperial Counties

By: */s/ Minouche Kandel*
Minouche Kandel

Attorney for Amici Curiae

BRIEF OF AMICI CURIAE IN SUPPORT OF OBJECTOR AND APPELLANT T.P.

INTRODUCTION

This case involves what scholars now identify as "the family regulation system."[1] This system—still perceived by many to function to protect children—typically has the opposite impact. Instead of increasing "child safety," removing children from their families often produces devastating outcomes, including exceedingly low graduation rates, high incarceration rates, poor health outcomes, and high rates of physical and sexual violence experienced while in foster care.[2] Even any minor interaction

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1 Amici use the term "family regulation system" to refer to the "child welfare system" because it more accurately describes a system meant to *"regulate and punish black and other marginalized people."* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation,* The Imprint (2020) at https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480. *See also* Nancy D. Polikoff and Jane M. Spinak, *Forward - Strengthening Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & LAW 427, 431 (2021) at https://journals.library.columbia.edu/index.php/cjrl/issue/view/789/188.

2 Alan J. Dettlaff, Kristen Weber, Maya Pendleton, Reiko Boyd, Bill Bettencourt & Leonard Burton, *It is not a broken system, it is a system that needs to be broken: the upend movement to abolish the child welfare system*, 14 J. PUBLIC CHILD WELFARE, 500, 503 (2020) at https://www.tandfonline.com/doi/full/10.1080/15548732.2020.1814542; J William Spencer & Dean D. Kundsen, *Out of Home Maltreatment: An Analysis of Risk in Various Settings for*

with the family regulation system can mire parents—particularly Black, Indigenous, and other women of color—in years of state surveillance, regulation, and punishment.[3]

Once in the clutches of the family regulation system, it is extremely difficult for parents to extricate themselves. For example, it is mandatory for a wide range of persons to report suspicion of abuse or neglect under the Child Abuse and Neglect and Reporting Act (CANRA), and then there is a "low standard of proof" for those reports to result in a parent being listed on California's Child Abuse Central Index (CACI). (*Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170, 1177 (9th Cir. 2009), as amended (Jan. 30, 2009), rev'd and remanded sub nom. *Los Angeles Cnty., Cal. v. Humphries*, 562 U.S. 29 (2010) (hereinafter "*Humphries*").) Being falsely charged with child abuse or neglect by the state is stigmatizing and, therefore, harmful to a parent in any circumstance, but being listed on the CACI also has practical, harmful consequences—for example, limiting the parent's employment, licensing, and future foster/adoption opportunities. Yet it is only relatively recently that parents even *could* petition to remove themselves from the CACI, *see id.* at 1179-80, and there still is only one way—within a limited time window—to do so.

Children," 14 CHILDREN AND YOUTH SERVICES REV. 485, 488 (1992).

[3] Dorothy Roberts, *How I Became a Family Policing Abolitionist,* 11 COLUM. J. RACE & LAW 455, 461 (2021) at https://journals.library.columbia.edu/index.php/cjrl/issue/view/789/188.

Amici ACLU of California Affiliates in this brief describe how the constitutional due process guarantees under both the California and U.S. Constitutions require that parents be able to challenge a state determination of child abuse or neglect—particularly in those circumstances where that determination could cause the parent to be placed on the CACI—but even where such determination "only" causes stigma. The brief also addresses the overinclusive nature of the CACI; the inadequacy of the existing mechanisms to challenge placement on the CACI; and the continued racist nature of California's family regulation system, as evidenced in part by the disproportionate impact on Black, Indigenous, other women of color, and poor women of being placed on the CACI.

Amici ACLU of California Affiliates urge the Court to recognize as many avenues as possible for a parent to challenge a state determination of child abuse or neglect, particularly where such determination could lead to a parent being placed on the CACI. Amici therefore agree with Appellant that his appeal should not have been held moot, where it left in place an outstanding court finding of possible neglect.

STATEMENT OF FACTS

This case, like so many of the cases involving the family regulation system, centers on a family of color. The mother immigrated to the United States in 2005, and works as a Chinese teacher and a kindergarten instructor. (Appellant's Opening Brief ("AOB") at 15; Appellant's Opening Brief in In re B.P., Court of

Appeal Case No. B301135 at 8.)[4] The father, born in Vietnam, works as a driver. (*Id*.) The mother's parents live with the family and help care for their two young children, D.P. and B.P..[5] (*Id*.) At the onset of the family's interactions with the Los Angeles Department of Children & Family Services ("DCFS"), D.P. was a two-month old baby *(Id. at 17)*, and B.P. was five. (*Id at 15.*)

In February 2019, the parents took D.P. to the hospital because he had a fever, and was congested and coughing. (*Id*. at 21.) As is often the case, the parents' efforts to obtain care for their child triggered their involvement in the family regulation system. (*Id*. at 16.) A chest x-ray of D.P. revealed possible viral bronchitis or pneumonia and an old, healing fractured rib. (*Id*. at 21.) The parents were shocked and alarmed to learn of the fracture and could not explain how it occurred. (*Id*. at 15-16.) Because the parents could not explain the fracture, the doctors at the hospital—who are required by law to report any "reasonable suspicion" of child abuse—contacted DCFS and law enforcement. (*Id*. at 16).

DCFS opened an investigation, and a DCFS social worker interviewed the parents, B.P., and the maternal grandmother. (*Id.* at 16.) The interviews with B.P. and her mother were

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[4] Because *Amici* did not have access to the sealed record in this case, we cite to facts as listed in Appellant's briefs.

