

No. [REDACTED]

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE**

[REDACTED],

Plaintiff and Respondent,

vs.

[REDACTED],

Defendant and Appellant.

Orange County Superior Court | Case No. [REDACTED]
The Honorable [REDACTED], Judge

**PROPOSED *AMICUS CURIAE* BRIEF OF CALIFORNIA
WOMEN'S LAW CENTER IN SUPPORT OF DEFENDANT
AND APPELLANT [REDACTED]**

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Date: 6/17/2021

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(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

A civil restraining order is a lifeline for individuals suffering from domestic or intimate partner violence. These orders often play a central role in helping survivors¹ break the cycle of abuse and achieve a sustainable exit from a vulnerable and painful season of their lives. But in this most fragile of moments, the efficacy of a survivor’s lifeline can be reduced or eliminated when a court issues an unjustifiably *mutual* restraining order—effectively equating abuser and abused.

Scholars and advocates specializing in the field of domestic violence have increasingly concluded that true instances of “mutual” abuse are virtually non-existent. Recognizing the risks inherent in a system that nonetheless permits mutuality in its restraining order system, California’s Domestic Violence

¹ The literature is divided on the important question whether it is more appropriate and respectful to refer to those who have suffered domestic and/or intimate partner violence as “victims” or “survivors.” As one prominent advocacy organization observes: “The word ‘victim’ is used by members of law enforcement and within the context of courtroom proceedings, but for many of our organizations, ‘survivor’ speaks to the sense of empowerment our coordinated response aims to encourage in the people we serve. In the end, it is imperative to follow the lead of the person seeking support, since the journey from victim to survivor is unique to each person. To that end, many are beginning to use the term Victim/Survivor (V/S) to represent this continuum.” (Women Against Abuse, *The Language We Use*, <<https://www.womenagainstabuse.org/education-resources/the-language-we-use>> [as of June 17, 2021].) For purposes of this brief, *amicus* will refer generally to those who have experienced domestic or intimate partner violence as survivors, except in direct quotations from other sources which employ different language.

Prevention Act, Fam. Code, §§ 6200–6460 (“DVPA”), requires a trial court to conduct a multi-layered inquiry and reach a specific set of factual findings before it may issue a mutual restraining order. The complex statutory regime governing mutual orders is driven by several policy concerns.

First, mutual restraining orders have broad-sweeping negative consequences for survivors, which may not be immediately obvious to the issuing court. For example, the orders can jeopardize the survivor’s right to custody and other support. They may cause a survivor to face criminal consequences, or to live her life in fear of these consequences. And on a more intangible level, they allow abusers to avoid accepting responsibility for their behavior, which further victimizes the survivor psychologically, emotionally, and socially. Ultimately, this host of negative consequences can serve to discourage survivors from seeking redress through the courts at all—even when such individuals urgently need and deserve judicial protection.

Second, abuse takes a heavy toll on domestic violence survivors’ physical and emotional well-being, frequently affecting their daily conduct and patterns of behavior and altering their responses to ongoing trauma and abuse. Such considerations are carefully built into the statutory regime governing mutual restraining orders and should guide this Court’s analysis. Indeed, the complexity of the statutory scheme suggests that the legislature intended for the judiciary to exercise great sensitivity and sophistication in analyzing a survivor’s interactions with—

and testimony about—her abuser, especially when the abuse has been occurring for a long time. The absence of such sensitivity can result in decision-making that is driven by implicit biases and subconsciously embedded notions of how a victim (usually a woman) “should” behave. This can easily result in unfair court outcomes that fail to protect survivors adequately.

Third, abusers recognize that a mutual restraining order is a tool that they can use to blunt the issuing court’s power. Individuals with manipulative tendencies are thus highly incentivized to seek mutual restraining orders as a defense tactic—on the theory that the best defense is a good offense. That is exactly what happened in this case, as even a cursory perusal of the respondent’s vituperative appellate brief indicates. Indeed, this phenomenon is even embedded in the procedural posture itself: respondent [REDACTED] is the plaintiff, not the defendant, because he got wind of appellant [REDACTED]’s intent to seek a restraining order and managed to win the race to the courthouse.²

The trial court’s issuance of a mutual restraining order against both [REDACTED] and [REDACTED], as well as the joint custody order that flowed from it, failed to account for any of these considerations and failed to follow the strictures of the DVPA’s statutory scheme. Instead, the trial court “applied improper criteria [and] incorrect legal assumptions,” which resulted in a failure to “exercise . . . informed discretion.”

² Following the guidance in California Rules of Court, rule 8.90, subd. (b), the body of the brief refers to the parties by their first name and last initial.

(*Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816, 820; see also *In re Marriage of Everard* (2020) 47 Cal.App.5th 109, 123–124.)

For these reasons, as an amicus curiae, the California Women’s Law Center joins ██████████ in urging this Court to reverse both orders. Specifically, the Court should reverse the mutual restraining order and remand it with instructions for the superior court to enter a restraining order as to ██████████ only. Further, the Court should reverse the joint custody order and remand it for a new trial on the issues of custody and visitation.

