E080924

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

MICHAEL MOSBY,
Petitioner,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,
Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

APPEAL FROM THE SUPERIOR COURT FOR RIVERSIDE COUNTY
HON. BERNARD SCHWARTZ, JUDGE • NO. RIF1604905

BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY; BOSTON UNIVERSITY CENTER FOR ANTIRACIST RESEARCH; FIVE ADDITIONAL CENTERS FOR RACE, INEQUALITY, AND THE LAW; AND NINE INDIVIDUAL PROFESSORS AND SCHOLARS IN SUPPORT OF PETITIONER

COMPLEX APPELLATE LITIGATION GROUP LLP
Kirstin M. Ault (No. 206052)
***Anna-Rose Mathieson** (No. 231770)
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700
kirstin.ault@calg.com
annarose.mathieson@calg.com

BOSTON UNIVERSITY CENTER FOR ANTIRACIST RESEARCH
***Caitlin Glass**
(*Pro Hac Vice* Pending)
Asees Bhasin
(*Pro Hac Vice* Pending)
1 Silber Way
Boston, MA 02215
(617) 353-2474
glassc@bu.edu
asees@bu.edu

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
Robert S. Chang
(*Pro Hac Vice* Pending)
Seattle University School of Law
901 12th Ave, Seattle, WA 98122
(206) 398-4025
changro@seattleu.edu

ATTORNEYS FOR AMICI CURIAE
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY; BOSTON UNIVERSITY CENTER FOR ANTIRACIST RESEARCH; FIVE ADDITIONAL CENTERS FOR RACE, INEQUALITY, AND THE LAW; AND NINE INDIVIDUAL PROFESSORS AND SCHOLARS

Document received by the CA 4th District Court of Appeal Division 2.

Table of Contents

Table of Authorities 3

Introduction and Summary of Argument 7

Argument 10

I. The California Racial Justice Act responds to federal cases that impose too high a burden on criminal defendants seeking to demonstrate racial bias. 10

II. The plain language of the California Racial Justice Act makes clear that statistical evidence alone is sufficient to establish a prima facie showing of racial bias and requires a hearing. 14

III. Accepted social science methodologies support a finding that statistical evidence alone can establish more than a mere possibility of racial bias. 17

A. Statistical evidence alone can demonstrate racial bias warranting a hearing under the California Racial Justice Act. 19

B. Statistical methods for analyzing racial discrimination need not consider every conceivable variable, just relevant variables. 24

IV. The studies offered by petitioner comport with accepted social scientific methods for demonstrating racial bias and far exceed the burden required for a hearing under the California Racial Justice Act 31

Conclusion 34

Certificate of Word Count 36

Document received by the CA 4th District Court of Appeal Division 2.

Table of Authorities

Cases

Batson v. Kentucky
(1986) 476 U.S. 79 .... 10, 11, 12

Commonwealth v. Long
(2020) 485 Mass. 711 21

Duncan v. Ornoski
(9th Cir. 2008) 286 Fed. Appx. 361 15

Griggs v. Duke Power Co.
(1971) 401 U.S. 424 21

Mayfield v. Woodford
(9th Cir. 2001) 270 F.3d 915 15

McCleskey v. Kemp
(1987) 481 U.S. 279 .... *passim*

People v. Bryant
(2019) 40 Cal.App.5th 525 11

People v. McIntosh
(Super. Ct. Riverside County, No. RIF2010203) 29

People v. Powell
(2018) 6 Cal.5th 136 15

People v. Windom
(Super. Ct. Contra Costa County, May 23, 2023, No. 01001976380)
Court's Order Re: PC 745(a)(3) Motion 20, 21, 28

State v. Gregory
(2018) 192 Wash.2d 1 .... 12, 13

State v. Saintcalle
(2013) 178 Wash.2d 34 .... 12, 13

United States v. Shah
(9th Cir. 2019) 768 Fed. Appx. 637 15

Yick Wo v. Hopkins
(1886) 118 U.S. 356 21

Young v. Superior Court
(2022) 79 Cal.App.5th 138 .... 14, 16

ocument received by the CA 4th District Court of Appeal Division 2.

Statutes

Pen. Code, § 745 .... *passim*

Rules

Wash. Rules of General Application, rule 37 12

Legislative Materials

Assem. Bill No. 2542 (2019-2020 Reg. Sess.) § 2 .... *passim*

Assem. Bill No. 256 (2021-2022 Reg. Sess.) 13

Assem. Com. on Pub. Safety, Hearing on Assem. Bill No. 256 (2021-2022 Reg. Sess.) (Mar. 23, 2021) 25

Other Authorities

Albrecht & Filip, *The Burden of Data: Court Practices Tilting the Scales* (2023) 22 Contexts 70 29

Ayres, *Outcome Tests of Racial Disparities in Police Practices* (2002) 4 Justice Research & Policy 131 25

Babyak, *What You See May Not Be What You Get: A Brief, Nontechnical Introduction to Overfitting in Regression-Type Models* (2004) 66 Psychosomatic Medicine 411 26

Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience* (1983) 74 J. Crim. L. & Criminology 661 27

Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling* (2005) 54 Duke L.J. 1089 31

Beckett & Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014* (2016) 6 Colum. J. Race & L. 77 .... 32, 33

Bright & Kwak, The Fear of Too Much Justice: Race, Poverty, and the Persistence of Inequality in the Criminal Courts (2023) 16

BU Center for Antiracist Research, Toward Evidence-Based Antiracist Policymaking: Problems and Proposals for Better Racial Data Collection and Reporting (May 2022). 23

ocument received by the CA 4th District Court of Appeal Division 2.