[5] The bias the family in this case experienced in the health care system is manifested in the "observation" that D.P.'s primary care provider felt necessary to include in a visit note that referenced that D.P.'s "all knowing, domineering maternal grandmother" was involved in his care. (*Id.* at 21.)

conducted with a Mandarin interpreter. (*Id.*) B.P. indicated she had not witnessed any abusive incidents with her brother, said that her mother and grandmother used to spank her "a long time ago," and that she felt safe and happy at home. (*Id.*) The parents denied any physical abuse. (*Id.*)

A few days later, DCFS filed a petition in Los Angeles Superior juvenile dependency court, alleging that D.P.'s fracture was caused by the "deliberate, unreasonable, and neglectful" acts of his parents, that on prior occasions the mother had spanked B.P., and that the parents had failed to protect both children. (*Id.* at 17.) DCFS recommended that the juvenile court remove both children from their parents and place them in protective custody. (*Id.* at 15.)

At the initial hearing, the juvenile court ordered that the children remain with their parents under the supervision of DCFS. (*Id.* at 17.) DCFS recommended that the parents participate in counseling, parent education, and family preservation services, and make and keep medical appointments for the children, all of which the parents did. (*Id.* at 18-19.)

The juvenile court subsequently received written and oral evidence from two physician experts on potential causes of D.P.'s injury. (*Id.* at 20-25.) The experts agreed that fractured ribs in an infant are typically due to compression of the chest. (*Id.* at 20, 23-25, 29-30.) One expert opined that the injury was caused by an intentional squeeze or blunt force trauma (*Id.* at 23.) The other opined that the injury could have been accidental, caused by someone picking up the child incorrectly and unintentionally

grasping too tightly because the baby was slipping. (*Id*. at 24.) He commented that a child the age of D.P.'s sister could have accidentally caused the fracture. (Appellant Father's Opening Brief at 20, *In re B.P. v. Twain P.*, No. B301135 (Cal. Ct. App. Jan. 28, 2020)) He noted that it was rare to see a single rib fracture, because cases involving intentional trauma typically contain multiple rib fractures. (*Id*. at 25.) Both doctors opined that this type of injury often has no other signs of trauma or bruising, so a caregiver would not necessarily know that an injury had occurred. (*Id*. at 24-25.)

At the jurisdictional hearing on September 20, 2019, the juvenile court dismissed the petition as to B.P. for insufficient evidence and sustained the petition as to D.P. on the count of failure to protect for a "possible neglectful act." (*Id*. at 25.) The court found that (1) the origin of the rib fracture could not be determined; (2) the lack of explanation of the rib fracture was not the parents' fault; (3) the parents did not "affirmatively through a deliberate act or some act on their part or omission on their part cause[ ] the injury"; (4) the rib might have been fractured while the child was outside the parents' view; and (5) at most this was "a possible neglectful act." *In re D.P.*, No. B301135, 2021 WL 486159, at *4 (Cal. Ct. App. Feb. 10, 2021), review granted (May 26, 2021)(Rubin, P.J. dissenting).

The juvenile court retained jurisdiction over D.P., allowing him to reside with his parents but under the supervision of DCFS for a six-month period. (AOB at 25-26.)

Both parents filed timely notices of appeal. (*Id*. at 26.) During the briefing for the appeal and in lieu of an appellate brief, DCFS submitted a letter to the appellate court noting its non-opposition to reversal of the juvenile court's jurisdiction over D.P. because the parents fully participated in all requirements. (Respondent's Letter In Lieu of Brief dated April 9, 2020.) While the appeal was pending, the juvenile court ended DCFS supervision and terminated its jurisdiction over D.P., but it did not reverse its findings of possible neglect by the parents of D.P.

In October 2020, the Court of Appeal invited the parties to submit letter briefs on whether the appeal should be dismissed because the juvenile court dependency proceedings had been terminated during the pendency of the appeal. The parents contended that their appeal is not moot because of the finding that they are responsible for D.P.'s fractured rib. Among other consequences, the parents claim that such a finding could subject them to registration on the CACI under the Child Abuse Neglect and Reporting Act (CANRA).

The Court of Appeal dismissed the appeals as moot, on the sole ground that being listed on the CACI could be effectuated by the DCFS investigator having made a determination of "possible neglect" and did not turn on the juvenile dependency court finding of possible neglect. (*In re D.P.*, No. B301135, 2021 WL 486159, at *3 (Cal. Ct. App. Feb. 10, 2021), review granted (May 26, 2021).) The Court, however, did not exclude the possibility that the juvenile dependency court's finding could be used as a basis for CACI registration.

The father then petitioned this Court for review. Appellant T.P. argues both that the juvenile dependency court's finding of his possible neglect on its own is stigmatizing, because it labels him a child neglecter (AOB at 11), and that the finding could subject him to future registration on the CACI (*id.* at 40-41). Both Appellee DCFS and an Amicus Lounsbery Law Office, which represents Californians seeking to remove themselves from the CACI, argue that the juvenile dependency court's finding of possible neglect cannot be used as a basis to register Appellant T.P. on the CACI—though DCFS and the law office argue this on different grounds.[6] From the perspective of Amici ACLU of California affiliates, the law is sufficiently confusing to warrant legitimate concern the DCFS or the California Department of Justice could use the juvenile dependency court finding to preclude a challenge to CACI registration. (*See In re D.P.*, No. B301135, 2021 WL 486159, at *5 (Rubin, P.J., dissenting) [concluding that the juvenile dependency court finding could lead to CACI registration, and that the parents would then not be able to challenge that registration].)