ARGUMENT

I. True Instances of Mutual Abuse Are Very Rare, Which Is Why the Family Code Requires Detailed Findings To Support a Mutual Restraining Order

At its heart, domestic abuse “stems from a desire to gain and maintain power and control over an intimate partner.” (National Domestic Violence Hotline, *Why People Abuse* <<https://www.thehotline.org/identify-abuse/why-people-abuse/>> [as of June 17, 2021].) Frequently, as they seek control, abusers employ tactics aimed at “dismantling equality in the relationship in order to make [the survivor or victim] feel less valuable and undeserving of respect.” (*Ibid.*)

True to form, the appellate record in this case is replete with egregious instances of this toxic dynamic between the parties—including a graphic photograph that ██████████ took of a naked and unconscious ██████████ immediately after sexually assaulting her, which he then texted to her with the comment, “Just showing you how disgusting you are.” (1 AA 028–029.)

Because intimate partner violence stems from one party’s

desire to exercise unwarranted power and control over the other, the dynamic should not be conceptualized as a two-way street. There is a growing consensus that so-called “mutual abuse” is a myth, or at most incredibly rare. As one commentator noted: “Domestic violence is rarely mutual. Those who believe that mutual abuse is common, may hold that belief because they do not appreciate what they are observing when dealing with couples who experience intimate partner abuse. What may appear to be ‘mutual,’ often reflects an at-risk partner’s attempts to find the most effective way to stop the abuse.” (Drew, *Collaboration and Intention: Making the Collaborative Family Law Process Safe(r)* (2017) 32 Ohio St. J. on Disp. Resol. 373, 386; see also Tarr, *The Cost to Children When Batterers Misuse Order for Protection Statutes in Child Custody Cases* (2003) 13 S. Cal. Rev. L. & Women’s Stud. 35, 54, fn.121 [“[W]e have not encountered persuasive evidence in our cases of mutual abuse, and researchers have concluded similarly that mutual abuse is rare.”], quoting Bancroft & Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002) at p. 4 (hereafter, Bancroft & Silverman)].)

For these reasons, this Court, as well as the trial court, should closely scrutinize the facts and context in any case involving mutual requests for protection—an approach to judicial review that is consistent with both the letter and spirit of the governing statutory scheme set forth in the DVPA. Specifically, the statute provides that a trial court considering a mutual restraining order must consider “written evidence of abuse or domestic violence in an application for relief” and the court must

make “detailed findings of fact indicating that both parties acted as a primary aggressor and that neither party acted primarily in self-defense.” (Fam. Code, § 6305, subds. (a)(1), (2).) If the court finds that “both parties acted primarily as aggressors,” its work is not yet done; it must then “consider the provisions concerning dominant aggressors set forth in paragraph (3) of subdivision (c) of Section 836 of the Penal Code.” (Fam. Code, § 6305, subd. (b).)

That Penal Code provision, in turn, specifies that “[t]he dominant aggressor is the person determined to be the most significant, rather than the first, aggressor.” It requires the court to consider “(A) the intent of the law to protect victims of domestic violence from continuing abuse, (B) the threats creating fear of physical injury, (C) the history of domestic violence between the persons involved, and (D) whether either person involved acted in self-defense.” (Pen. Code, § 836, subd. (c)(3).)

Overall, the intent of this statutory scheme is to ensure that mutual restraining orders are issued in rare instances where the evidence demonstrates a pattern of abuse by both parties that makes them *equally* the most significant aggressor. (*Conness v. Sartram* (2004) 122 Cal.App.4th 197, 204.) Only such highly unusual circumstances warrant the blunt instrument of a mutual restraining order.

Here, the superior court did not meet these requirements. It improperly issued a mutual restraining order against both [REDACTED] and [REDACTED] without properly applying the relevant statutory standards. The record contains clear evidence that [REDACTED] acted as the primary and dominant aggressor,

terrorizing ██████ for years with his pattern of abusive, manipulative, and controlling behavior. The evidence is overwhelming that ██████ physically injured ██████ on multiple occasions and subjected her to shocking levels of emotional abuse. (AOB 15–29.) Bafflingly, the superior court equated these undisputed events with an unrelated prior shoplifting conviction, some of ██████ written communications to ██████ on the Talking Parents Application, and her oral response to a direct threat of physical violence—statements that indicate frustration and anger, but which in no way suggest that she was a primary or dominant aggressor. (AOB 32–34.)

II. Wrongly Issued Mutual Restraining Orders Carry Broad Negative Consequences for Survivors of Domestic Violence

A civil restraining order with unjustified mutuality, like the one in this case, is a compound failure from the survivor’s perspective. First, it negatively impacts the survivor’s *ability to obtain* further relief from the court, if needed. Second, it negatively impacts the survivor’s *willingness to seek* further redress of her ongoing wrongs and violations through the court system. Third, studies show that a survivor accused of inflicting domestic violence may suffer serious criminal consequences of her own or be forced to live in fear of those consequences. Fourth, it carries intangible but equally important negative consequences by providing abusers with a supposed justification for their behavior, which enables further abuse, and by imposing social and emotional stigma on a survivor.