Chien et al., *Proving Actionable Racial Disparity Under the California Racial Justice Act* (March 27, 2023) Hastings L.J. (forthcoming) 19, 22

Couzens et al., Cal. Practice Guide: Sentencing California Crimes (The Rutter Group 2022) ch. 28, § 28:5 .... 24, 25

Deziel, *The Effects of a Small Sample Size Limitation* (Mar. 13, 2018) Sciencing 29

Freedman, *Statistical Models and Shoe Leather* (1991) 21 Sociological Methodology 291 26

Gross, *David Baldus and the Legacy of McCleskey v. Kemp* (2012) 97 Iowa L.Rev. 1905 27

Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement* (2019) 66 UCLA L.Rev. 1394 25

Hetey & Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System* (May 2018) 27 Current Directions in Psychological Science 183 23

Hinton & Cook, *The Mass Criminalization of Black Americans: A Historical Overview* (2021) 4 Ann. Rev. Criminology 261 22

Hinton et al., Vera Institute of Justice, An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System (May 2018)... 23

Judicial Council of Cal., Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant (2019) 25

Liu, *State Courts and Constitutional Structure* (2019) 128 Yale L.J. 1304 11

Morgan & Winship, Counterfactuals and Causal Inference: Methods and Principles for Social Research (2007)........... 31

Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America (2011)............ 22

Phillips & Marceau, *Whom the State Kills* (2020) 55 Harvard Civil Rights – Civil Liberties L.Rev. 601 27

ocument received by the CA 4th District Court of Appeal Division 2.

Ridgeway & MacDonald, *Doubly Robust Internal Benchmarking and False Discovery Rates for Detecting Racial Bias in Police Stops* (2009) 104 J. Am. Stat. Assn. 661 26

Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging* (2018) 45 Am. J. Crim. L. 95 .... 24, 31

Volis et al., *Combining Adjusted and Unadjusted Findings in Mixed Research Synthesis* (2011) 17 J. Eval. Clin. Pract. 429 .... 18, 32

Winship & Morgan, *The Estimation of Causal Effects from Observational Data* (1999) 25 Annual Rev. Sociology 659 31

ocument received by the CA 4th District Court of Appeal Division 2.

Introduction and Summary of Argument

The California Racial Justice Act (CRJA or the Act) aims "to eliminate racial bias from California's criminal justice system." (Assem. Bill No. 2542 (2019-2020 Reg. Sess.) § 2(i) <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB2542> [as of Jul. 7, 2023] (hereafter AB 2542).) The California Legislature enacted the CRJA in response to judicial decisions that imposed a high burden on criminal defendants seeking to show that their cases were infected with racial bias.

The Act's findings explain that "[e]ven when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish." (AB 2542, § 2(c).) The Act explicitly rejects the nearly impossible-to-meet standard of purposeful discrimination, so defendants do not need to prove the individual decisionmakers in their case acted with racial animus. Instead, the Act allows defendants to show racial discrimination through "statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses." (Pen. Code, § 745, subd. (c)(1).) The CRJA's endorsement of these forms of evidence rightfully recognizes the power of social science methods to uncover critical information about racial bias in charging and sentencing practices. (See *post*, at Part I.)

In direct contravention of the CJRA's text and purpose, the court below required petitioner to establish that no non-racial factor explains his disparate treatment, thereby requiring direct proof of individual racial discrimination and reinstating the

ocument received by the CA 4th District Court of Appeal Division 2.

previous standard the California Legislature expressly rejected. Petitioner provided ample statistical evidence of racial discrimination, but the court found that he still had not shown a prima facie case sufficient to warrant a hearing under the CRJA.[1] The trial court's imposition of an additional barrier at this preliminary stage is directly contrary to the CRJA's directive to address racial bias without requiring proof of purposeful discrimination. The statutory text and legislative history of the CRJA makes clear that statistics alone are sufficient to warrant a hearing under the Act. (See *post*, at Part II.)

The court's additional requirement also reflects a misunderstanding of social science methods, which can demonstrate the influence of racial bias without speculating about individualized motives or impacts. Rigorous, statistical analysis can reveal recurring acts demonstrating systemic and structural racism, including recurring institutional cultures and practices that drive racial bias and racial inequity. Different types of statistical analysis are often appropriate depending on the type of data and the context being measured. For purposes of the CRJA, descriptive statistical analyses (that is, analyses that do not account for potential confounding variables) can reveal

[1] The court explained that to pass the prima facie stage and receive a hearing, "my reading of the statute is that there has to be some showing more than statistical analysis that individually these defendants, I'm talking about Mr. Mosby and Mr. Austin, are being discriminated against, vis-à-vis, nonminority defendants that are similarly situated, with similar cases, charges, and all of the other factors that go into it." (Petn. Exh. L, p. 383.)

Document received by the CA 4th District Court of Appeal Division 2.

stark racial disparities that strongly indicate racial bias sufficient to warrant a hearing under the CRJA. Regression analyses (which account for potential confounding variables) go a step further and provide even stronger evidence of racial bias that clearly exceeds what is required for a hearing under the Act. Petitioner provided both forms of analysis here, but the superior court found both insufficient. Instead, the court returned the focus of the prima facie inquiry to the isolated actions of individuals – something the CRJA explicitly rejects. (See *post*, at Part III.A.)

The statistical evidence put forth by petitioner here comports with accepted social science methods for proving racially disparate treatment of similarly situated groups. (See *post*, at Part III.B.) Petitioner presents multiple descriptive analyses demonstrating stark racial disparities. Moreover, petitioner also presented a complex multivariate set of regression analyses that control for possible race-correlated and non-race correlated confounding variables. In other words, the studies petitioner submitted to the court establish not only a mere possibility of racial bias, but statistically strong evidence of recurring racial bias, amply meeting the "substantial likelihood" requirement to warrant a hearing. (Pen. Code, § 745, subd. (h)(2) [defining "prima facie showing"].)

The superior court's imposition of the additional requirement of case-specific racial animus at this early stage in the proceedings prevents the development of a more robust factual record of repetitive biased outcomes. Allowing for more

Document received by the CA 4th District Court of Appeal Division 2.

thorough examination of the statistical evidence and findings on the record will comply with the statutory requirements and enhance public confidence that the courts are seriously considering charges of racial bias.

The statistical studies petitioner presented warrant a hearing under the CRJA. Amici urge this Court to issue a writ of mandate and/or prohibition, directing respondent the Superior Court of Riverside County to set aside its order denying petitioner's motion for a CRJA hearing, and enter a new order granting that motion.

Argument

I. The California Racial Justice Act responds to federal cases that impose too high a burden on criminal defendants seeking to demonstrate racial bias.