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[6] DCFS argues that a finding of "general neglect" cannot be used as a basis for CACI registration (Appellee's Answer Brief at 30), yet both Appellant and Amicus Legal Services for Prisoners with Children note that this is largely within the Department's discretion. (Appellant's Reply Brief at 19-20; Amicus Brief of Legal Services for Prisoners with Children et al. at 18-19. And the Lounsbery Law Office argues that CANRA cannot be read to permit a finding of a juvenile dependency court to preclude a hearing on a CACI registration. (Brief of Amicus Curiae Lounsbery Law Office, PC, at 14-17.)

ARGUMENT

I. CONSTITUTIONAL DUE PROCESS REQUIRES THAT PARENTS BE ABLE TO CHALLENGE STATE DETERMINATIONS OF CHILD ABUSE AND NEGLECT.

Both the Due Process Clause of the U.S. Constitution and the California Constitution require that parents must be given an opportunity to challenge state determinations of child abuse and neglect. California's Constitution generally provides broader due process protection than the U.S. Constitution. (*People v. Ramirez*, 25 Cal. 3d 260, 268 (1979).) Under the four-factor test for determining due process violations under the California Constitution, Appellant here is deprived of constitutional due process if he cannot challenge the state's finding of his possible neglect of his child, particularly where that finding could lead to him being listed on the CACI and even if the finding "only" causes stigma.

To determine a violation of the constitutional right to due process under the California Constitution, California courts apply a four factor test: (1) the type of interest that will be affected by the state action; (2) the risk of an erroneous deprivation; (3) the dignitary interest in providing notice and a hearing to the individual; and (4) the government's interest in the deprivation. (*See, e.g., Today's Fresh Start, Inc. v. Los Angeles Cnty. Off. of Educ.*, 57 Cal. 4th 197, 213 (2013).) This test incorporates the three factors imposed by federal courts in determining due

process violations under the U.S. Constitution and importantly adds the fourth factor of dignitary interest. (*Compare Mathews v. Eldridge,* 424 U.S. 319, 334 (1976) [due process under U.S. Constitution requires balancing (1) private interest affected by state action; (2) risk of erroneous deprivation; and (3) government interest].)

A. A State Determination of Abuse or Neglect Affects a Parent's Liberty Interests.

The determination by a California court that a parent possibly neglected their child affects the parent's liberty interest, and that interest is even more affected where the determination could lead to the parent being placed on the CACI. The liberty interests that are implicated are: (1) the right to bring up one's children; (2) the right to family association; (3) the right to privacy; and (4) the right to reputational honor.

1. A State Determination of Abuse or Neglect Affects a Parent's Right to Raise Their Children.

A parent's right to raise their children has long been recognized as a fundamental liberty interest under both the federal and state constitutions. (*See, e.g., Troxel v. Granville,* 530 U.S. 57, 65–66 (2000); *In re M.S.*, 41 Cal. App. 5th 568, 590 (2019).)

In *Stanley v. Illinois,* the U.S. Supreme Court deemed it an essential civil right "to conceive and to raise one's children," and further held that "the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth

Amendment." (405 U.S. 645, 651 (1972).) When protected liberty interests, such as the right to parenthood, "are implicated, the right to some kind of prior hearing is paramount." (*Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70 (1972).) Similarly, the California Supreme Court has held that "a parent's interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest." (*In re Marilyn H.*, 5 Cal. 4th 295, 307 (1993).)

Being labeled by the state as a neglectful or abusive parent affects this core right, and that is particularly the case where, as here, the determination could lead to the parent being placed on the state's abuse and neglect registry. Indeed, a California court has already recognized that listing on the CACI is an invasion of familial privacy under both the U.S. and California Constitutions. (*Burt v. Cnty. of Orange*, 120 Cal. App. 4th 273, 283-286 (2004).) And one commentator has recently noted that with the increasing use of predictive analytics in child welfare systems, entries into child abuse and neglect registries may have progressively harmful impacts on parents' rights, as the listing may be used in formulas that paint parents as dangerous in future actions. (Amanda S. Sen, Stephanie K. Glaberton, Aubrey Rose, *Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries*, 77 Wash. & Lee L. Rev. 857, 879–80 (2020) at https://scholarlycommons.law.wlu.edu/wlulr/vol77/iss2/7/.)

Inclusion on the CACI can create obstacles to finding a job or caring for family members who are minors, further entrenching parents and guardians into a cycle of surveillance, poverty, and interactions with the child welfare system. (*See Saraswati v. Cnty. of San Diego*, 202 Cal. App. 4th 917, 922–23, (2011) [Saraswati was afraid to apply for a teaching job because his potential employer could learn about the CACI listing during a background check]; *In re N.V.*, 189 Cal. App. 4th 25, 30 (2010) [agency must compete a CACI check before placing a child with a relative].)

