IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re N.R., A Person Coming Under the Juvenile Court Law. _____ LOS ANGELES DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent, v. O.R., Objector and Appellant. _____	No. B312001 Superior Court Nos. 20CCJP06523 Consolidated with 20CCJP06523A

APPLICATION FOR LEAVE TO FILE *AMICI CURAIE* BRIEF IN SUPPORT OF OBJECTOR; [PROPOSED] BRIEF OF AMICI CURAIE PROFESSORS OF LAW WITH EXPERTISE IN CHILD WELFARE, PUBLIC HEALTH, AND DRUG POLICY

Allison E. Korn
(*pro hac vice* pending)
Gabrielle Feliciani
(*supervised law student*)
Duke Law School
210 Science Drive
Durham, NC 27708
korn@law.duke.edu
Telephone: 919-613-9595

Alicia Virani (SBN281187)
UCLA School of Law
405 Hilgard Avenue
Los Angeles, CA 90095
virani@law.ucla.edu
Telephone: 310-825-5216

Attorneys for Amici Curaie

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF OBJECTOR.

Pursuant to California Rules of Court, Rule 8.520(f), proposed amici curiae W. David Ball, Barton Child Law and Policy Center, Paul Bennett, Leo Beletsky, Taleed El-Sabawi, Matthew I. Fraidin, Stephanie K. Glaberson, Cynthia Godsoe, Crystal Grant, Josh Gupta-Kagan, Julia Hernandez, Alex Kriet, Sarah Lorr, Laura Matthews-Jolly, Jennifer D. Oliva, Dorothy Roberts, Shanta Trivedi, and Vivek Sankaran respectfully request leave to file the accompanying [Proposed] Amicus Curiae Brief in Support of Objector and Appellant O.R.

Applicants are professors of law with expertise in the fields of child welfare, public health, and drug policy. Amici are concerned about the harm of unnecessary and unwarranted state intervention into the lives of children and their families, especially those from low-income and other historically marginalized populations. Amici write to offer this Court information on the policy and social science context we believe informs the critical questions raised by this appeal.

The landscape of child welfare law in the United States has been significantly impacted by the War on Drugs. Over the past fifty years, dangerous assumptions about the nature of parental drug use have fueled dependency court interventions and family separations. Parents and children targeted by these interventions are almost all low-income and disproportionately Black, American Indian, and Latinx. These interventions—and the separations that follow—are based in large part on the

misperception that any drug use by a parent harms or poses risk of harm to his child; rarely, if ever, do these interventions take into account the consequential harms caused by family separation or a child's right to family integrity.

Amici aim to challenge longstanding assumptions about drug use and correct misinformation about a correlation between parental drug use and child maltreatment. Amici's expertise and analysis are directly relevant to the questions presented by this appeal, as the Court is being asked whether the California Legislature intended juvenile courts to use a scientifically based definition of "substance abuse," whether the definition of "substance abuse" under § 300(b)(1) can be met by recurrent use of an illicit substance alone, and whether substance abuse is prima facie evidence of abuse and neglect when a child is of "tender years."

This application is timely under Rule 8.520(f)(2) of the California Rules of Court. Granting leave to file the attached amicus brief would not delay or complicated the proceedings of this case. The parties would have ample time to respond to the points discussed in this brief before oral argument.

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, applicant law professors respectfully request that this Court accept and file the attached *amicus curaie* brief.

Dated: April 4, 2023

Respectfully submitted,

/s/ *Allison E. Korn*
Allison E. Korn
(*pro hac vice* pending)
Duke Law School
210 Science Drive
Durham, NC 27708
korn@law.duke.edu
Telephone: 919-613-9595

/s/ *Alicia Virani*
Alicia Virani (SBN281187)
UCLA School of Law
405 Hilgard Avenue
Los Angeles, CA 90095
virani@law.ucla.edu
Telephone: 310-825-5216

APPENDIX: LIST OF AMICI CURAIE[1]

W. David Ball, Professor of Law, Santa Clara University Law School

Barton Child Law and Policy Center, Emory Law School

Paul Bennett, Charles E. Ares Professor of Law and Director, Child and Family Law Clinic, University of Arizona, James E. Rogers College of Law

Leo Beletsky, Professor of Law and Health Sciences, Northeastern University

Taleed El-Sabawi, Research Scholar, Addiction & Public Policy Practice Initiative, O'Neill Institute for National and Global Health Law, Georgetown University Law Center

Matthew I. Fraidin, Professor of Law, University of the District of Columbia David A. Clarke School of Law

Stephanie K. Glaberson, Visiting Professor and Director, Civil Litigation Clinic, Georgetown University Law Center

Cynthia Godsoe, Professor of Law, Brooklyn Law School

Crystal Grant, Clinical Professor of Law and Director, Children's Law Clinic, Duke University School of Law

Josh Gupta-Kagan, Clinical Professor of Law, Columbia Law School

Julia Hernandez, Associate Professor of Law and Co-Director, Family Defense Practicum, CUNY School of Law

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[1] The titles and institutional affiliations of the individual Amici are included as an appendix to this motion. Unless otherwise specified, institutional affiliations are given for identification purposes only and are not to be taken as indicating endorsement by the schools themselves.