As the Act's findings make clear, the California Legislature enacted the CRJA in part as a response to case law from the U.S. Supreme Court restricting racial bias claims.

Prevailing U.S. Supreme Court jurisprudence makes it nearly impossible to prove actionable racial bias in criminal cases under federal law. The U.S. Supreme Court's decision in *Batson v. Kentucky* (1986) 476 U.S. 79 set out a three-part framework for challenges to the government's use of peremptory strikes against criminal jurors,[2] but that framework has come under withering

[2] Under the *Batson* framework, a defendant seeking to show the government used peremptory challenges in a racially biased manner must first provide evidence establishing a prima facie case that the prosecutor engaged in purposeful

(footnote continues on following page)

Document received by the CA 4th District Court of Appeal Division 2.

criticism for imposing too high a burden on defendants to prove racial discrimination. (E.g., *People v. Bryant* (2019) 40 Cal.App.5th 525, 544-549 (conc. opn. of Humes, J.).)

The Supreme Court's decision in *McCleskey v. Kemp* (1987) 481 U.S. 279, substantially limited subsequent Equal Protection challenges to the death penalty by holding that statistical analysis is insufficient to prove racial bias in capital cases. The majority acknowledged the racial disparities in death penalty cases but suggested this defect had to be accepted as "an inevitable part of our criminal justice system." (*Id.* at p. 312) Justice Brennan famously dissented from that decision, describing the majority's concern about opening the floodgates to future litigation as a "fear of too much justice." (*Id.* at p. 339 (dis. opn. of Brennan, J.).)

Many state courts initially followed the lead of the U.S. Supreme Court in interpreting parallel provisions of state constitutions and law. But after decades of unredressed racial discrimination, courts and legislatures have begun to recognize the ineffectiveness of the prevailing federal standard and have used their power to create more expansive paths for relief. (Cf. Liu, *State Courts and Constitutional Structure* (2019) 128 Yale L.J. 1304.)

---

discrimination. (*Batson*, *supra*, 476 U.S. at pp. 93-97.) If the defendant makes that showing, the burden shifts to the government to provide a race-neutral explanation for the strike. (*Id.* at p. 97.) If the government does, the trial court must then assess whether the defendant "has established purposeful discrimination" under all the evidence. (*Id.* at p. 98.)

Document received by the CA 4th District Court of Appeal Division 2.

The Washington Supreme Court is a prime example of a court acting to address racial bias – and the California Legislature cited that court when passing the CRJA. (AB 2542, § 2(c), citing *State v. Saintcalle* (2013) 178 Wash.2d 34.) In 2013, the Washington Supreme Court unanimously acknowledged racial bias regarding the exercise of peremptory challenges in *Saintcalle*, although the court at that point felt itself bound to follow the federal *Batson* test. In 2018, that court decided to take action: It adopted a rule of court that largely eliminated the first step of the *Batson* test that had required a defendant to provide evidence showing a prima facie case, identified a number of presumptively invalid reasons for a strike, and moved away from a purposeful discrimination test by adopting an objective observer standard to assess the peremptory challenge. (Wash. Rules of General Application, rule 37, <https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf> [as of Jul. 7, 2023].)

Also in 2018, the Washington Supreme Court split from the federal standard set out in *McCleskey*, and invalidated Washington's capital punishment statute as unconstitutional because it was being imposed "in an arbitrary and racially biased manner." (*State v. Gregory* (2018) 192 Wash.2d 1, 18-19.) In doing so, the court relied on a defense-commissioned study that sought to determine the effect of race on the imposition of the death penalty without requiring proof of purposeful discrimination. (*Id.* at p. 12.) The study included a regression analysis that controlled for various factors and concluded that Black defendants were

ocument received by the CA 4th District Court of Appeal Division 2.

between 3.5 and 4.6 times more likely to be sentenced to death than similarly situated White defendants. (*Id.* at p. 19.) The court declined to require "indisputably true social science to prove that our death penalty is impermissibly imposed based on race," and also relied on historical evidence of racism in Washington's legal system. (*Id.* at pp. 21-23.) Significantly, the court did not require the defendant to prove that a decision maker acted with discriminatory purpose.

In enacting the CRJA, the California Legislature followed the lead of the Washington Supreme Court and sought to eliminate racial bias from California's criminal legal system.[3] The Legislature explicitly relied on *Saintcalle*, stating that "[m]ore and more judges in California and across the country are recognizing that current law, as interpreted by the high courts, is insufficient to address discrimination in our justice system." (AB 2542, § 2(c).) The Legislature also recognized that statistical evidence of racially disparate treatment in charging and sentencing, along with historical evidence of racism, is sufficient to demonstrate that a case may have been impacted by racial bias. (AB 2542, § 2(j); Pen. Code, § 745, subd. (c)(1).) The Act makes clear that an evidentiary hearing is warranted where a petitioner establishes "more than a mere possibility" of racial

---

[3] The California Legislature amended the CRJA in 2022 through the California Racial Justice Act for All, making the provisions retroactive and adding some technical revisions to the original act. (Assem. Bill No. 256 (2021-2022 Reg. Sess.) <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB256> [as of Jul. 7, 2023].)

Document received by the CA 4th District Court of Appeal Division 2.

bias, as petitioner has here. (Pen. Code, § 745, subd. (h)(2); *Young v. Superior Court* (2022) 79 Cal.App.5th 138, 160.)

II. The plain language of the California Racial Justice Act makes clear that statistical evidence alone is sufficient to establish a prima facie showing of racial bias and requires a hearing.

When the U.S. Supreme Court held that statistical evidence was insufficient to establish racial bias in violation of the federal Constitution, the Court indicated that the defendant's arguments for using those statistics were better presented to legislative bodies. (*McCleskey*, *supra*, 481 U.S. at p. 319.) In 2020, the California Legislature took up that call and enacted the California Racial Justice Act of 2020.[4] (AB 2542.) In passing the CRJA, the Legislature cited *McCleskey* and explicitly stated its intent "to provide remedies that will eliminate racially discriminatory practices in the criminal justice system" and "to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination

---

[4] As the First District explained after comprehensively examining the CRJA, "[t]here is little doubt which side of the *McCleskey* debate our Legislature has aligned California with by statute. More than three decades after *McCleskey* was decided, the Legislature took up the high court's invitation to fashion a response to the intractable problem that Justice Brennan identified. In the Racial Justice Act, it enacted a statutory scheme applicable in all criminal and juvenile delinquency cases that not only eliminates any requirement to show discriminatory purpose [citation] and permits violations of the Act to be established based on statistics [citation], but also appears to be a direct response to the result reached in *McCleskey* . . . ." (*Young*, *supra*, 79 Cal.App.5th at 152-153.)