2. A State Determination of Abuse or Neglect Affects a Parent's Right to Family Association.

Beyond the right to parent one's child, there is the broader liberty interest of family association. Recognized as stemming from the U.S. Constitution's Due Process Clause, as well as the First Amendment, the liberty interest of family association seeks to protect the right to family integrity and preservation of the family unit. In *Overton v. Bazzetta*, a case involving freedom of association in the context of incarceration, the U.S. Supreme Court explained "that the Constitution protects 'certain kinds of highly personal relationships,'" [citing *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 619–620, (1984)] and that "there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents." (*Overton v. Bazzetta*, 539 U.S. 126, 131 (2003); *see also Keates v. Koile*, 883 F.3d 1228, 1238 (9th Cir. 2018) [finding

mother and daughter stated plausible claim for violation of constitutional rights to familial association when CPS worker removed daughter from mother following daughter's hospitalization for depression and suicide without any reasonable cause to believe the daughter was in imminent danger of serious bodily injury from mother].)

State determinations of abuse or neglect could have long term negative impacts on rights to family association. As the *Humphries* Court explained, the CACI is made "available to a broad array of government agencies, employers, and law enforcement entities and even requires some public and private groups to consult the database before making hiring, licensing, and custody decisions." (*Humphries*, 554 F.3d at 1175-76.); (*see also* Cal. Penal Code § 11170(b)(4) [CACI information is available to agencies in connection with persons applying for a license for community care or day care, to be a resource family, or for a job having supervision over children or in a residential care home for children]; Cal. Penal Code § 11170(b)(7) [CACI information available to agencies placing children in foster home]; 22 C.C.R. § 89219.2 [(requiring the Department of Social Services to consult CACI prior to licensing a foster family home]; Cal. Penal Code § 11170.5 [requiring adoption agencies to review CACI].)

3. A State Determination of Abuse or Neglect Affects a Parent's Right to Privacy.

Any recorded state determination of abuse or neglect implicates parental privacy interests. California courts have already found that placement on the CACI implicates California's

right to informational privacy, a "class of legally recognized privacy interests" which "includes 'interests in precluding the dissemination or misuse of sensitive and confidential information.'" (*Burt*, 120 Cal. App. 4th at 285.) Similarly, in *Castillo v. Cnty. of Los Angeles*, the court found that a parent referred to a CACI-like database of child abusers had "a reasonable expectation of privacy and the County's inclusion of Castillo in a database where the information therein is disseminated to multiple agencies amounts to a serious invasion of his privacy." (959 F. Supp. 2d 1255, 1262 (C.D. Cal. 2013); see *also Cent. Valley Ch. 7th Step Found., Inc. v. Younger*, 214 Cal. App. 3d 145, 162 (1989), reh'g denied and opinion modified (Oct. 26, 1989) [collection, retention, and dissemination of arrest records impinges on right to privacy under California constitution]; *Saraswati*, 202 Cal. App. 4th at 928 ["familial and informational privacy rights …are sufficient to establish that there is substantial impact on fundamental vested rights when...a parent is listed on the CACI."].)

Indeed, California enacted its constitutional privacy amendment in part to address the unnecessary collection and dissemination of private information about its residents. (*Cent. Valley Ch. 7th Step Found.*, 214 Cal. App. 3d at 161. Among the government overreach the amendment was meant to address: "(1) government snooping and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained

for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records. (*Id.*) (Internal quotations omitted).

4. Stigma Alone Is Sufficient To Demonstrate a Deprivation of a Liberty Interest Under the California Constitution.

In the federal case that required California to institute a grievance process for persons placed on the CACI, the Ninth Circuit found that being labeled a child abuser or child neglecter by placement on the CACI is "unquestionably stigmatizing." (*Humphries*, 554 F.3d at 1186.) The *Humphries* court also found that in addition to being stigmatizing, placement on the CACI satisfied the "stigma plus" test required to show deprivation of a liberty interest for purposes of the federal constitutional due process analysis, by altering a right or status previously held under state law. Because CACI checks are required for certain professions that involve work with children and for qualifying as a foster home provider, the Court found that listing on the CACI altered rights previously held. (*Id.* at 1188.)

While it is undeniable that listing on the CACI does alter important rights so as to satisfy the "stigma plus" standard, the Court should take this opportunity to clarify that California law does not require a showing of "stigma plus" to prove a deprivation of a liberty interest for the purposes of the state constitutional due process analysis. (*Rutter Group California Practice Guide: Administrative Law* 3:131.1.) The California Constitution's

explicit right to privacy, as well as this Court's addition of a "dignitary interest" in its analysis of due process claims under the California Constitution, means that a showing of reputational harm should be sufficient to show a deprivation of a liberty interest. In adding the dignitary requirement to the due process analysis, this Court explained:

> Thus, even in cases in which the decision-making procedure will not alter the outcome of governmental action, due process may nevertheless require that certain procedural protections be granted the individual in order to protect important dignitary values, or, in other words, "to ensure that the method of interaction itself is fair in terms of what are perceived as minimum standards of political accountability - of modes of interaction which express a collective judgment that human beings are important in their own right, and that they must be treated with understanding, respect, and even compassion." [Citation.]

(*People v. Ramirez,* 25 Cal. 3d 260 at268.)

By this measure, Appellant here should only need show that he suffers stigma as a result of the state's determination of his possible neglect to show a deprivation of his liberty interest. At the very least, in this case, the Court should recognize that the stigma of the state's determination of Appellant's possible neglect combined with the fact that such determination could be used as a basis to register Appellant on the CACI is sufficient to show a deprivation of Appellant's liberty interest, in that courts have already found inclusion on the CACI to deprive Californians of liberty interests. (*Humphries*, 554 F.3d at 1188; *Burt*, 120 Cal. App. 4th at 285.)