A. Mutual Restraining Orders Frequently Prevent Survivors from Obtaining Further Judicial Relief That They Need and Deserve

As many scholars have pointed out, mutual restraining orders “generate the impression before the court, the police, and other persons that both parties are equally abusive.” (O’Brien, *Mutual Restraining Orders in Domestic Violence Civil Cases* (1996) 30 Clearinghouse Rev. 231, 231–232 (hereafter, O’Brien).) By their nature, they cast a traumatized domestic violence victim in the role of perpetrator. This equating of abuser and abused almost certainly indicates that the survivor has lost the court’s sympathy—the very sympathy on which the survivor must rely for help in sensitive related areas such as custody, visitation, and child support. (*Ibid.*, citing Zorza, *Women Battering: High Costs and the State of the Law* (1994) 28 Clearinghouse Rev. 383, 393.)

As one scholar has observed: “The most devastating effect of mutual protection orders is their use in future proceedings against the woman. They can be used in divorce proceedings, civil proceedings on domestic violence, and criminal proceedings against the abuser.” (Topliff, *Why Civil Protective Orders are Effective Remedies for Domestic Violence but Mutual Restraining Orders are Not* (1992) 67 Indiana L.J. 1039, 1062 (hereafter, Topliff).) “If the woman petitions for a modification of custody or visitation based on the abusive behavior of the respondent, the batterer can often use the mutual protection order as an indication that she was also violent, making changes in custody and visitation very difficult to obtain. Courts will sometimes even award custody to the batterer.” (*Id.* at p. 1064.)

A variation of that common fact pattern played out in this case. The superior court’s order providing for joint custody of the parties’ child, ■■■, appeared to flow directly from the court’s decision, in its mutual restraining order, to equate ■■■ oral and written expressions of frustration with ■■■ undoubted history of violent physical and emotional abuse.

B. Mutual Restraining Orders Discourage Survivors from Seeking Other Relief Through the Court System

The phenomenon of retraumatization—trauma because of trauma—has long been recognized in California. A 1996 report from the California Judicial Council observed tellingly that, when the justice system “fails to deal effectively with victims of domestic violence, [it] contributes to their victimization.” (Judicial Council of California Advisory Committee on Gender Bias in the Courts, *Achieving Equal Justice for Women and Men in the California Courts* (1996) <<https://www.courts.ca.gov/documents/f-report.pdf>> [as of June 17, 2021], p. 207 (hereafter, *Achieving Equal Justice*)). “Retraumatization, also known as secondary victimization, describes the experience of survivors who encounter ‘victim-blaming attitudes, behaviors, and practices’ from service providers and institutions, ‘which results in additional trauma.’” (Katirai, *Retraumatized in Court* (2020) 62 Ariz L. Rev. 81, 88 (hereafter, Katirai); see also *Monterroso v. Moran* (2006) 135 Cal.App.4th 732, 738 [“an improvidently issued mutual restraining order may adversely impact victims of domestic violence and continue their victimization”].)

Simply put, a civil restraining order that is unjustifiably mutual, like the one at issue here, augments the risk of retraumatization for the domestic violence survivor. That risk, in turn, “presents a serious barrier to justice, as it negatively influences survivor’s choices in several ways. First, many may opt out of seeking help from the legal system entirely. . . . Second, some may settle for less than they would like in settlement negotiations or mediation. The result is a chilling effect on the participation of survivors in both criminal and civil court proceedings.”³ (Katirai, *supra*, at p. 96.)

In other words, an unjustifiably mutual restraining order sets a dangerous cycle in motion by discouraging the survivor from seeking court intervention and assistance to protect herself

³ Moreover, as the same commentator points out, the negative repercussions are not confined to a single individual but can extend far into her community—a ripple-effect phenomenon recently brought to the forefront of public discourse by the Black Lives Matter movement. The end result of this ripple effect is a decreased likelihood that members of the community will opt to seek help from the criminal or civil justice system. (Compare Katirai, *supra*, at p. 96 [observing that “the chilling effect of negative experience for one survivor can infect an entire community, resulting in distrust and reluctance to access the courts on the part of a large number of survivors.”] with Herd, *Pain of Police Killings Ripples Outward to Traumatize Black People and Communities Across US*, *The Conversation* (May 24, 2021) <<https://theconversation.com/pain-of-police-killings-ripples-outward-to-traumatize-black-people-and-communities-across-us-159624>> [as of June 17, 2021] [“[R]acism, like trauma, can be experienced vicariously.’ [¶] . . . [¶] [T]he cumulative impact of harmful policing can shred the social fabric of Black neighborhoods and drain Black people and their communities of the health and social resources they need to live healthy lives.”].)

in the future. The complexity and the many steps involved in seeking, challenging, or attempting to modify a restraining order—among others: serving the abuser, completing forms, seeking legal counsel, finding transportation and childcare for court appearances, and recounting a deeply personal and upsetting story to complete strangers in a public forum—can be daunting, frustrating, exhausting, and expensive. (See Topliff, *supra*, at p. 1044.) When a survivor is then knocked down by the very system through which she sought relief, her trust in and reliance upon that system is often understandably shattered.