Alex Kriet, Assistant Professor and Director, Center on Addiction Law and Policy, Northern Kentucky University Salmon P. Chase College of Law

Sarah Lorr, Assistant Professor of Clinical Law, Brooklyn Law School

Laura Matthews-Jolly, Assistant Professor of Law, North Carolina Central University School of Law

Jennifer D. Oliva, Professor of Law & Co-Director, UCSF/UC Law Consortium on Law, Science and Health Policy, University of California College of the Law, San Francisco

Dorothy Roberts, George A. Weiss University Professor of Law & Sociology, Raymond Pace & Sadie Turner Mossell Alexander Professor Civil Rights, Professor of Africana Studies, Director of Penn. Program on Race, Science & Society University of Pennsylvania

Shanta Trivedi, Assistant Professor of Law and Faculty Director, Sara & Neil Meyerhoff Center for Families, Children & The Courts, University of Baltimore School of Law

Vivek Sankaran, Clinical Professor of Law and Director, Child Advocacy Law Clinic and Child Welfare Appellate Clinic, University of Michigan Law School

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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BRIEF OF *AMICI CURAIE* PROFESSORS OF LAW WITH EXPERTISE IN CHILD WELFARE, PUBLIC HEALTH, AND DRUG POLICY IN SUPPORT OF OBJECTOR

Allison E. Korn
(*pro hac vice* pending)
Gabrielle Feliciani
(*supervised law student*)
Duke Law School
210 Science Drive
Durham, NC 27708
korn@law.duke.edu
Telephone: 919-613-9595

Alicia Virani (SBN281187)
UCLA School of Law
405 Hilgard Avenue
Los Angeles, CA 90095
virani@law.ucla.edu
Telephone: 310-825-5216

Attorneys for Amici Curaie

CERTIFICATE OF INTERESTED PERSONS OR ENTITIES

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: April 4, 2023

/s/ *Allison E. Korn*

Allison E. Korn
(*pro hac vice* pending)
Duke Law School
210 Science Drive
Durham, NC 27708
korn@law.duke.edu
Telephone: 919-613-9595

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INTERESTS OF AMICI

Amici are professors at law schools throughout the United States who have expertise in the fields of child welfare, public health, and drug policy. Amici are concerned about the harm of unnecessary and unwarranted state intervention into the lives of children and their families, especially those from low-income and other historically marginalized populations. Amici write to offer this Court information on the policy and social science context we believe informs the critical questions raised by this appeal.

ARGUMENT

I. THE UNITED STATES' WAR ON DRUGS INSPIRED POLICIES THAT PERPETUATE DANGEROUS ASSUMPTIONS ABOUT DRUG USE, SEPARATE FAMILIES, AND HARM CHILDREN.

For more than fifty years, the United States has waged a war on drugs. What began with President Nixon's declaration that "America's public enemy number one in the United States is drug abuse" (Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971), 7 Weekly Comp. Pres. Doc. 941) is widely recognized today as a "staggering policy failure." (Hudak, *Biden should end America's longest war: The War on Drugs* (Sept. 24, 2021) Brookings <https://www.brookings.edu/blog/how-we-rise/2021/09/24/biden-should-end-americas-longest-war-the-war-on-drugs/> [as of Mar. 25, 2023].) The drug war has promoted and implemented hundreds of punitive anti-drug laws and programs, while slashing funding for compassionate, evidence-based treatment. (Korn, *Detoxing the Child Welfare System* (2016) 23 Va. J. of Soc. Pol'y & the L. 293, 296.) These laws and programs empowered law enforcement to target people suspected of using drugs, arrest them, separate them from their families and communities, send them to prison, and subject them to legalized discrimination even after they reenter society. (Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) pp. 73–79.)

Drug policies over the last five decades were predicated on assumptions that all drug users are immoral, all criminals are dangerous, and arrest and punishment are always necessary. (Korn, *supra*, at p. 300.) At the same time, these drug policies

diverted attention and funding from alleviating the systemic consequences of poverty, racial segregation, inadequate education, and poor healthcare. (*Id.* at p. 296.) The harmful impacts of these drug war policies fell disproportionately on Black, American Indian, and Latinx communities.