A determination that Appellant committed possible neglect is undoubtedly stigmatizing; indeed, few labels are more stigmatizing than being accused of child abuse or neglect. Appellant should accordingly have the opportunity to challenge the stigmatizing label. A conclusion here that stigma alone is sufficient to trigger constitutional due process protections would also accord with decisions in which California courts concluded that parties had the right to appeal a decision when the only harm to be remedied is that the underlying decision creates a stigma or casts a shadow on their good name. (*See People v. Becker*, 108 Cal. App. 2d 764, 770, (1952) [an appeal of a criminal conviction may proceed even when appellant has completed his sentence and only purpose is to permit him to clear his name]; *In re Dana J.*, 26 Cal. App. 3d 768, 771, (1972) [juvenile who was found to have violated a law could appeal decision even when he had completed his six months' probation and the case had been dismissed, "to rid himself of 'the stigma of criminality'…and to 'clear his name' of a criminal charge" (citations omitted)]; *Mazzola v. City & Cnty. of San Francisco*, 112 Cal. App. 3d 141, 148, (1980) [city commissioner who was removed from his post due to finding of official misconduct could appeal this finding even though his term had ended, and sole purpose was to clear his name].)

B. The Risk of Erroneous Deprivation of Liberty Interests Is Considerable in State Abuse or Neglect Determinations.

The second prong of the due process analysis under the California Constitution requires a determination of the risk of erroneous deprivation of the liberty interest(s) by the state action, as assessed through an analysis of the procedures in place and the "probable value, if any, of additional or substitute procedural safeguards." (*People v. Ramirez*, *supra*, 25 Cal. 3d at 269; *see also People v. Davis*, 160 Cal. App. 3d 970, 981 (Ct. App. 1984).)

Courts have found that the risk of erroneous deprivations is low if the individual receives adequate notice of the state action and a meaningful opportunity to be heard so as to ensure that the action is based on sufficient evidence. (*See*, *e.g.*, *Stevens v. Workers' Comp. Appeals Bd.*, 241 Cal. App. 4th 1074, 1099, (2015) ["[A]s a result of the multiple layers of review, the risks of erroneous deprivations ... appear to be fewer"].) Conversely, courts have found that the risk of error is high when the individual does not receive adequate notice or does not have a meaningful opportunity to be heard so as to ensure that the state action was based on accurate information. (*See*, *e.g.*, *Naidu v. Superior Ct.*, 20 Cal. App. 5th 300, 314 (2018) [significant risk of erroneous deprivation where no actual evidence presented of petitioners' dangerousness before suspending business licenses].)

Here, if the Court were to conclude that Appellant's appeal of the juvenile dependency court finding of his possible neglect

were moot, then he would be unable to challenge the accuracy of this determination. The Court should therefore permit the appeal to move forward, thereby providing an additional procedural safeguard of a meaningful opportunity to be heard. (*See, e.g., People v. Sanchez*, 18 Cal. App. 5th 727, 748–49 (2017) [where there is no process for individual to challenge their prosecution for allegedly violating the injunction, there is a risk of erroneous deprivation that would be substantially mitigated by additional procedural protections].)

The risk of the possible neglect finding being used as a basis to place Appellant on the CACI is even further reason to provide the relief Appellant seeks.

1. There is a Low Bar for Mandatory Reports of Child Abuse and Neglect in California.

California mandates that a wide range of persons interacting with children report any "reasonable suspicion" of abuse and neglect. The Child Abuse and Neglect Reporting Act (CANRA) requires mandated reporters, such as D.P.'s treating physician in this case, to submit a report when they observe a child they "know[ ] or reasonably suspect[s] has been the victim of child abuse or neglect." (Cal. Penal Code § 11166(a).) The Penal Code explains:

> "Reasonable suspicion" does not require certainty that child abuse or neglect has occurred nor does it require a specific medical indication of child abuse or neglect; *any* "reasonable suspicion" is sufficient.

(Cal. Penal Code §11166(a)(1) (emphasis added).)

Failure to report reasonable suspicion can result in a misdemeanor conviction, resulting in both fines and jail time. (Cal. Penal Code §11166(c).) Given the low bar to trigger the reporting requirements and the serious consequences for failing to report, CANRA plainly results in overreporting. (*See* Robert J. Lukens, *The Impact of Mandatory Reporting Requirements on the Child Welfare System*, 5 Rutgers J.L. & Pub. Pol'y 177, 216 (2007).)

Many professionals who are required to report child abuse disagree on what constitutes reasonable suspicion. (G. Inguanta and Catharine Sciolla, *Time Doesn't Heal All Wounds*: *A Call to End Mandated Reporting Laws*, 19 Columbia Social Work Review 116, 123 (2021) at https://journals.library.columbia.edu/index.php/cswr/issue/view/765/162.) Medical professionals, for example, receive little to no training on child abuse and neglect outside of pediatric programs. In a survey of accredited medical schools, the median amount of required instruction in child abuse and neglect was two hours across a four-year program. (Lynn Chen, *Cultural Competency in Mandated Reporting Among Healthcare Professionals*, 28:2 S. Cal. Rev. L. & Social Justice 319, 328 (2019) at https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/volume28/Spring2019/2-3-chen.pdf.) Further, many definitions of child abuse and neglect may not distinguish "poverty-related factors" from "intentional behavior that threatens or actually harms the child." (Lukens at pp. 223-224.)