C. A Mutual Civil Restraining Order May Cause a Restrained Survivor to Suffer Serious Criminal Consequences or Live in Fear of Those Consequences

A survivor who is subject to a mutual civil restraining order must live indefinitely under an oppressive set of threatened consequences. Specifically, Judicial Council Form DV-130, titled “Restraining Order After Hearing,” describes the consequences that may result from the violation of the restraining order: “If you do not obey this order, you can be arrested and charged with a crime. [¶] If you do not obey this order, you can go to jail or prison and/or pay a fine. [¶] It is a felony to take or hide a child in violation of this order. [¶] If you travel to another state or to tribal lands or make the protected person do so, with the intention of disobeying this order, you can be charged with a federal crime. [¶] You cannot have guns, firearms and/or ammunition.” (*Isidora M. v. Silvino M.* (2015) 239 Cal.App.4th 11, 21, quoting Judicial Council Form DV-130, Restraining Order After Hearing (rev. July 1, 2014) at p. 5); *see also* the current

version of Judicial Council Form DV-130, Restraining Order After Hearing (rev. July 1, 2016) at p. 5 (same). A mutual restraining order “may subject both parties to subsequent criminal charges and immediate arrest, even where one party is falsely accused by the other.” (O’Brien, *supra*, at p. 23.)

Moreover, a violation of a restraining order is itself a separate crime, punishable with imprisonment. Penal Code Section 273.6 sets forth the criminal consequences of violating a restraining order: “(a) Any intentional and knowing violation of a protective order . . . is a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in a county jail for not more than one year, or by both that fine and imprisonment.”

These multifarious legal consequences, whether actual or merely threatened, further victimize a survivor struggling to rebuild her life after escaping from domestic or intimate partner violence. They should not be imposed without a deep and searching inquiry by the trial court into the dynamics of the abusive relationship—an inquiry that was not conducted here. (AOB 38–57.)

D. Unjustifiably Mutual Restraining Orders Fail to Make Abusers Accept Responsibility for Their Behavior

On a more intangible, but no less real, level, a mutual restraining order’s equalization of abuser and abused inflicts a massive psychological injustice that favors the abuser and makes him less likely to reform his future behavior. “Domestic violence experts believe abusers must accept responsibility if they are to

change their behavior.” (O’Brien, *supra*, at p. 233.)⁴ Mutual restraining orders decrease the likelihood of any such change of heart—indeed, if anything, they encourage the abuser’s behavior patterns to become more entrenched by providing them with a fig leaf of justification for their appalling conduct.

As one expert has observed: “Judicial behavior strongly influences the possibility of future violence, and issuing a mutual protection order can send a message to both the batterer and to the victim regarding violence. . . . The batterer often rationalizes his abuse and blames his victim or others for his violent behavior. Even acts of self-defense can be rationalized by the batterer as a justification for abuse.” (Topliff, *supra*, at p. 1060.) “The issuance of a mutual restraining order can reinforce the batterer’s belief that the problem is not his but is the result of external factors. He could easily understand a mutual protection order to mean that the court blames the victim as much as the batterer. The implication is that there is no accountability by the batterer.” (*Id.* at pp. 1060–1061.)

The Court can witness this phenomenon occurring before its eyes in the respondent’s brief, where ██████ fails to address

⁴ The crucial importance of acknowledging responsibility in preventing repeated behavior is similarly well-recognized in the field of restorative justice studies. (See, e.g., Kohn, *What’s So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention* (2010) 40 Seton Hall L.R. 517, 531 [emphasizing the importance of “making the offender accept the nature and extent of the harm done by the offence and of his own responsibility for that harm” in connection with “mending the rift between the parties and healing the community at large”].)

any of his own violent acts and instead engages in a rationalization process, blaming ██████ for “willfully mak[ing] ██████ upset and faustured [flustered] so she can start arguments with [him].” (RB 4; see *People v. Kovacich* (2011) 201 Cal.App.4th 863, 901 [citing expert testimony that abusers commonly “blam[e] the battering incident on the victim, which is part of the psychological and emotional abuse that exists in these relationships”].) It is no stretch to deduce from ██████ appellate brief that his failure to take responsibility for his violent behavior—and his choice to blame his own violence on ██████ for supposedly provoking him—is reinforced by the mutuality of the restraining order, and perhaps even derives in part from it.

E. Mutual Civil Restraining Orders Further Victimize the Survivor Emotionally and Socially

Social and emotional stigma is another intangible, but by no means minor, consequence to a domestic violence survivor whom the court has subjected to a wrongfully issued mutual restraining order. As scholars have noted, in such instances “the victim is likely to suffer embarrassment and humiliation when family, friends, work associates, and other acquaintances learn she too has been classified as an abuser. Victims’ self-esteem is usually already low, and when they are characterized as batterers it may drop even lower.” (O’Brien, *supra*, at p. 233.) Indeed, as noted *infra* in Section I, instilling low self-esteem in the survivor is frequently among the batterer’s principal goals. It is not surprising that “victims of domestic violence who have not

engaged in an act of violence are confused, humiliated and degraded by orders restraining such conduct.” (*Achieving Equal Justice, supra*, at p. 231.)

To sum up, the negative repercussions of an unjustifiably mutual restraining order are legion. This is exactly why the legislature drafted a comprehensive statutory scheme to make them difficult to obtain. When coupled with the implicit bias that makes such orders easier to obtain than they should be, see Section III, *infra*, and the fact that abusers are highly incentivized to utilize them as a cynical litigation tactic, see Section IV, *infra*, mutual restraining orders can be a truly dangerous phenomenon.