As the War on Drugs hit a crescendo point in the 1990s, a shocking number of children were removed from their families and placed into foster care. (Kohomban, et al., *The foster care system was unprepared for the last drug epidemic—let's not repeat history* (Jan. 31, 2018) Brookings <https://www.brookings.edu/blog/up-front/2018/01/31/the-foster-care-system-was-unprepared-for-the-last-drug-epidemic-lets-not-repeat-history/> [as of Mar. 17, 2023].) Between 1986 and 1996, the number of children taken from their parents and placed into foster care increased by 100 percent. (Ludwig, *The Foster System Is a Battleground for the Racist War on Drugs* (June 28, 2020) Truthout <https://truthout.org/articles/the-foster-system-is-a-battleground-for-the-racist-war-on-drugs/> [as of Mar. 25, 2023.) During this same time, incarcerations increased 400 percent as the War on Drugs sharpened its focus on crack cocaine use. (*Id.*)

After more than a half-century, it has become clear that many of these drug policies have neither resulted in fewer drug users nor alleviated social problems associated with drug abuse. A growing reform movement is successfully reshaping drug policies in the United States to reflect science and human rights rather than perceptions of "law and order" and political hysteria. (Korn, *supra*, at p. 300.) Nationwide bipartisan efforts have led to sentencing reforms for nonviolent drug offenses and harm

reduction legislation, such as syringe exchange programs, overdose prevention, and access to rehabilitation services. (*See e.g.*, Off. of Nat'l Drug Control Pol'y, Exec. Off. of the President, *National Drug Control Strategy* (2022) pp. 40–42 [discussing recent state efforts to expand Good Samaritan laws, harm reduction programs, and access to support services].) To date, twenty-one states, Washington, D.C., and Guam have legalized marijuana for recreational use and possession. (Hansen et al., *Where is Marijuana Legal? A Guide to Marijuana Legalization* (Mar. 16, 2023) U.S. News & World Rep. <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization> [as of Mar. 25, 2023].) Many others have decriminalized possession of small amounts of scheduled drugs. (*See Decriminalization*, NORML <https://norml.org/laws/decriminalization/> [as of Mar. 5, 2023] [marijuana]; Quinton, *Oregon's Drug Decriminalization May Spread, Despite Unclear Results* (Nov. 3, 2021) Pew Charitable Trs. <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/11/03/oregons-drug-decriminalization-may-spread-despite-unclear-results> [as of Mar. 17, 2023] [all controlled substances].)

Drug reforms in the criminal legal system especially have helped illuminate the ways in which the War on Drugs produced the highest incarceration rate in the world, contributed to a growing number of overdose deaths, and fractured families and communities of color. (Korn, *supra*, at p. 296.) But in spite of this growing reform movement, family law has remained static when it comes to addressing punitive drug laws, challenging the

assumptions associated with drug use, and presenting new approaches to harm reduction and treatment where appropriate. (*Id.*)

Comprised of the child welfare and foster care systems, the family regulation system "holds perhaps the greatest power a state can exercise over its people: the power to forcibly remove children from their parents and permanently sever parent-child relationships." (Movement for Fam. Power, *How the Foster System Has Become Ground Zero for the Drug War* (2020) p. 35 [hereafter *Movement for Fam. Power*].) Although the evolution of drug policies in the criminal legal system has been galvanized by public awareness of their harmful effects on communities of color and their anemic response to social ills, the family regulation system and its practices remain unmoved. Suspected drug use has become "a ubiquitous excuse for investigating families." (Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World* (2022) p. 203.)

Today, a significant percentage of cases in dependency courts include allegations of parental drug use: they account for approximately 80 percent of all child welfare investigations. (*Movement for Fam. Power*, *supra*, at p. 51.) This is true even as the population of people incarcerated for drug offenses fell by one-third over the past decade. (*Drug Arrests Stayed High Even as Imprisonment Fell From 2009 to 2019* (Feb. 15, 2022) Pew Trs. <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019> [as of Mar. 25, 2023].) Like those

subjected to criminal legal system intervention, the parents and children targeted by child welfare investigations are almost all low-income and disproportionately Black, American Indian, and Latinx. (*Movement for Fam. Power*, *supra*, at p. 10.) These investigations are based in large part on the assumption that any drug use by a parent harms or poses a risk of harm to children. (*Id.* at p. 14.)

This amicus brief operates to challenge the assumption that parental drug use alone poses harm or risk of harm that justifies state jurisdiction over children. A groundswell of literature and media narratives about parents who use drugs—especially low-income parents of color—arose amid the drug war. (*Id.* at p. 19.) These narratives vilified drug users and perpetuated this dangerous assumption of harm, although no study to date can clearly show that parental drug use alone causes child maltreatment. (*Id.*) As amici note, there *is* persuasive evidence that the policies and practices premised on this assumption are harmful to children and families. (*Id.*)

II. CURRENT SCIENTIFIC RESEARCH DOES NOT SUPPORT THE CONCLUSION THAT A PARENT'S RECREATIONAL DRUG USE POSES SUBSTANTIAL RISK OF SERIOUS PHYSICAL HARM TO A CHILD.