Indeed, the expansion of mandatory reporting to cover non-serious forms of physical abuse and neglect has both disproportionately affected poor families and families of color and flooded child protection agencies with so many reports that they cannot deliver "meaningful and effective services." (Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 Nebr. L. Rev 897, 933 (2014) (citation omitted) at https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1222&context=nlr.)[7]

2. There is a "Low Standard of Proof" for Reports of Child Abuse and Neglect To Lead to CACI Registration.

Under the CANRA, reports of child abuse and neglect from mandatory reporters are submitted to various public agencies, including county welfare departments like DCFS. (Cal. Penal Code §§ 11165.7, 11165.9, and 11166.) The law then requires that the agency to which the initial report is submitted investigate the report (Cal. Penal Code § 11169(a)) and determine whether the allegations are "unfounded"; "substantiated"; or "inconclusive" (Cal. Penal Code § 11165.12). "Substantiated reports," such as that in this case (AOB at 39-40), are required to be submitted to the California Department of Justice for inclusion in the CACI. (Cal. Penal Code §§ 11169(a), 11170(a)(3).)

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[7] Research also shows that mandatory reporting laws do not result in better child safety outcomes. (Gupta-Kagan, 92 Nebr. L. Rev. at 936.)

As the *Humphries* Court found, however, there is a "low standard of proof required for a report to be categorized as 'substantiated.'" (*Humphries*, 554 F.3d at 1177.) The Court described "the minimum evidence required for CANRA to compel the submission of a report to be something less than a preponderance, but more than a scintilla." (*Id.*) And the Court noted that "[t]here are many different ways a person can find themselves listed in the CACI." (*Id.* at 1176.)

3. The CACI Is Demonstrably Overinclusive.

In cases evaluating databases to determine the likelihood of erroneous deprivations, courts often evaluate the risk of false positives. For example, in *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), the Second Circuit held that the "some credible evidence" standard was insufficient to protect accused individuals from erroneous listings on a state child abuse registry. (*Id.* p. 1004-1005.) In making this determination, the Court noted that roughly one-third of cases in which the Department found that abuse had occurred were ultimately removed from the registry following a hearing. (*Id.* at p. 1004.) The court further noted that this standard was particularly problematic in the child abuse and neglect registry context because the determinations were "inherently inflammatory" and were, therefore, particularly open to the subjective values of the factfinder. (*Id.*) Similarly, in *Jamison v. State, Dep't of Soc. Servs., Div. of Fam. Servs.*, 218 S.W. 3d 399, 409 (Mo. 2007), the Supreme Court of Missouri found that placement on that state's child abuse and neglect

registry had a high risk of erroneous deprivation where the Board reversed the determination 35-40 percent of the time.

Available CACI data tells a similarly troubling story. In responses to the ACLU of Southern California's Public Records Act requests, the California Department of Social Services reported that between 2015 and 2019, 29-36 percent of CACI hearings resulted in removal from the CACI, suggesting that had these individuals not requested a hearing, at least 29-36 percent of the CACI listings would be inaccurate. Amici ACLU of California Affiliates have also analyzed Public Record Act responses provided to Amicus Lounsbery Law Office, PC from 32 California counties, and determined that in 2019, of the 2,206 people referred to the CACI in those counties, only 285 people had a grievance hearing.[8] Of the people who had a grievance hearing, approximately 30 percent were removed from the CACI.

In 2004, the California CANRA Task Force uncovered similar inaccuracies in San Diego. (Child Abuse and Neglect Reporting Act Task Force Report 24 (2004), available at http://www.ossh.com/firearms/caag.state.ca.us/publications/childabuse.pdf) The CANRA Task Force reviewed listings in San Diego's child abuse and neglect database, most of which would have been reported to the CACI. In doing so, they determined

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[8] According to responses to Public Record Act requests submitted by Amicus Lounsbery Law Office to the California Department of Justice reviewed by Amici ACLU of California Affiliates, the total number of cases submitted to the CACI by all 58 counties was 6,498 in 2015 and 6,822 in 2016.

that San Diego should purge ***50 percent*** of its initial CACI listings because they were erroneous. (*Id*. at 24)

The California Legislature also recently raised concerns with the inaccuracy of CACI listings by requesting a state audit, noting that "[i]t is of utmost importance that personnel making decisions that will affect the permanence of the families are equipped with accurate and up-to-date information." (*See* Letter from Assemblymember Tom Lackey to Joint Legislative Audit Committee dated April 28, 2021; Joint Legislative Audit Committee Roll Call dated June 30, 2021.)

4. The Means for Challenging a CACI Listing Are Limited.

There is currently only one means of challenging a CACI listing. (Cal. Penal Code § 11169(d).) When a person is added to the CACI, the California Department of Justice mails a notice post-deprivation, providing the person with 30 days to challenge their listing on the CACI. (Child Welfare Services Manual of Policies and Procedures at 31-021.2, available at: https://www.cdss.ca.gov/Portals/9/Regs/cws1.pdf?ver=2019-01-29-130847-963) The grievance process is established by the California Department of Social Services, and described in a lengthy manual, which is on its face complex. (*Id.*) If parents fail to exhaust their administrative remedies via the grievance process, courts have held that they may not challenge a CACI listing in other contexts. (*See In re C.F.*, 198 Cal. App. 4th 454, 466 (2011).)

Parents must challenge their listing during a period in which they are coping with the trauma of going through a dependency process and possibly having had their child taken or threatened to be taken away. Importantly, parents have no right to a state-provided attorney for this challenge. (Child Welfare Services Manual of Policies and Procedures at 31-021.42.) As noted above, it appears from data regarding the number of CACI grievances that only a limited percentage of persons subjected to a CACI listing are taking advantage of the grievance process.