Document received by the CA 4th District Court of Appeal Division 2.

in seeking or obtaining convictions or imposing sentences." (AB 2542, § 2(f), (j).)

The California Legislature recognized the need for a new approach because of the overwhelming evidence of systemic racism throughout the criminal legal system (AB 2542, § 2(c)-(e)), and the inability – or perhaps unwillingness – of courts to provide a remedy under existing law. The Legislature cited with disapproval several examples of courts upholding instances of racial bias in criminal proceedings because the bar for proving legally actionable racial bias was so high. (AB 2542, § 2(d), citing *United States v. Shah* (9th Cir. 2019) 768 Fed. Appx. 637, 640 [finding no error in allowing racist testimony by expert regarding predisposition toward bribery of people of Indian descent], *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 924-925 (en banc) [denying ineffective assistance of counsel claim by Black defendant in death penalty case where defense counsel used racist language in reference to clients of color and generally demonstrated racial prejudice], and *id.* at pp. 939-940 (dis. opn. of Graber. J.) [describing in detail defense counsel's racist behavior].) The Legislature also disapproved of opinions failing to address the use of overtly racist language, racially coded language, and racist stereotypes in criminal trials. (AB 2542, § 2(e), citing *Duncan v. Ornoski* (9th Cir. 2008) 286 Fed. Appx. 361, 363 [finding no misconduct where prosecutor compared Black capital defendant to a Bengal tiger], and *People v. Powell* (2018) 6 Cal.5th 136, 182-183 [same].)

Document received by the CA 4th District Court of Appeal Division 2.

The Legislature also challenged the supposed inevitability of racial disparities in the criminal legal system. (AB 2542, § 2(f), citing *McCleskey*, *supra*, 481 U.S. at p. 312 [calling racial disparities in sentencing "an inevitable part of our criminal justice system"].) Rather than normalizing such evidence, the Act states that "we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California[.]" (AB 2542, § 2(g); see *Young*, *supra*, 79 Cal.App.5th at 152 & fn. 7.)[5]

Accordingly, the Act creates a system to eradicate racism from the criminal legal process and rejects any requirement of proof of racial animus. (AB 2542, § 2(i) ["[R]acism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under . . . the California Constitution, and violates the laws and Constitution of the State of California. . . . It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing. It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice [system] are inevitable, and to actively work to eradicate them."].)

[5] See also Bright & Kwak, The Fear of Too Much Justice: Race, Poverty, and the Persistence of Inequality in the Criminal Courts (2023).

Document received by the CA 4th District Court of Appeal Division 2.

But the court below ignored this legislative directive and imposed a nearly insurmountable barrier to making a prima facie showing of a CRJA violation, thereby eliminating even the possibility of an evidentiary hearing in many cases. According to the superior court, a defendant must show as part of his prima facie case that there is no "nonracial explanation" for the disparate treatment, and the failure to make such a showing precludes a hearing:

> The idea that there must be harm to the defendant's own case is just another way of saying that there is no nonracial explanation for the disparate treatment. That is, it's a way to show that legitimate aggravating factors do not explain the prosecutor's charging decisions. Or, if one prefers, that the comparison is between similarly situated persons.

(Petn. Exh. S, p. 884.)

This requirement would also place an impossible burden on an individual defendant to prove that a potentially infinite list of supposed "nonracial explanation[s]" do not apply – especially given that data about these theoretical factors is not attainable by the defendant. Such a requirement would be inappropriately applied to a prima facie standard and would also have no defined end point. The superior court's decision contravenes the purpose of the CRJA and ignores what social science methodology can demonstrate about racial bias and disparate outcomes.

III. Accepted social science methodologies support a finding that statistical evidence alone can establish more than a mere possibility of racial bias.

Accepted social science methods support a finding that statistical evidence of racial disparity alone is sufficient to meet

Document received by the CA 4th District Court of Appeal Division 2.

petitioner's prima facie burden warranting a hearing under the CRJA. Statistical methods can establish that members of one racial group have been subjected to disparate charging or sentencing practices compared to similarly situated members of other racial groups.

While statistics alone cannot show whether purposeful racial discrimination occurred in an individual case, no such showing is required under the CRJA. Even descriptive statistics – that is, statistical analyses that do not control for other factors – can establish more than a "mere possibility" of racial bias, which is all that is required for an evidentiary hearing. (Pen. Code, § 745, subd. (h)(2).)[6] Regression analyses go even further in demonstrating the racially disparate treatment of similarly situated groups by accounting for potential confounding variables. Regression analyses can establish not only a "mere possibility" of racial bias but strong evidence of racial bias – an even higher showing than the CRJA requires. Contrary to the prosecution's assertions, such analyses need only account for materially race-correlated and other relevant variables potentially correlated with the decision or outcome, and not every conceivable variable.

---

[6] A descriptive analysis shows the relationship between an independent and dependent variable without controlling for additional covariates. (See Volis et al., *Combining Adjusted and Unadjusted Findings in Mixed Research Synthesis* (2011) 17 J. Eval. Clin. Pract. 429 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3063329/#:~:text=An%20unadjusted%20finding%20is%20the,between%20intervention%20type%20and%20adherence> [as of Jul. 7, 2023].)

ocument received by the CA 4th District Court of Appeal Division 2.