Scientific studies do not support the proposition that substance use or even chemical dependence is, itself, sufficient reason for family court intervention. Studies of the factors associating child welfare agency involvement with drug-using parents "all found that factors other than substance use were of greater importance." (Taplin & Mattick, *Child Protection and*

Mothers in Substance Abuse Treatment (2011) p. 10.) These factors include mental health problems, age, number of children, and social support. (*Id.* at p. 73.) A large-scale survey found that a vast majority of mothers in opioid treatment programs rated themselves as "average or above average" parents, and half kept their children unaware of their drug use or treatment program participation. (*Id.* at p. 61.)

Research shows that drug-using parents regularly practice harm reduction and are equipped to address and mitigate any risks associated with drug use; indeed, parents call on these practices when engaging in *any* activity that could potentially harm their children. (*See, e.g.*, Klee, *Drug-using Parents: Analysing the Stereotypes* (1998) 9 Int'l J. of Drug Pol'y 437; Richter & Bammer, *A Hierarchy of Strategies Heroin-using Mothers Employ to Reduce Harm to Their Children* (2000) 19 J. of Substance Abuse Treatment 403; Rhodes et al., *Parents Who Use Drugs: Accounting for Damage and Its Limitation* (2010) 71 Soc. Sci. & Med. 1489.) Child welfare legal experts have observed:

> [M]any people in our society suffer from drug or alcohol dependence, yet remain fit to care for a child. An alcoholic or drug dependent parent becomes unfit only if the dependency results in mistreatment of the child, or in a failure to provide the ordinary care required for all children.

(Foster Care Project, Am. Bar Ass'n, *Foster Children in the Courts* (Mark Hardin edit., 1983) p. 206.) This view was echoed in a recent California Department of Social Services Office of Child Abuse Prevention policy paper, which found that "the caregiver's inability to provide regular care, *not substance abuse per se*, is the

basis for substantiations for neglect." (Chen, *Child Neglect in California: Risk Factors and Early Interventions*, Cal. Off. of Child Abuse Prevention (2019) p. 4 [emphasis added].)

Courts that adopt an approach of finding jurisdiction based on a single positive drug test disregard this evidence. "[S]tudies are inconsistent in defining whether substance involvement is the primary or causal reason for a parent's involvement with the child welfare system, or whether substance involvement is an ancillary or co-occurring problem." (Nat'l Ctr. On Addiction & Substance Abuse at Colum. Univ., *No Safe Haven: Children of Substance-Abusing Parents* (1999) p. 165.) In fact, "best evidence to date suggests that substance abusing parents pose no greater risk to their children than do parents of other children taken into child protective custody." (Testa & Smith, *Prevention and Drug Treatment* (2009) 19 The Future Children 147, 162.)

Courts that find jurisdiction based on a single positive drug test also lag behind recent evolutions in the State's understanding of drug policy, which has progressively decriminalized and legalized previously prohibited substances and promoted diversion programs. (*See* Weinberger, *The Criminal Justice System and More Lenient Drug Policy: Three Case Studies on California's Changes to How Its Criminal Justice System Addresses Drug Use. Santa Monica* (2019) pp. 14–15, 62–64 [describing policies and programs].) Even where a caseworker investigation has appropriately identified parental substance abuse, courts must require affirmative evidence of risk, or they will encourage unwarranted state intervention that is harmful to children and families.

III. AN OBJECTIVE DEFINITION OF "SUBSTANCE ABUSE" WILL PREVENT UNWARRANTED STATE INTERVENTIONS BASED ON MISPERCEPTIONS ABOUT PARENTAL DRUG USE.

A single positive test cannot constitute proof of current or future risk to a child or support a finding that N.R. could not be protected without oversight by Respondent, the Los Angeles Department of Children and Family Services (the Department). Drug use does not measure parenting ability, and a single positive drug test would not lead to a diagnosis of a substance use disorder by a mental health professional.