5. The Risk of Erroneous Deprivation in State Abuse or Neglect Determinations Disproportionately Impacts Black, Indigenous, Other Women of Color, and Poor Women.

Finally, the risk of erroneous deprivation in the context of state abuse or neglect determinations must be particularly scrutinized given the racial and gendered disproportionality in the child welfare system, particularly with respect to poor, Black, and Indigenous women. The use of child abuse registries:

> … falls most heavily along the fault lines of race, class, and gender. Already disadvantaged groups have a higher risk of both being placed on registries and having their employment prospects affected by it. The consequences of being listed on a registry, therefore, reverberate beyond the child welfare system, perpetuating gender- and race-based disadvantages and economic insecurity.

(Colleen Henry, Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. Rev. 1, 3 (2021) at https://academicworks.cuny.edu/clr/vol24/iss1/3/.)

In California, Black children were more than twice as likely as white children to be referred to the child welfare system, to have the report substantiated, and to be placed in foster care by age five. (Emily Putnam-Hornstein, Barbara Needell, Bryn King, Michelle Johnson-Motoyama, *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37 CHILD ABUSE & NEGLECT 33 (2013) at https://www.ojp.gov/ncjrs/virtual-library/abstracts/racial-and-ethnic-disparities-population-based-examination-risk .) In Los Angeles County, over 50% of all Black children will be subjected to a child abuse investigation by the time they are 18. (Frank Edwards, Sara Wakefield, Kieran Healy, Christopher Wildeman, *Child Protective Services is pervasive but unequally distributed by race and ethnicity in large US counties* PNAS (October 11, 2021) 118 (30) at https://doi.org/10.1073/pnas.2106272118.)

The disproportionality of Black children in the family regulation system stems from bias, implicit or explicit, held by reporters of child abuse and the workers who respond. One study evaluated cases of young children hospitalized for fractures (like D.P. in this case). The researchers found that children of color were more likely to be reported for suspected abuse than white children, and particularly for very young children with accidental injuries (like the child in this case). (Wendy Lane, David Rubin, Ragin Monteith, Cindy W. Christian, *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603 (2002) at https://pubmed.ncbi.nlm.nih.gov/12350191/. *See*

also Vincent J. Palusci, Ann S. Botash, *Race and Bias in Child Maltreatment Diagnosis and Reporting*, 148 PEDIATRICS 1 (2021) at https://pediatrics.aappublications.org/content/148/1/e2020049625 [pediatricians have implicit and explicit racial biases that make them more likely to report Black children for abuse]; Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How The Child Welfare System Punishes Poor Families of Color*, The Appeal (Mar. 26, 2018) at https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/ [racial disparities in child welfare system due to bias, not higher incidence of abuse and neglect in Black families].)

The racist outcomes are not merely a function of the individuals acting inside of the system; rather, they are embedded in the design and purpose of the family regulation system itself. In the U.S. and in California, state-sponsored family separation has long been a tool of white supremacy. During chattel slavery in the 1600s to 1800s, separating Black enslaved families was commonly a condition of bondage, weaponized to threaten parents and prevent familial bonds. (Heron Greenesmith, *Best Interests: How Child Welfare Serves as a Tool of White Supremacy*, November 26, 2019, at: https://politicalresearch.org/2019/11/26/best-interests-how-child-welfare-serves-tool-white-supremacy.) In the mid-1800s to the mid-1900s, Indigenous children were stolen from their families and forced into boarding schools with assimilationist policies.

(*Ibid*.) Such schools forbade Indigenous children from speaking their native languages or exercising their religion and culture. (*Ibid*.) During the same period, westbound trains known as "Orphan Trains" funneled thousands of children away from their immigrant parents to be offered as free or cheap labor. (*Ibid*.)

The staggering statistics on the number of Black, Indigenous, and other people of color in California's child welfare system is no accident. The system has grown from deliberately racist foundations and has not deviated the course.

C. Parents Have a Dignitary Interest in Challenging State Determinations of Abuse and Neglect.

The due process analysis under the California Constitution diverges from that under the federal constitution in that this Court has included an additional factor designed to assess the dignitary interest afforded to the individual from informing them of the nature, grounds, and consequences of the state action and enabling them to present their side of the story. (*See Ryan v. Cal. Interscholastic Fed'n-San Diego Section*, 94 Cal. App. 4th 1048, 1069-1071 (2001) [the primary difference between federal due process and state due process is the dignity factor].)

The seminal case explaining the dignitary interest factor, *People v. Ramirez*, criticizes the federal due process analysis because it "undervalues the important due process interest in recognizing the dignity and work of the individual by treating [them] as an equal, fully participating, and responsible member of society." (*People v. Ramirez*, 25 Cal. 3d 260, 267–68 (1979).)

> For government to dispose of a person's significant interests without offering him a chance to be heard is to risk treating him as a nonperson, an object, rather than a respected, participating citizen.

(*Id*. *citing* Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 30 (1977).)

Even in cases in which the additional process will not alter the outcome, due process may nevertheless require that additional procedural protections be afforded to the individual in order to protect their dignitary interests. (*People v. Ramirez*, 25 Cal. 3d at 267–68.) Dignitary interests are affected both by the deprivation itself and by the perception of the deprivation. (*People v. Sanchez*, 18 Cal. App. 5th at 756 ["dignitary interest encompasses the appearance of fairness to those involved"].)