III. Courts Risk Subjecting Domestic Violence Survivors to Unfair and Outdated Stereotypes by Failing to Account for the Mental Toll That Years of Abuse Can Take

The two orders that ██████████ seeks to challenge in this appeal reflect an all-too-common societal tendency to disbelieve women. “The tendency to discount women’s experiences permeates our society, including the social service and justice-based systems to which so many survivors turn for help in their efforts to be safe.” (Epstein, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences* (2019) 167 U. Pa. L.R. 399, 439 (hereafter, Epstein).) This “discounting” effect drives implicit biases in decisionmakers that may be reinforced, rather than overcome, by certain characteristic behaviors common to abusers and abused. Any court considering a mutual restraining order must consequently be alert to these behaviors.

“[W]hen a survivor tells the story of the abuse she has experienced, her demeanor may be symptomatic of psychological trauma induced by extended abuse.” (*Id.* at p. 421.) Certain common indicia of post-traumatic stress disorder, such as numbing,⁵ hyperarousal,⁶ and intrusion,⁷ can play an outsized role in the survivor’s general demeanor in ways that can unfairly influence a decision-maker charged with the difficult task of assessing whether she is telling the truth. As a result, “despite the proliferation of police and judicial training, many gatekeepers continue to misinterpret—and, as a result, discount—the credibility of women who display each set of symptoms when telling their stories of abuse.” (*Ibid.*; citing Am. Psychiatric Ass’n

⁵ “A survivor can respond to overwhelming trauma by becoming emotionally numb, a compensating psychic response that often manifests as a highly constrained affect.” (*Ibid.*, citing Am. Psychiatric Ass’n Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) at pp. 271–272.)

⁶ Hyperarousal is “an anxious posture of alertness and reactivity to an imminent danger. This ‘hyperarousal can cause a victim to seem highly paranoid or subject to unexpected outbursts of rage in response to relatively minor incidents.’” (*Id.* at p. 421, quoting Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System* (1999) 11 *Yale J.L. & Feminism* 3, 3–4.)

⁷ Intrusion is “reliving the violent experience as if it were occurring in the present, often through flashbacks. Such unbidden re-experiencing of traumatic events may badly impair a witness’s ability to testify in a narratively seamless—or indeed, even a roughly sequential—fashion.” (*Id.* at p. 421.)

Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) 271–272.)

Paradoxically, “abusive men often provide a sharp credibility contrast; they tend to excel at presenting themselves as self-confident and in control, are adept at manipulation, and ‘are commonly able to lie persuasively, sounding sincere,’ all of which tends to trigger assumptions that they are in fact credible.” (Epstein, at p. 423, quoting Bancroft & Silberman, *supra*, at pp. 15–16; see also Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women* (2009) 17 Am. U.J. Gender Soc. Pol’y & L. 163, 174 [“[B]atterers tend to be self-confident and ultra-controlled in their outward appearance and thus testify in a way that is traditionally perceived as truthful.”].)

With these psychological contrasts in play, “[t]he skeptical reactions of justice system gatekeepers to survivor demeanor can trigger a vicious cycle of credibility discounts.” (Epstein, at p. 424.) “To assess the trustworthiness of a woman’s account of domestic violence, judges and other gatekeepers are inevitably (though perhaps unconsciously) influenced by stereotypical beliefs about women, particularly in the context of intimate relationships. Although such beliefs vary by individual, certain fundamental cultural tropes about women’s motives to lie and manipulate tend to resonate here. Two of the most persistent and crude stereotypes about women’s false allegations about male behavior are the grasping, system-gaming woman on the make

and the woman seeking advantage in a child custody dispute.”
(*Id.* at p. 425; citation omitted.)

In California, both the legislative branch and the judicial branch have traditionally shown admirable sensitivity to these concerns. As noted *supra* in Section I, the legislature designed the DVPA to require many steps of fact-finding and analysis before a superior court judge may issue a mutual restraining order. Indeed, the DVPA’s structure—with its careful delineation of primary aggressors, dominant aggressors, and multi-part tests for each—is designed to prompt the kind of close analysis that will hopefully minimize or eliminate the influence of implicit bias. On the flip side, it is not surprising that a trial court’s failure to follow the steps carefully would infect the ultimate outcome with unfairness, as occurred here.

The judiciary as a whole, like the legislature, has been alert to the evils of gender bias in judicial decision-making. The Judicial Council of California conducted a comprehensive analysis of gender bias in the California court system in the mid-1990s and observed that “[g]ender bias can affect a judge in spouse abuse cases in the following three ways: (1) blaming the victim for not meeting her husband’s needs and for provoking the violence; (2) tending to accept the husband’s testimony over his wife’s; and (3) identifying with the husband as a victimized male.” (*Achieving Equal Justice, supra*, at p. 208; citation omitted.)

Nonetheless, the pull of outdated stereotypes and implicit biases can be strong, rendered all the more powerful by the fact

that they are often unconsciously held.⁸ In order to fully counterbalance such biases, any court considering a mutual restraining order must not fail to account for the toll that years of domestic abuse may have on a survivor.