To assess and monitor parental drug abuse, the family regulation system mandates drug tests and attaches severe consequences to those test results. (*Movement for Fam. Power*, *supra*, at p. 33.) However, the American Soc'y of Addiction Medicine stresses that "a positive drug test is not sufficient evidence for diagnosis of substance use disorder." In most cases, a positive drug test cannot "measure patterns of use over time," as each body's distribution of drugs and their metabolites depends on a variety of factors. (Am. Society of Addiction Med., *Appropriate Use of Drug Testing in Clinical Addiction Medicine* (2017) p. 4.) Yet, caseworkers and judges who are not trained on testing procedures and analysis regularly interpret drug test results to draw conclusions about the severity of a parent's drug use. (*See* Moeller et al., *Clinical Interpretation of Urine Drug Tests* (2017) 92 Mayo Clinic Proc. 774, 790 [determining that the presence of a metabolite at a certain level is indicative of abuse or dependence].) Here, the Department, trial court, and appellate court all attached great significance to the "levels" in Father's

single positive drug test without any citation to any scientific authority supporting their conclusions. (Answer Br. at 17.)

The DSM-V's diagnostic criteria for substance use disorder considers an individual's impaired control over their substance use, social impairment, risky use, and various pharmacologic factors, such as the individual's tolerance and whether they experience withdrawal symptoms. The Los Angeles County Department of Public Health considers the presence of 2-3 criteria as indicating a mild substance use disorder, 4-5 criteria as a moderate disorder, and 6 or more as a severe disorder. (L.A. Cnty. Dep't of Pub. Health, *DSM-5 Substance Use Diagnosis* <http://publichealth.lacounty.gov/sapc/NetworkProviders/ClinicalForms/TS/DSM5Diagnoses.pdf> [as of Feb. 18, 2023].)

Research has shown that the child welfare system is not able to effectively identify parental drug use problems among families in the system. (Marsh et al., *Integrated Substance Abuse and Child Welfare Services for Women: A Progress Review* (2011) 33 Child & Youth Servs. Rev. 466, 468, 471; Grella et al., *Mothers in Substance Abuse Treatment: Differences in Characteristics Based on Involvement with Child Welfare Services* (2006) 30 Child Abuse & Neglect 55, 69.) Therefore, the Court should adhere to DSM-V or similarly rigorous diagnostic criteria[2] to identify a risk of harm emanating from parental drug use, particularly given

[2] *E.g.*, Andrews et al., *The World Health Organization Composite International Diagnostic Interview Short-Form (CIDI-SF)* (1998) 7 Int'l J. Methods Psychiatric Res. 171; *Drug Courts*, Cal. Cts. <https://www.courts.ca.gov/5979.htm> [as of Mar. 25, 2023) ["Juvenile and Dependency Drug Courts use similar approaches as the adult drug court model."].

that studies have found that only about 25 percent of substance users identified by child welfare services meet the DSM-V's diagnostic criteria for substance use disorders. (Testa & Smith, *supra*, p. 149.) When making a determination of harm, courts should consider the impact of substance use on a parent's ability to care for their child rather than its mere occurrence.

IV. ERADICATING THE "TENDER YEARS" DOCTRINE WILL ENCOURAGE A HOLISTIC ASSESSMENT OF THE CHILD'S ENVIRONMENT.

A. Empirical evidence does not support the mechanical response to any and all parental substance use advocated for by the Department.

Researchers looking for a link between parental drug use and child maltreatment have concluded that "the most consistent variable used to determine maltreatment" in child protective services (CPS) case outcomes is caseworker "opinion about the presence of maltreatment." (Berger et al., *Caseworker-Perceived Caregiver Substance Abuse and Child Protective Services Outcomes* (2010) 15 Child Maltreatment 199, 207–10.) Studies show that when parental drug abuse is suspected, interventions and subsequent findings of jurisdiction are based on the caseworkers' opinions of parental drug use rather than on child safety. (*Id.* at p. 210; Victor et al., *Domestic Violence, Parental Substance Misuse and the Decision to Substantiate Child Maltreatment* (2018) 79 Child Abuse & Neglect 31, 38.) Rather than being viewed as one marker of maltreatment-related risks, caseworker perceptions of parental substance abuse directly influence determinations of the intensity and types of

interventions mandated to families. This "may be cause for concern because many of these other measures should more directly reflect parental actions and omissions that may constitute abuse or neglect than should substance abuse in and of itself." (*Berger, supra,* at p. 209.)

Investigations seeking to determine whether a child is at risk of harm are notoriously challenging and subject caseworkers to intense pressure and uncertainty. (*Movement for Fam. Power*, *supra*, at p. 29.) Therefore, such a determination requires caseworkers to tailor their assessment of risk to the specifics of a particular family, including "the effects of generational poverty and racism." (*Id.*)

The present case supports these findings. The Department's holistic assessment of N.R.'s home environment does not demonstrate harm that supports a finding of jurisdiction. A Department caseworker assessed Father's home after he assumed full custody of N.R. and found that it was in good condition, contained food for the child, and there was no presence of illegal or dangerous substances. (Pet'r's Bf. At 11.) N.R. appeared to be healthy and well cared-for. (*Id.*) Father consented to a drug test, which returned positive for cocaine and negative for any other substances. (*Id.*) Father admitted that he used cocaine at a party the weekend before the drug test but maintained that he was not an active user and did not take care of N.R. while under the influence. (*Id.*) Father tested negative for all substances during three following tests. (*See* Answer Br. At 18–19 [Father was unable to complete two drug tests due to work

conflicts, which were not treated as positive due to his consent to testing].)