If this Court agrees that the appeal of the juvenile dependency court finding of possible neglect is moot, then Appellant will be permanently left with a state determination labeling him a child neglecter. And the label could later result in Appellant's inclusion on the CACI. Both outcomes—being labeled as a child neglecter and being listed on the CACI—undermine Appellant's dignity interests. By contrast, permitting Appellant to continue pursuing his case would allow him the opportunity to challenge the possible neglect determination—which the state no longer supports—thereby preventing the finding from being a basis for Appellant being listed in the CACI.

D. **The Government Has No Interest in Inaccurate Determinations of Parental Abuse or Neglect.**

It is undisputed that California has a compelling state interest in preventing child abuse and neglect, and the creation and maintenance of a centralized database is a method through which the state can effectuate its interest. (See *Santosky v. Kramer,* 455 U.S. 745, 766(1982); *People ex rel, Eichenberger v. Stockton Pregnancy Control Med. Clinic, Inc.* (1988) 203 Cal. App. 3d 225, 241-243, (1988) [detecting and preventing child abuse are a "compelling" government interest].) But the operative question is not whether California has a significant interest in making determinations of child abuse and neglect or in maintaining the CACI, but whether California has a significant interest in limiting the avenues by which parents can challenge state determinations of child abuse and neglect. (*See Humphries*, 554 F.3d at 1194 [applicable inquiry was narrow question of whether California has an interest in limiting the ability of individuals to challenge their CACI listing].)

California has no interest in maintaining a system of records that erroneously labels parents as child abusers or child neglectors, as the effectiveness of a system recognizing individuals found to be a danger to children is nullified if it contains erroneously listings. The *Humphries* decision expounded with respect to the CACI:

> To clarify our point through an extreme example, it is obvious that if one hundred percent of the population were erroneously included in the CACI, it would provide no benefit to California in identifying dangerous individuals.

> Thus, the more false information included in a listing index such as the CACI, the less useful it becomes as an effective tool for protecting children from child abuse."

(*Humphries,* 554 F.3d at p.1194; *see also Castillo*, 959 F. Supp. 2d at 1263 [plaintiff placed on internal statewide database of child abuse perpetrators without opportunity to challenge inclusion; court denied government's summary judgment motion, finding that the government has no interest in maintaining an inaccurate database].)

To the contrary, California has an affirmative interest in ensuring that its records contain accurate information, as the state has an interest in promoting the welfare of the child and preserving the family. (*See Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1130; see also *Lassiter v. Dep't of Soc. Servs. of Durham Cnty. N.C.*, 452 U.S. 18, 27 (1981) ["Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision."]; *Santosky*, 455 U.S. at 747-748 [state has an interest in family preservation].)

Similar conditions exist in the state's adjudication of public benefits. In the seminal public benefits case *Goldberg v. Kelly*, the U.S. Supreme Court observed that the government has an interest in fostering the dignity and well-being of all persons, including through uninterrupted public assistance when needed. (*Goldberg v. Kelly*, 397 U.S. 254, 265-266 (1970).) The court found that the state's interest in facilitating low-income people to meaningfully participate in community life outweighs any competing fiscal concern. (*Id.*) Facilitating the preservation of the

family and welfare of the children are government interests that supersede any burdens associated with the additional process.

Finally, the government's burden in litigating child abuse allegations to maintain an accurate database is exactly the sort of burden the government is expected to bear. (*See Humphries*, 554 F.3d at 1194 [dismissing the idea that it would be unduly burdensome on the government to provide a hearing because this is "precisely the sort of administrative costs we expect our government to shoulder"].) In *Castillo*, , the court found that the government must grant individuals listed in an internal government-only child abuse database "some sort of hearing", despite any administrative or fiscal burdens, as not doing so would be "inherently unjust." (959 F. Supp. 2d at 1263.)

The burden on parents of navigating an erroneous determination of child abuse or neglect and the state's interest in child welfare greatly outweigh the minimal additional burden to provide process in this context.

CONCLUSION

Parents' liberty interests in challenging incorrect allegations of child abuse and neglect are profound, and the state has no interest in maintaining an inaccurate database. Courts have already recognized that CACI listings result in material deprivations and the state must therefore offer procedures to challenge such a listing; yet California parents are still subjected to a system where the opportunities to be labeled by the state a child abuser or neglecter are many, and the ways to challenge

such a label are few. We urge the Court to continue to affirm the due process rights of parents and families by ensuring that parents or guardians have as many mechanisms as possible to contest court findings that they have committed abuse or neglect, and to challenge placements on the Child Abuse Central Index that may stem from those findings.

Dated: November 3, 2021 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520 (c) 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 7,845 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 8.520(f)(1-3), this certificate, and the signature blocks.

ACLU Foundation of
Southern California

Dated: November 3, 2021

By: */s/ Minouche Kandel*
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1313 West Eighth Street, Los Angeles, California 90017. I am employed in the office of a member of the bar of this court at whose direction the service was made. On November 3, 2021, I served the attached document by electronically transmitting a true copy via this Court's TrueFiling system to the recipients listed on the below service list. Also on this date, I transmitted the above document to be mailed by Nationwide Legal, LLC via U.S. mail to the recipients listed on the below service list.

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on November 3, 2021, at Los Angeles, California.

ANGELICA LUJAN

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S267429**
Lower Court Case Number: **B301135**

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