IV. Abusers Are Incentivized to Seek Mutual Restraining Orders as a Tactic

As explained above in Section II, severe negative consequences adhere to a survivor of domestic or intimate partner violence who is subject to a mutual restraining order in tandem with her abuser. And as explained in Section III, implicit bias in the justice system can provide insidious—if frequently unconscious—assistance to an abuser who is seeking to discredit his abused partner’s story.

With these factors in play, abusers themselves often recognize that a mutual restraining order is a powerful tool to which they have unique access, which they can deploy to blunt or deflect the negative effects of the portion of the mutual restraining order that restrains them. Individuals with

⁸ The pull of implicit bias is potentially even more complex and insidious when a Court is considering a mutual restraining order in the context of LGBTQ+ domestic or intimate partner violence. In such instances, when the relationship between the parties does not necessarily fall within traditional gender roles, the trial court’s scrupulous adherence to the statutorily-mandated fact findings process outlined in the DVPA becomes even more vital. (See generally Andreano, Note, *The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims* (2020) 108 Calif. L.R. 1047 [discussing how the erasure of LGBT victims from the domestic violence narrative has perpetuated the overuse of dual arrest and mutual restraining orders in domestic violence cases with same-sex couples].)

manipulative tendencies are highly incentivized to seek mutual restraining orders as a defense tactic. If a court fails to appreciate the underlying gender dynamics at play, it may well fail to see the abuser's request for a mutual order as the guileful tactic that it is.

It is a striking feature of this lawsuit that [REDACTED] not [REDACTED] is the plaintiff. "It is not uncommon for an abuser who has been served with his victim's complaint or petition for protection to then file a cross-complaint or cross-petition against her. Occasionally, after a serious incident, the true abuser may arrive at the courthouse or local authority before his victim and be the initial complainant, especially if he has previously sought advice of counsel." (O'Brien, *supra*, at p. 236.) In the present case, [REDACTED] learned that [REDACTED] was going to file for a temporary restraining order and rushed to the court to seek his own temporary restraining order before she could get her papers on file. (AOB 28–29.) The eventual permanent mutual restraining order, and the joint custody order that accompanied it, flowed directly from and relied upon this asymmetrical initial set of temporary orders. (AOB 29–35.) This Court is thus faced with an abusive dynamic embedded in the case's very procedural history.

V. CONCLUSION

Domestic violence survivors in California deserve fairer treatment from our state's justice system than [REDACTED] has thus far received. All of the considerations listed above point to the danger of the mutual restraining order and joint custody order she is bravely challenging in this appeal. Mutual restraining orders are, and should be, very hard to obtain in

California. The trial court's failure to follow the mandatory statutory guidance governing such orders has resulted in an injustice that the undersigned *amicus* strongly urges this Court to step in and remedy: first, by reversing the restraining order insofar as it targets [REDACTED] and remanding this matter with instructions to enter a new restraining order that applies only to [REDACTED] and second, by reversing the joint custody order as to [REDACTED] and remanding for a new trial on the question of custody and visitation.

Dated: June 17, 2021

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to California Rules of Court, rule 8.204, subd. (c)(1), and rule 8.360, subd. (b)(1), the enclosed brief of *Amicus Curiae* California Women’s Law Center is produced using 13-point Century Schoolbook font in roman style, including footnotes. It contains approximately 7324 words, which is fewer than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: June 17, 2021

/s/ Elizabeth Holt Andrews
Elizabeth Holt Andrews

ADDENDUM

The following individuals and organizations support and join in California Women’s Law Center’s amicus curiae brief.

1. Alliance for HOPE International
2. Battered Women’s Justice Project
3. Building Futures
4. Coalition for Family Harmony
5. Domestic Abuse Center
6. Domestic Violence Legal Empowerment & Appeals Project
7. Domestic Violence Report
8. Human Options
9. Legal Aid Foundation of Los Angeles
10. Legal Voice
11. Los Angeles Center for Law and Justice
12. Los Angeles LGBT Center
13. Public Interest Law Project
14. Queen’s Bench Bar Association of the San Francisco Bay Area
15. Sanctuary for Families
16. San Diego Volunteer Lawyer Program, Inc.
17. Stand Up Placer, Inc.
18. Wild Iris
19. Women Lawyers Association of Los Angeles
20. Women’s Law Project
21. Professor Margaret Drew
22. Professor Joan S. Meier
23. Professor Wendy Seiden
24. Professor Merle H. Weiner

Each individual and organization has its own unique mission statement and/or statement of professional interest, all of which indicate an interest in supporting California Women’s Law Center’s amicus curiae brief.

Alliance for HOPE International. Alliance for HOPE International (“Alliance”) is a non-profit organization launched in

2003. The Alliance has five core programs: National Family Justice Center Alliance, Training Institute on Strangulation Prevention, Camp HOPE America, Justice Legal Network and VOICES Survivor Network. The Justice Legal Network is an innovative public interest law firm made up of approximately 15 solo attorneys who have pledged to work with the Alliance in providing civil legal services to domestic violence/sexual assault victims and their children, including protection orders, family law, immigration, personal injury, landlord issues, criminal law and victim rights.