Nevertheless, N.R. was removed from Father's custody based on this single positive test and past substance use. The court allowed monitored visitation with N.R. and, notably, did not require Father to enroll in a drug treatment program unless he failed or missed a drug test. (*Id.* at 19–20.)

The available scientific evidence and the Department's own investigation do not support the assertion that N.R. was placed at risk of substantial physical harm by Father's cocaine use. Father's cocaine use in this case "offers a false sense of certainty in the inherently uncertain endeavor of predicting whether a child is at risk of harm due to his parent's actions." (*Movement for Fam. Power*, *supra*, at p. 29.)

B. The "tender years" presumption is outdated, misguided, and fails to account for a child's right to family integrity.

The lower court's adherence to the *Drake M.* Court's reading of California Welfare and Institutions Code § 300(b)(1),[3] which considered parental substance abuse as prima facie evidence that a child of tender years is at substantial risk of serious physical harm, contradicts the policy underlying the tender years presumption. (*In re Drake M.* (2012) 211

[3] "[A]ny child who . . . has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's . . . substance abuse" is within juvenile court jurisdiction. Cal. Welf. & Inst., § 300, subd. (b)(1).

Cal.App.4th 754, 767.) The Department claims that this assumption is a "commonsense inference," as children of tender years are more vulnerable than older children, unable to report abuse or neglect, and are more dependent on their parents for basic needs. (Answer Br. at 54–55.) But, the Department does not consider the impact of state intervention, parental separation on young children and infants, or a child's right to family integrity. (*See* Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity* (2021) 56 Harv. C.R.-C.L. L. Rev. 286, 283 ["[R]elying on Supreme Court dicta . . . the majority of federal courts of appeals have determined that a child has a constitutional right to family integrity"].)

The original "tender years" doctrine presumed, in custody disputes, that maternal opposed to paternal custody served the child's best interests; this notion was "consistent with the policy goal advocated by child development experts-maximization of 'continuity of care.'" (Klaff, *The Tender Years Doctrine: A Defense* (1982) 70 Cal. L. Rev. 335, 347.) Modern studies demonstrate that parental separation causes lifelong trauma and that young children are especially vulnerable to disruptions in caregiving. (Gee, *I study kids who were separated from their parents. The trauma could change their brains forever* (June 20, 2018) Vox <https://www.vox.com/first-person/2018/6/20/17482698/tender-age-family-separation-border-immigrants-children> [as of Mar. 17, 2023].)

As in the present case, children are often removed from their homes during child welfare investigations involving

parental drug use. Early parental separation, even for times as short as one week, can result in "distress for a young child who lacks the cognitive abilities to understand the continuity of maternal availability," and separation has been correlated with higher levels of negativity and aggression. (Howard et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families* (2009) 13 Attachment & Hum. Dev. 5, 6–7.) Because lasting harms can result from parental separation at early ages, it is far from "commonsense" that the risks arising from Father's substance use—even at tender years—outweigh the trauma N.R. will suffer from months of parental separation.

C. Risk assessment must be based on a host of factors and cannot be determined solely on a parent's substance use.

California courts should, at minimum, expect a caseworker's assessment to follow standard agency practices. The Department uses a Structured Decision-Making assessment to quantify the present harm or danger to a child and ultimately decide whether a referral needs to be opened or ongoing. (*E.g.*, *California SDM Policy and Procedures*, Evident Change <https://ca.sdmdata.org/Definitions/RA/PP> [as of Feb. 18, 2023].) In L,A. County, "[a] thorough assessment of the family must be completed to determine if alcohol/drug use is impairing a parent's judgment and ability to provide a minimally safe level of care to the child," including random drug tests, self-reports, a comprehensive substance abuse assessment, behavioral observations by abuse treatment providers, and child safety and risk assessments. (Cal. Dep't of Children & Fam. Servs., *0070-*

421.10 Assessment of Drug & Alcohol Abuse, Child Welfare Pol'y Manual <http://policy.dcfs.lacounty.gov/content/Assessment_of_Drug_Alc.htm> [as of July 29, 2015].)

As the Department already uses an objective assessment for determining the risk that substance use may pose to a child, courts declining to implement and enforce Department procedures undermine current State public policy and will lead to the same harmful impacts on children and families as would result without such measures.