A. Statistical evidence alone can demonstrate racial bias warranting a hearing under the California Racial Justice Act.

Statistical evidence alone can establish more than a mere possibility of racial bias requiring a hearing under the CRJA. The prosecution contends that "[s]preadsheets, charts, and mathematics cannot capture the complexity of fact, law, experience, and collaboration inherent in prosecutorial charging decisions." (Austin Return at 20; Mosby Return at 22.) However, the aim of the CRJA is not to identify the motivations of individual prosecutors but to "eliminate racial bias from California's criminal justice system." (AB 2542, § 2(i).) Accordingly, the CRJA provides for relief based on a showing that members of one racial group were systematically more likely to be subjected to racially disparate charging or sentencing practices compared to similarly situated members of other racial groups, regardless of whether the discrimination was intentional.[7]

It is a fundamental principle of social science that an analysis of aggregated data can allow researchers to identify factors that cause or contribute to observed outcomes, without knowing the individual circumstances of each case included in the study. For example, as noted by petitioner, statistical data

---

[7] Chien et al., *Proving Actionable Racial Disparity Under the California Racial Justice Act* (March 27, 2023) Hastings L.J. (forthcoming), at p. 2 <https://ssrn.com/abstract=4392014> [as of Jul. 7, 2023] (noting that the CRJA "gives by state statute what the *McCleskey* decision foreclosed constitutionally – a pathway to relief based solely on evidence of unexplained racial disparity").

Document received by the CA 4th District Court of Appeal Division 2.

has demonstrated a strong connection between smoking and lung cancer, such that it can be inferred with a high level of certainty that an individual's smoking history impacts their lung health. (Petn. Exh. O, p. 808.)

Social scientists routinely take up administrative datasets of court records and other crime data to measure patterns in outcomes across that data with the intention of predicting the likelihood that those outcomes will occur. Standard social scientific methods for evaluating this type of data are selected based on the research question and the allowances of the specific data provided. Included in these analyses are robustness checks that provide information on the level of confidence that can be ascribed to particular findings, specific investigations of data quality and potential sources of error, and the application of substantive expertise in making decisions about data modeling.

A variety of statistical models can be used to provide important and coherent findings about racial disparity. Even descriptive statistical analyses of racial disparities can provide a strong indication of racial bias warranting further investigation at an evidentiary hearing. The Superior Court of Contra Costa County recently found that a study calculating statistical disparity using "implied odds" established racial bias warranting relief under the CRJA, even without the stronger evidence that comes from a regression analysis. (*People v. Windom* (Super. Ct. Contra Costa County, May 23, 2023, No. 01001976380) Court's Order Re: PC 745(a)(3) Motion.) There, the court credited the testimony of an expert who found that a Black defendant was

Document received by the CA 4th District Court of Appeal Division 2.

significantly more likely than a White defendant to be charged with special circumstances and that, based on the odds ratio analysis, the racial disparity in charging was just 8 percent likely to be a random occurrence. (*Id.* at p. 9.) Since the prosecution did not prove that the racial disparity was due to "an alternate race-neutral cause" the court found that the defendants had met their burden under the CRJA and granted the motion to dismiss the special circumstances allegations against them.

Similarly, courts in other contexts have found descriptive statistical evidence of racial disparities to be powerful enough to warrant relief. (See *Commonwealth v. Long* (2020) 485 Mass. 711, 719 [allowing an equal protection violation based on selective enforcement of traffic laws to be established through statistical evidence showing " 'that the racial composition of motorists stopped for motor vehicle violations varied significantly from the racial composition of the population of motorists making use of the relevant roadways, and who therefore could have encountered the officer or officers whose actions have been called into question' "]; *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 434-436 [holding that racially disparate impact of a job requirement that was not reasonably related to job performance was sufficient to establish a Title VII violation without proof of discriminatory intent]; *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 374 [finding an equal protection violation based on the disparate enforcement of a permitting ordinance where the city denied permits to all 200 Chinese laundromat operators who applied, yet granted permits to all but one of the White operators who applied].)

Document received by the CA 4th District Court of Appeal Division 2.

The prosecution's assertion that statistical evidence of disparity should *not* warrant a hearing belies the language and animating purpose of the CRJA, which recognizes that racial disparities are an indication of historical and ongoing inequity requiring interrogation and redress. The prosecution's arguments imply that stark racial disparities are unconcerning, or perhaps to be expected since there are reasonable and legitimate explanations for the fact that Black defendants are systematically charged and sentenced more harshly than White defendants.[8] The normalization of these racial disparities is derived from a long history of racialized oppression in the criminal legal system – and in American society as a whole – and the resulting racist stereotypes unwarrantedly associate Blackness and criminality.[9] But in enacting the CRJA, the

---

[8] Chien et al., *Proving Actionable Racial Disparity Under the California Racial Justice Act*, *supra*, Hastings L.J. (forthcoming).

[9] See, e.g., Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America (2011) p. 4 (noting that in the early twentieth century, "African American criminality became one of the most widely accepted bases for justifying prejudicial thinking, discriminatory treatment, and/or acceptance of racial violence as an instrument of public safety"); Hinton & Cook, *The Mass Criminalization of Black Americans: A Historical Overview* (2021) 4 Ann. Rev. Criminology 261, 270 <https://www.annualreviews.org/doi/10.1146/annurev-criminol-060520-033306> [as of Jul. 7, 2023] (noting that "statistical discourses about black criminality shaped the strategies urban law enforcement authorities deployed in black neighborhoods" even as "[t]he alarming racial disparities in arrest and incarceration rates led W.E.B. Du Bois and other

(footnote continues on following page)

ocument received by the CA 4th District Court of Appeal Division 2.

Legislature rightfully “reject[ed] the conclusion that racial disparities within our criminal justice [system] are inevitable.” (AB 2542, § 2(i).) The Act explicitly created a path for defendants to challenge their conviction or sentence with statistical evidence.

Comprehensive data under a range of sampling and analytic conditions on racial inequities spanning policy areas exposes how and where racism manifests, including in the allocation of resources and creation of harms.[10] Accordingly, statistical evidence alone can demonstrate the racially disparate treatment of similarly situated groups and thereby establish

---

prominent civil rights activists to vociferously critique racism in the justice system”); Hinton et al., Vera Institute of Justice, An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System (May 2018) <https://vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [as of Jul, 7, 2023] (discussing the ways in which “America’s history of racism and oppression continues to manifest in the criminal justice system, and . . . how the system perpetuates the disparate treatment of black people”); Hetey & Eberhardt, *The Numbers Don’t Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System* (May 2018) 27 Current Directions in Psychological Science 183, 184 <https://journals.sagepub.com/doi/epdf/10.1177/0963721418763931> [as of Jul. 7, 2023] (“Ironically, researchers have found that being presented with evidence of extreme racial disparities in the criminal justice system can cause the public to become more, not less, supportive of the punitive criminal justice policies that produce those disparities.”).