Battered Women's Justice Project. The Battered Women's Justice Project (BWJP) serves as a national resource center on the civil and criminal legal responses to gender-based violence and promotes systemic change within these systems to create an effective and just response to victims, perpetrators, as well as the children exposed to gender-based violence. BWJP provides resources and training to advocates, victims, legal system personnel, policymakers, and others engaged in the justice system response to gender-based violence. BWJP's National Center on Full Faith and Credit (NCFFC) was supports the implementation of the Full Faith and Credit provision of the federal Violence Against Women Act, the effective enforcement of protection orders, protection-order related issues, and to address legislation on firearms prohibitions related to domestic violence. BWJP's National Resource Center on Domestic Violence and Firearms provides technical assistance and training on the development and implementation of domestic violence related

firearms prohibitions, and a unified voice on issues surrounding domestic violence and firearms. BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers primarily funded by the U.S. Department of Health and Human Services since 1993. BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice.

Building Futures. The mission of Building Futures is to build communities with underserved individuals and families, where they are safely and supportively housed, free from homelessness and domestic violence.

Coalition for Family Harmony. Coalition for Family Harmony provides direct services to victims of domestic violence and sexual assault that empower the victim to move past victimhood and into survivorship. Our direct services include shelter services, legal services, counseling and support groups for victims of sexual assault and sexual harassment.

Domestic Abuse Center. The Domestic Abuse Center (DAC) is a nonprofit organization founded in 1990 and works exclusively with victims of gender-based violence. DAC works to support all levels of safety for our clients and appellate decisions, especially on the issue of child custody, help to stop the inter-generational transmission of domestic abuse from parent to child. DAC provides counseling, advocacy, and support to victims of gender-based violence and abuse.

Domestic Violence Legal Empowerment and Appeals Project. The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) is a national non-profit organization that

makes the law work for family violence survivors through appellate advocacy, technical training, and policy initiatives. Working in partnership with a network of law firms, DV LEAP provides survivors across the country pro bono appellate representation to fight unjust trial outcomes and protect their rights. DV LEAP's amicus briefs in state and federal courts, including numerous briefs filed in the United States Supreme Court, advance judicial understanding of the law's significant implications for domestic violence litigants.

Domestic Violence Report. Domestic Violence Report is the leading professional report devoted exclusively to the topics of legal developments, innovative programs, current services, and research in the field of domestic violence law and prevention.

Human Options. Human Options is a nonprofit organization founded in 1981 that ignites social change by educating Orange County to recognize relationship violence as an issue that threatens everyone, advocating for those affected by abuse, extending a safe place for victims, and empowering survivors on their journey of healing. Human Options' services include a 24-hour hotline, emergency shelter, transitional housing, counseling and supportive services, prevention and education, and legal advocacy.

Legal Aid Foundation of Los Angeles. Legal Aid Foundation of Los Angeles is a nonprofit law firm that protects and advances the rights of the most underserved—leveling the playing field and ensuring that everyone can have access to the justice system.

Legal Voice. Legal Voice is a non-profit public interest legal organization dedicated to advancing women's legal rights and gender equity. The organization advocates for an improved legal response to intimate partner violence and has long sought to ensure that laws and policies live up to the promise of preventing violence and ensuring the safety of survivors and their families.

Los Angeles Center for Law and Justice. The mission of Los Angeles Center for Law and Justice (LACLJ) is to secure justice for survivors of domestic violence, sexual assault and human trafficking and empower them to create their own future. Located in East Los Angeles, LACLJ is a non-profit law firm serving survivors throughout Los Angeles County. LACLJ's primary practice areas are family law and immigration. However, LACLJ strives to provide clients with holistic legal services and has both a robust criminal justice advocacy and appellate practice and a legal/social worker service model, that provides supportive services such as education, safety planning, accompaniment, and linkages to other service providers.

Los Angeles LGBT Center. The Los Angeles LGBT Center (Center) has been providing services and advocating on behalf of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community since 1969 and today is the largest LGBT organization in the world, providing health and human services as well as community support to through more than 504,000 client visits annually. The Center operates one of the nation's largest LGBT community-based legal services program, which includes having provided comprehensive and holistic legal assistance to more

than 1,300 survivors of domestic violence, sexual assault, stalking, and dating violence.

Public Interest Law Project. The Public Interest Law Project is a nonprofit state support center for IOLTA funded legal services projects focusing on affordable housing and public benefits. Mutual restraining orders almost always cause some and often significant uncertainty for the housing of the children involved. Both parents, including the abused parent with custody encounter vastly increased risks of losing their tenancy, becoming homeless, losing public benefits, and, sometimes, losing the custody of their children.

Queen's Bench Bar Association of the San Francisco Bay Area. The Queen's Bench Bar Association is a nonprofit voluntary membership organization made up of judges, lawyers, and law students in the San Francisco Bay Area. Established in 1921, Queen's Bench is one of the oldest women's bar associations in the country. Queen's Bench seeks to advance the interests of women in law and society, and to serve the professional needs of women lawyers, judges, and law students. Queen's Bench has a strong and demonstrated interest in the preservation of the Constitutional right to equal protection of the laws.