V. UPHOLDING JURISDICTION IN THIS CASE WILL PERPETUATE AND EXACERBATE LONGSTANDING NARRATIVES ABOUT DRUG-USING PARENTS AND WILL CAUSE HARM TO CALIFORNIA'S FAMILIES, PARTICUARLY THOSE MOST MARGINALIZED.

Permitting jurisdiction in this case will have impacts extending beyond N.R.'s family: it will perpetuate dangerous narratives about the nature of drug use and harm. The War on Drugs was built upon these narratives and advanced policies that permanently disenfranchised people of color, further exacerbated state-sanctioned violence, and divested resources from communities living in poverty. (*Movement for Fam. Power*, *supra*, at p. 15.)

Throughout the pendency of the drug war, people of color have been blamed for myriad harms in their communities: harms stemming not only from drug abuse but also from segregation, criminalization, overpolicing, and other discriminatory policies. (*Id.*) Although the family regulation system's responses to

parental drug use have proven to be as unsuccessful as criminal legal policies borne out of the drug war, the flawed assumptions about drug-using parents—particularly parents of color—persist today.

A. Misinformed narratives about drug-using parents support punitive family regulation system interventions that have a disproportionate impact on families of color.

The demonization of drug-using parents was sustained through media coverage in the 1980s and 90s, when stories emerged about babies exposed to crack cocaine in the womb. (Gómez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* (1997) p. 15.) These stories helped fuel the political movement to not only jail drug users but to also take away their children. While public awareness of and concern for the War on Drugs' influence on mass incarceration, unfair sentencing laws, overpolicing, and diminished civil rights protections has grown in recent years, media and public perception continue to present a troubling picture of drug using parents—a picture uplifted by family regulation system practices.

Against the backdrop of decriminalization and legalization efforts in the criminal legal system, the family regulation system continues to police communities of color, resulting in the disproportionate representation of children of color involved in child welfare investigations and the foster care system. (Roberts, *Family Policing as Counterinsurgency and the Gathering Abolitionist Force* (2022) 74 Am. Q. 221, 222.) A startling 15.44 percent of American Indian children and 11.5 percent of Black children are placed in foster care before their 18th birthday,

compared to 4.86 percent of white children. (*Id.*) Children of color are also uniquely affected by removal, as they are often placed with families unfamiliar with their cultural and familial customs. (Trivedi, *The Harm of Child Removal* (2019) 43 N.Y.U. Rev. of L. & Soc. Change 523, 540–41.)

B. When risk of harm is assumed rather than grounded in scientific evidence and research, it results in family policing that disproportionately harms parents, children, and communities of color.

By encouraging interventions based on caseworker perceptions, instincts, and assumptions grounded in drug war-era narratives regarding parental drug use, the Department and courts risk disproportionately surveilling and separating families of color. Caseworkers in New York City's Administration for Children's Services (ACS) have described its child welfare system as "predatory," finding that "race operates as an indicator of risk," with Black and Brown parents assumed incompetent based on racial stereotypes. (Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes* (Nov. 11, 2022) N.Y. Times <https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html> [as of Mar. 17, 2023].) Poor parents of color are also more likely to be reported for abuse and neglect, leading to ACS investigations. (*Id.*)

Disproportionate family regulation system involvement in Black, American Indian, and Latinx families occurs in cities across the United States.[4] According to an unpublished ACS

[4] For state- and county-specific examples, see Chang, *'Unsafe In Foster Care' Investigates How A System To Keep Kids Safe Can*

report, parents of color are treated as incompetent parents "at every juncture." (*Id.*) Cases involving Black families are more likely to result in child removal. (Roberts, *Shattered Bonds: The Color of Child Welfare* (2002) p. 16–17.) This racial gap subjects Black families to invasive policing and monitoring, such as home searches with no Miranda warnings, strip searches of children, and mandatory drug testing. (Newman, *supra*.)

Although many child welfare agencies and employees seek to ensure child safety without overenforcement, courts must support these efforts by committing to objective measures when making abuse and neglect determinations to counter implicit racial bias present and systemically embedded in caseworker

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Harm Them (July 20, 2021) <https://www.npr.org/2021/07/20/1018501145/unsafe-in-foster-care-investigates-how-how-a-system-to-keep-kids-safe-can-harm-t> [as of Mar. 17, 2023] [L.A. County, CA]; Hixenbugh et al., *Mandatory Reporting Was Supposed to Stop Severe Child Abuse. It Punishes Poor Families Instead* (Oct. 12, 2022) ProPublica <https://www.propublica.org/article/mandatory-reporting-strains-systems-punishes-poor-families> [as of Mar. 17, 2023] [Philadelphia, PA]; Sanchez & Eldeib, *Illinois Child Welfare Agency Continues to Fail Spanish Speaking Families* (Aug. 31, 2021) ProPublica <https://www.propublica.org/article/illinois-child-welfare-agency-continues-to-fail-spanish-speaking-families> [as of Mar. 17, 2023] [Illinois]; Hager et al., *For Black Families in Phoenix, Child Welfare Investigations Are a Constant Threat* (Dec. 8, 2022) ProPublica <https://www.propublica.org/article/for-black-families-in-phoenix-child-welfare-investigations-are-constant-threat> [as of Mar. 17, 2023] [Maricopa County, AZ]; The Associated Press, *Oregon is dropping an artificial intelligence tool used in child welfare system* (June 2, 2022) NPR <https://www.npr.org/2022/06/02/1102661376/oregon-drops-artificial-intelligence-child-abuse-cases> [as of Mar. 17, 2023] [Oregon].).