[10] See generally BU Center for Antiracist Research, Toward Evidence-Based Antiracist Policymaking: Problems and Proposals for Better Racial Data Collection and Reporting (May 2022) <https://www.bu.edu/antiracism-center/files/2022/06/Toward-Evidence-Based-Antiracist-Policymaking.pdf> [as of Jul, 7, 2023].

Document received by the CA 4th District Court of Appeal Division 2.

more than a “mere possibility” of racial bias warranting a hearing under the CRJA. Statistical evidence of this kind need not interrogate individualized motives or impacts.[11] Petitioner’s evidence here warranted a hearing under the CRJA.

B. Statistical methods for analyzing racial discrimination need not consider every conceivable variable, just relevant variables.

Social science methods allow researchers to evaluate the comparative treatment of different racial groups without knowing or accounting for every detail about each individual within those groups. As discussed above, descriptive statistical evidence of stark racial disparities is sufficient to demonstrate more than a mere possibility of racial bias warranting an evidentiary hearing under the CRJA. But even a regression analysis that goes further by providing strong evidence of racially disparate treatment of similarly situated groups need not consider every possible variable that might distinguish those groups.[12]

As Retired Judge J. Richard Couzens observed, the “similarly situated” standard does not “require absolute equality,” but rather requires consideration of variables that are material to the analysis. (Couzens et al., Cal. Practice Guide: Sentencing California Crimes (The Rutter Group 2022) ch. 28,

---

[11] Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging* (2018) 45 Am. J. Crim. L. 95, 101-102 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710318> [as of Jul, 7, 2023].

[12] Thaxton, *Disentangling Disparity*, *supra*, 45 Am. J. Crim. L. at pp. 130-138.

Document received by the CA 4th District Court of Appeal Division 2.

§ 28:5; see also Assem. Com. on Pub. Safety, Hearing on Assem. Bill No. 256 (2021-2022 Reg. Sess.) (Mar. 23, 2021), at 3:45:40, <https://www.assembly.ca.gov/media/assembly-public-safety-committee-20210323> [as of Jul. 7, 2023] [citing Judge Couzens's analysis].) Likewise, the statutory definition of "similarly situated" states that the term means "that factors that are relevant in charging and sentencing are similar" not "that all individuals in the comparison group are identical." (Pen. Code, § 745, subd. (h)(6).) This statutory definition comports with accepted social science methodology.

In social science, comparative analysis requires consideration of material confounding variables, not every possible variable that may distinguish the comparators. Social science researchers commonly evaluate the comparative treatment of racial groups without accounting for every minor factual distinction among cases used as data points.[13] In fact,

[13] Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement* (2019) 66 UCLA L.Rev. 1394, 1433-1440 (engaging a logistic regression model to demonstrate the racially disparate application of special circumstances enhancements by accounting for several material variables, but not factual circumstances unrelated to the charges); Judicial Council of Cal., Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant (2019) p. 12 <https://www.courts.ca.gov/documents/lr-2019-JC-disposition-of-criminal-cases-race-ethnicity-pc1170_45.pdf> [as of Jul. 7, 2023] (using statistical methods to control for age, gender, and other legal factors available in the data to compare outcomes for similarly situated defendants); Ayres, *Outcome Tests of Racial Disparities in Police Practices* (2002) 4 Justice Research & Policy 131.

Document received by the CA 4th District Court of Appeal Division 2.

using too many variables, relative to the number of observations in a dataset can lead to a statistical concept called overfitting.[14] Models that are overfit can appear to show significant patterns in a population, when such patterns do not exist and can fail to replicate.[15] The solution then is high-quality design and the leveraging of expertise to isolate a set of theoretically meaningful covariates – not forcing a giant universe of variables into an increasingly complex model.[16]

While some social scientists have engaged in painstaking efforts to demonstrate racial discrimination by using a massive number of variables in an effort to ward off critiques such as those levied by the prosecution here, their studies do not set the bar for what is required under the CRJA. Notably, the line of papers collectively referred to as the Baldus study included over

---

[14] Ridgeway & MacDonald, *Doubly Robust Internal Benchmarking and False Discovery Rates for Detecting Racial Bias in Police Stops* (2009) 104 J. Am. Stat. Assn. 661 <https://www.rand.org/pubs/reprints/RP1394.html> [as of Jul 7, 2023].

[15] See Babyak, *What You See May Not Be What You Get: A Brief, Nontechnical Introduction to Overfitting in Regression-Type Models* (2004) 66 Psychosomatic Medicine 411, 414 <https://journals.lww.com/psychosomaticmedicine/Fulltext/2004/05000/What_You_See_May_Not_Be_What_You_Get__A_Brief,.21.aspx> [as of Jul. 7, 2023] (presenting a simulation showing that a model filled with random noise can prove out with good r-squared values even when no true pattern can possibly be present).

[16] See Freedman, *Statistical Models and Shoe Leather* (1991) 21 Sociological Methodology 291, 291 (noting that "statistical technique can seldom be an adequate substitute for good design, relevant data, and testing predictions against reality in a variety of settings").

Document received by the CA 4th District Court of Appeal Division 2.

200 variables and a complex analysis that took years and served to confirm findings from much simpler models.[17] The Baldus study contained more variables than can be reasonably expected – or even desirable – in most legal cases, and were not necessary to demonstrate racial bias.

Contrary to accepted social science methodology and the language of the CRJA, the prosecution in this case effectively contends that two cases must be identical in order to be "similarly situated" for the purpose of a comparative analysis. According to the prosecution, defendants seeking to meet their prima facie burden under the CRJA must demonstrate that the following factors in all comparator cases are factually the same as in petitioner's case: "the relative strength, availability, and admissibility of the evidence, the viability of potential defenses, the wishes of the victims and their next of kin, the defendants' criminal history, and the heinousness of the offenses." (Austin Return at 17-18; Mosby Return at 19-20.) There are several significant problems with the prosecution's proposed interpretation of the "similarly situated" standard.