Sanctuary for Families. Sanctuary for Families is the largest non-profit in New York State dedicated exclusively to serving victims of domestic violence, sex trafficking, and related forms of gender-based violence. Every year, Sanctuary offers legal, shelter, clinical and economic empowerment services to thousands of survivors. Sanctuary also engages in extensive

community outreach, education, and training, and advocates for policies and legislation designed to protect survivors.

San Diego Volunteer Lawyer Program, Inc. San Diego Volunteer Lawyer Program, Inc. (SDVLP), was established in 1983 as a private, not for profit, charitable law firm which provides pro bono legal assistance to indigent residents of San Diego County. One of SDVLP's priority areas of service is legal assistance to victims of domestic violence.

Stand Up Placer, Inc. Stand Up Placer, Inc. is a triple agency with the mission of saving lives by empowering survivors and educating communities to stand up to domestic violence, sexual assault, and human trafficking.

Wild Iris. Wild Iris is dedicated to promoting a safer community by empowering and restoring the independence of those affected by domestic violence, sexual assault, and child abuse. Our vision is for non-violent relationships based on dignity, respect, compassion, and equality. Our service area is all of Inyo and Mono Counties, including Death Valley and Tecopa regions and Coleville/ Walker, north to the Nevada State line. We have been serving survivors and their families since 1981 and continue to provide legal, shelter, clinical and economic empowerment services.

Women Lawyers Association of Los Angeles. Women Lawyers Association of Los Angeles (WLALA) is a nonprofit organization comprised primarily of lawyers and judges in Los Angeles County. Founded in 1919, WLALA is dedicated to promoting the full participation in the legal profession of women

lawyers and judges from diverse perspectives and racial and ethnic backgrounds, maintaining the integrity of our legal system by advocating principles of fairness and equality, and improving the status of women by supporting their exercise of equal rights, equal representation, and reproductive choice. WLALA has participated as an amicus curiae in cases involving the unequal treatment of women before the California Courts of Appeal and Supreme Court, and the federal district courts, Courts of Appeals and U.S. Supreme Court. WLALA believes that bar associations have a special obligation to protect the core guarantees of our Constitution to secure equal rights for women and girls.

Women's Law Project. Founded in 1974, Women's Law Project is a nonprofit public interest legal organization working to defend and advance the rights of women, girls, and LGBTQ+ people in Pennsylvania and beyond. We leverage impact litigation, policy advocacy, public education, and direct assistance and representation to dismantle discriminatory laws, policies, and practices and eradicate institutional biases and unfair treatment based on sex or gender. We seek equitable opportunity in many arenas including healthcare, education, athletics, employment, public benefits, insurance, and family law, and seek justice for survivors of gender-based violence. WLP has pursued a number of initiatives focused on improving the response of law enforcement and the courts systems to domestic violence survivors, including by opposing mutual protection from abuse restraining orders.

Professor Margaret Drew. Professor Margaret Drew is associate professor of law at the University of Massachusetts Law School. Professor Drew has a decades-long history of representing women who have experienced violence. She researches and writes in the field of gender violence, particularly on issues of intimate partner abuse. Professor Drew often represents victims of violence in their appeals of trial court decisions. Professor Drew appreciates the power of a client's ability to appeal and has an extensive history of pro bono appellate work.

Professor Joan S. Meier. Joan S. Meier is a Professor of Clinical Law and Director of the National Family Violence Law Center at the George Washington University Law School, where she has been a clinical law professor for 29 years. She has founded three pioneering and nationally recognized interdisciplinary domestic violence clinical programs. Prior to stepping down from the Domestic Violence Legal Empowerment and Appeals Project, the nonprofit Professor Meier founded to provide pro bono appeals in domestic violence cases, she co-authored 11 amicus briefs and three party briefs in the U.S. Supreme Court. She has also represented domestic violence organizations and survivors of domestic violence in state court appeals throughout the United States. Professor Meier has provided numerous trainings for judges, psychologists, lawyers, domestic violence coalitions, and others on best practices in adjudication of domestic violence and family court litigation on her empirical research. She has received several awards,

including, the Cahn Award from the National Equal Justice Library for her article on domestic violence and welfare reform.

Professor Wendy Seiden. Wendy Seiden is Clinical Professor of Law at Chapman University Fowler School of Law. Professor Seiden has worked in the field of family violence for more than 25 years, specializing in the intersection of domestic violence and child welfare. Professor Seiden spent more than 12 years representing children of all ages in child welfare and high conflict custody cases before teaching law school clinics full-time for the past 15 years. Professor Seiden currently directs the Bette & Wylie Aitken Family Protection Clinic. She earned her A.B. from the University of Michigan and her J.D. from Harvard Law School.

Professor Merle H. Weiner. Merle H. Weiner is the Philip H. Knight Professor of Law at the University of Oregon School of Law where she teaches classes focusing on various aspects of family law and gender-based violence. She has focused much of her scholarly research on issues related to gender-based violence. She is the founder and former faculty director of the University of Oregon's Domestic Violence Clinic and currently serves on the Oregon Attorney General's Advisory Committee for the Department of Justice's Crime Victims and Survivor Services Division.

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Proposed Amicus Curiae Brief of California Women's Law Center in Support of Defendant Appellant and Appellant [REDACTED]
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 6/17/2021

Elizabeth Holt Andrews

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APP-009E, Item 4

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