investigations and child dependency cases. These implicit biases faced by families of color are well-documented. Unconscious racial, socioeconomic, and cultural bias, paired with broad caseworker discretion, impacts "each stage of child welfare proceedings and, ultimately, child removal outcomes." (Trivedi, *The Harm of Child Removal*, *supra*, at pp. 535–36.) Consequently, white children are more likely to remain with their families than Black, American Indian, and Latinx children. (*Id.* at p. 536.)

This Court has the power to question and subvert the assumptions upon which so many child welfare interventions are justified, including in the matter of N.R. Any state interested in implementing progressive policies to address problems of overpolicing and mass incarceration must also ensure that its family regulation system adopts evidence-based practices and standards that prioritize family unity and promote the best interests of all children.

CONCLUSION

The War on Drugs fomented the dangerous assumption that parental drug use alone poses harm or risk of harm to their children and justifies state intervention. Family regulation system policies regarding allegations of substance abuse often rely on gross misperceptions about parental drug use. Investigations resulting in state jurisdiction over children of drug-using parents pay little attention to the significant harms that result from parental separation. For too long, the family regulation system's approach to drug policy has avoided the scrutiny responsible for sparking an evolution of drug war-era

criminal laws. Today, courts have an obligation to dismantle these punitive policies and practices and thus ensure that the impacts of family policing no longer fall disproportionately on families of color.

Dated: April 4, 2023

Respectfully submitted,

/s/ *Allison E. Korn*
Allison E. Korn
(*pro hac vice* pending)
Gabrielle Feliciani
(*supervised law student*)
Duke Law School
210 Science Drive
Durham, NC 27708
korn@law.duke.edu
Telephone: 919-613-9595

/s/ *Alicia Virani*
Alicia Virani (SBN281187)
UCLA School of Law
405 Hilgard Avenue
Los Angeles, CA 90095
virani@law.ucla.edu
Telephone: 310-825-5216

CERTIFICATE OF COMPLIANCE

In compliance with California Rules of Court, rule 8.520(c)(1), I hereby certify that the foregoing brief of Amici Curaie professors of law with expertise in child welfare, public health, and drug policy consists of 4664 words, not including the cover sheet, the Application, the Tables of Contents and Authorities, the Certificate of Service, or this Certificate, as counted by the Microsoft Word computer program used to generate this brief. The brief is set in Century Schoolbook, 13-point.

Dated: April 4, 2023

/s/ Allison E. Korn

Allison E. Korn
(*pro hac vice* pending)
Duke Law School
210 Science Drive
Durham, NC 27708
korn@law.duke.edu
Telephone: 919-613-9595

PROOF OF SERVICE

IN THE SUPREME COURT OF CALIFORNIA

In re N.R.,

Supreme Court Case No: S274943

Appellate Court Case No.: B312001

I, Allison E. Korn, declare and state: I am employed in the County of Durham, State of North Carolina. I am over the age of 18 and not a party to the within action. My business address is 210 Science Drive, Durham, NC 27708. I am an attorney admitted to practice law in New York State and the State of Maryland.

On April 4, 2023, I served the following:

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Upon the persons or organizations listed below electronically. I utilized service through the true filing electronic system.

Michael Neu, neum@ladlinc.org
Daniel Hoang, Hoangd@ladlinc.org
Samantha Bhuiyan, bhuiyans@clcla.org
Office of County Counsel, appellate@counsel.lacounty.gov
CAP-LA, capdocs@lacap.com
Superior Court, JuvJoAppeals@lacourt.org
Appellate Court, through truefiling

Upon the persons or organizations listed below, by placing this document in the mail addressed to:

O.R. - Appellant, Address on file

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 4, 2023 at Durham, NC.

/s/ *Allison E. Korn*
Allison E. Korn

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **IN RE N.R.**
Case Number: **S274943**
Lower Court Case Number: **B312001**

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4/4/2023

Date

/s/Allison Korn

Signature

Korn, Allison (4644183)

Last Name, First Name (PNum)

Duke University School of Law

Law Firm