[17] Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience* (1983) 74 J. Crim. L. & Criminology 661, 680, fn. 81 <https://scholarlycommons.law.northwestern.edu/jclc/vol74/iss3/2/> [as of Jul. 7, 2023]; Gross, *David Baldus and the Legacy of McCleskey v. Kemp* (2012) 97 Iowa L.Rev. 1905, 1912; see also Phillips & Marceau, *Whom the State Kills* (2020) 55 Harvard Civil Rights – Civil Liberties L.Rev. 601 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440828> [as of Jul. 7, 2023].

ocument received by the CA 4th District Court of Appeal Division 2.

First, the prosecution provides no explanation for how its proposed variables would be relevant to the outcome of interest in a racial disparity analysis. The prosecution has not explained how the wishes of a victim's family members, for instance, would impact the racial disparity petitioner demonstrated. Rejecting similar arguments in another CRJA case, one judge in the Superior Court of Contra Costa County found that the prosecution failed to establish that Black defendants "had, on average, worse criminal records than non-Black defendants, committed the crimes in crueler fashion, or committed more provable crimes." (*People v. Windom*, *supra*, Court's Order Re: PC 745(a)(3) Motion at p. 6.) In other words, "Black defendants . . . faced charging decisions that were made using the same set of relevant factors that were also used in the charging decisions for the non-Black defendants." (*Ibid*.) The prosecution's proposed control variables have no discriminant validity to establish a robust argument that these variables can distinguish between groups or predict their outcomes. In other words, the prosecution's proposed variables have no demonstrated relevance to the racial disparity analysis required under the CRJA.

Second, several of the prosecution's proposed control variables are unattainable. For example, data regarding "the viability of potential defenses" and the "wishes of the victims and their next of kin" is generally not recorded or feasible to include in a statistical analysis at all, let alone at the prima facie stage of litigation. The ability to produce an ideal set of variables requires the data itself to be meticulously recorded, maintained, and

Document received by the CA 4th District Court of Appeal Division 2.

produced. If it is not so produced, and is not made available, the social scientist or statistician must use the highest quality and most theoretically valid data available to them. Information that is not kept or produced by the prosecution cannot be required for relief under the CRJA.[18]

Finally, the prosecution's proposed similarly situated standard is inadministrable and infinite. The prosecution would require such extreme factual similarity that the number of comparator cases would be too small to allow for meaningful statistical analysis.[19] Moreover, the prosecution's citations to supposed counter-examples – where White comparators were treated comparably to petitioner – are inapposite. Seeking the death penalty against a White defendant does not, as the prosecution claims, "demonstrat[e] a lack of racial bias." (Austin Return at 28; Mosby Return at 30-31 [citing *People v. McIntosh* (Super. Ct. Riverside County, No. RIF2010203), which involved the White defendant abusing his young son over a period of years, killing the child, and disposing of his body – which was never found – likely by dissolving him in acid].)

---

[18] See Albrecht & Filip, *The Burden of Data: Court Practices Tilting the Scales* (2023) 22 Contexts 70 (supporting the general principle that placing the burden to retroactively create data not in their purview is not a reasonable expectation for defense experts).

[19] See Deziel, *The Effects of a Small Sample Size Limitation* (Mar. 13, 2018) Sciencing <https://sciencing.com/effects-small-sample-size-limitation-8545371.html> [as of Jul. 7, 2023] (stating that smaller sample sizes reduce the power of a study by increasing the margin of error, reducing the confidence level of the study).

Document received by the CA 4th District Court of Appeal Division 2.

The prosecution's claim demonstrates a fundamental misunderstanding of the utility of statistical analysis. Statistical methods are useful for identifying patterns across a universe of information and often allow statisticians to draw conclusions about how particular phenomena influence outcomes. In terms of causality and even correlation, an exception does not disprove the validity of the larger pattern. As an example, imagine students in a class are given a very unfair exam that covers material they were not taught. Perhaps a few students still pass the exam. That does not make the exam fair. Applied to the present analysis, anecdotal counter-examples do not overcome the weight of petitioner's statistical studies demonstrating racial bias.

In sum, the absence of immaterial or unattainable control variables should not be wielded to bar relief under the CRJA. The prosecution's proposed interpretation of the "similarly situated" standard would impose an unreasonably high burden on petitioner. This result would frustrate the stated purpose of the Act, which is to eliminate racial bias in California courts by making it no longer "impossible to establish" that racial bias exists. (AB 2542, § 2(c).) In accordance with this purpose, concerns about the methodological comparison of similarly situated groups are not appropriate at the prima facie stage of litigation, and instead should be reserved for an evidentiary hearing.

Document received by the CA 4th District Court of Appeal Division 2.

IV. The studies offered by petitioner comport with accepted social scientific methods for demonstrating racial bias and far exceed the burden required for a hearing under the California Racial Justice Act.

Petitioner's evidence comports with accepted social science standards and far exceeds his burden of establishing that there is "more than a mere possibility" of racial bias, thereby requiring an evidentiary hearing under Penal Code section 745, subdivision (h)(2). Petitioner offered evidence by three experts establishing that Black defendants are treated more harshly than similarly situated White defendants with respect to capital charging and sentencing in Riverside County. These studies included both descriptive statistical analyses and a regression analysis that controlled for possible confounding variables and isolated the impact of racial bias.[20] By imposing a burden that could not be met through even this robust statistical showing, the trial court gutted the CRJA and invalidated the animating intent of the Act.

As discussed above, a statistical analysis demonstrating racial disparity in charging and sentencing is more than

---

[20] See, e.g., Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling* (2005) 54 Duke L.J. 1089 (identifying the magnitude of the causal effect by establishing what happens in its absence). See also Thaxton, *Disentangling Disparity*, *supra*, 45 Am. J. Crim. L. at pp. 130-138; Winship & Morgan, *The Estimation of Causal Effects from Observational Data* (1999) 25 Annual Rev. Sociology 659 <http://nrs.harvard.edu/urn-3:HUL.InstRepos:3200609> [as of Jul. 7, 2023]; Morgan & Winship, Counterfactuals and Causal Inference: Methods and Principles for Social Research (2007).

Document received by the CA 4th District Court of Appeal Division 2.

sufficient to warrant an evidentiary hearing under the CRJA.[21] Here, the descriptive analyses by Dr. Marisa Omori, Dr. Nick Peterson, and Dr. Frank Baumgartner demonstrated stark racial disparities in charging and sentencing practices. (See Austin Petn. at 26-29, 30-34, 35-38; Mosby Petn. at 26-29, 30-34, 35-38.) These findings were consistent across different data sets and over different time periods. (Austin Petn. at 26, 29-30, 33, 35-36; Mosby Petn. at 25-26, 29-30, 33, 35-36.) This level of consistency strongly supports the experts' findings of racial disparity.

Moreover, petitioner's proffered evidence went beyond the descriptive analyses that are sufficient to warrant a hearing under the CRJA, and included a multiple regression analysis that controlled for potential confounding variables. "Regression models include an outcome or dependent variable . . . as well as a number of factors (independent variables) that may affect the outcome. The results of regression analysis reveal how much the outcome changes when any one of the independent variables is varied and the other independent variables are held constant." (Beckett & Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014* (2016) 6 Colum. J. Race & L. 77, 91.)

Regressions thus allow "researchers to identify the unique impact of each independent variable . . . over and above the impact of the other variables included in the model." (Beckett &

---

[21] See Volis et al., *Combining Adjusted and Unadjusted Findings in Mixed Research Synthesis*, *supra*, 17 J. Eval. Clin. Pract. 429.

Document received by the CA 4th District Court of Appeal Division 2.

Evans, *Race, Death, and Justice*, *supra*, 6 Colum. J. Race & L. at pp. 91-92.) Accordingly, such studies can support a conclusion about whether a particular policy was imposed in an arbitrary and racially biased manner. (*Ibid*.) Here, Dr. Peterson's study demonstrated that even while controlling for other factors, Black defendants were still significantly more likely to be charged with a special circumstance, receive a death notice, and receive a death sentence, compared to similarly situated White defendants. (Austin Petn. at 31-32; Mosby Petn. at 31-32.) Dr. Peterson's rigorous statistical findings thus establish far more than a "mere possibility" of racial bias requiring a hearing, and indeed establish strong evidence of racial bias.

To be clear, while a regression study such as Dr. Peterson's provides powerful evidence comparing similarly situated defendants and cases, this is not the bar that petitioner must meet to obtain a hearing under the CRJA. As discussed above, descriptive statistical evidence of racial disparities alone warrants further interrogation at an evidentiary hearing. (See *ante*, at Part III.A.) It may be infeasible to conduct a regression analysis at the prima facie stage, given that it requires a substantial amount of data and expertise to perform the complex analysis, which may not be available to every defendant prior to an evidentiary hearing, particularly in non-capital cases. Additionally, in small counties or in cases with infrequently charged offenses, there may simply be insufficient data to perform a meaningful regression analysis. Because descriptive analysis alone is sufficient to make a prima facie case, a

Document received by the CA 4th District Court of Appeal Division 2.

defendant need not take the extra step of producing complex regression analyses to obtain a hearing under the CRJA. But here, petitioner not only made the required showing that there was "more than a mere possibility" of racial bias through descriptive analysis, he also submitted regression analysis that provides even stronger evidence of racial bias. The trial court erred by rejecting this evidence and finding petitioner did not make the prima facie case necessary for an evidentiary hearing because he had not shown individualized racial bias in his particular case.

Conclusion

For the reasons set forth above, accepted principles of social science support a finding that petitioner's proffered statistics satisfied his prima facie burden under the California Racial Justice Act. Accordingly, this Court should issue a writ of mandate and/or prohibition, directing respondent the Superior Court of Riverside County to set aside its order denying petitioner's motion for a CRJA hearing, and enter a new order granting that motion.

Document received by the CA 4th District Court of Appeal Division 2.

Respectfully Submitted,

July 10, 2023

Complex Appellate Litigation Group LLP
Kirstin M. Ault
Anna-Rose Mathieson

Boston University Center for Antiracist Research
Asees Bhasin
Caitlin Glass

Fred T. Korematsu Center for Law and Equality
Robert S. Chang

By /s/ Anna-Rose Mathieson
Anna-Rose Mathieson

Attorneys for Amici Curiae
Fred T. Korematsu Center for Law and Equality; Boston University Center for Antiracist Research; Five Additional Centers for Race, Inequality, and the Law; and Nine Individual Professors and Scholars

ocument received by the CA 4th District Court of Appeal Division 2.

Certificate of Word Count

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 6,828 words as counted by the Microsoft Word program used to generate this brief.

Dated: July 10, 2023

/s/ Anna-Rose Mathieson
Anna-Rose Mathieson

ocument received by the CA 4th District Court of Appeal Division 2.

Proof of Service

I, Stacey Schiager, declare as follows:

I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 96 Jessie Street, San Francisco, CA 94105. On July 10, 2023, I served the following document:

> **Brief of Amici Curiae Fred T. Korematsu Center for Law and Equality; Boston University Center for Antiracist Research; Five Additional Centers for Race, Inequality, and the Law; and Nine Individual Professors and Scholars in Support of Petitioner**

On July 10, 2023, I caused the above-identified document to be electronically served on all parties and the California Supreme Court via TrueFiling, which will submit a separate proof of service.

Additionally, on July 10, 2023, I served the above-identified document by mail. I enclosed a copy of the document in an envelope and deposited the sealed envelope with the U.S. Postal Service, with the postage fully prepaid. The envelope was addressed as follows:

Clerk for Hon. Bernard Schwartz
Hall of Justice
4100 Main Street, Dept. 44
Riverside, CA 92501
Trial Judge

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 10, 2023.

/s/ Stacey Schiager
Stacey Schiager

Document received by the CA 4th District Court of Appeal Division 2.