

Case No. F076195 (consolidated with F076261)

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

MARIA G. [REDACTED]

Appellant,

v.

LUIS E. [REDACTED]

Respondent.

Appeal from the Superior Court of California County of Tulare
Hon. Judge Nathan D. Ide, Case No. VFL258020

**PROPOSED AMICUS CURIAE BRIEF OF ACLU OF SOUTHERN
CALIFORNIA, ACLU OF NORTHERN CALIFORNIA, LAMBDA
LEGAL, AND LGBTQ CENTER LONG BEACH IN SUPPORT OF
APPELLANT MARIA G. [REDACTED]**

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INTRODUCTION

Family Code Section 6305 requires a trial court to make detailed factual findings that each party acted as a primary aggressor and not primarily in self-defense in order to issue mutual domestic violence¹ restraining orders (“DVRO”). The statute’s intent is to ensure that mutual orders are issued only in rare instances when the evidentiary record shows a pattern of abuse by both parties. (*Conness v. Satram* (2004) 122 Cal.App.4th 197, 204.) A primary aggressor assessment seeks to identify the party who is the most significant aggressor, not necessarily the first aggressor. To make this determination, the court is to consider the same factors that peace officers are to consider in determining whether to arrest a party as a primary aggressor: the intent of the law to protect victims of domestic violence from continuing abuse; the threats creating fear of physical injury; the history of domestic violence between the persons involved; and whether either person involved acted in self-defense. (Pen. Code § 836(c)(3)).

In the present case, the trial court erred by issuing a mutual restraining order against Appellant Maria [REDACTED] (“Maria”) without properly applying section 6305 of the Family Code. The record reflects clear evidence that Appellee Luis [REDACTED] (“Luis”) acted as a primary aggressor and not primarily in self-defense, terrorizing Maria with a pattern of abusive behaviors throughout their marriage and after they had divorced.

¹ “Domestic violence” and “intimate partner violence” are used interchangeably throughout this brief. Intimate partner violence refers to physically or emotionally abusive actions or patterns of power and control exerted by one intimate partner over another. Intimate partners include current and former spouses, dating relationships, and parties with children in common. Family Code Section 6211 applies the term “domestic violence” broadly to include the relationships of former cohabitants, children, and people related by blood or affinity within the second degree.

The trial court used the fact that Maria had not disclosed the intimate partner violence (“IPV”) in earlier family court proceedings against her in the determination of whether to issue mutual DVROs. Despite the evidence that Maria presented, the court, without performing the appropriate analysis pursuant to Family Code Section 6305, also issued a DVRO against Maria. The trial court thus violated Family Code Section 6305 and should be reversed.

Amici are interested in ensuring the consistent and proper application of Family Code Section 6305 in situations involving allegations of mutual abuse. Although Maria and Luis are an opposite-sex couple, the issues raised by this appeal present significant implications for all IPV survivors² against whom a mutual DVRO is wrongly issued, and especially for the LGBTQ community because the unwarranted issuance of DVROs disproportionately impacts lesbian, gay, bisexual, transgender, queer, and questioning (“LGBTQ”)³ people, and particularly LGBTQ people of color and LGBTQ immigrants.⁴ Such practice is particularly concerning because

² “Victim” and “survivor” are used interchangeably throughout this brief to refer to people against whom intimate partner violence has been committed. Use will typically reflect the source utilized.

³ LGBT and LGBTQ are the generally accepted terms used to refer to the large and heterogeneous groups of people who may identify as lesbian, gay, bisexual, transgender, queer, or questioning, among other identities reflecting a minority sexual orientation and/or gender identity. In instances where LGB or TGNC are used here, it is because the specific source or study focused on particular identities within the larger community. LGB or LGBQ refers to non-heterosexual sexual orientation identities of lesbian, gay, and bisexual (and queer). TGNC refers to non-cisgender gender identities, including those of transgender and gender non-conforming people. Cisgender refers to people whose gender identity aligns with the sex assigned or presumed at birth. Transgender refers to people whose gender identity, their inner sense of being male, female, or something else, differs from their assigned or presumed sex at birth.

⁴ While this brief primarily focuses on the impact of mutual DVROs on LGBTQ people, women are also disproportionately impacted by

an issued DVRO carries wide-ranging collateral consequences, such as limited access to employment, housing, education, and immigration status, such that issuing a DVRO against an individual who is in fact a survivor compounds the abuse and frustrates the purpose of California's DVRO program.

Accordingly, amici urge this Court to reaffirm the importance of adherence to Family Code Section 6305 in making detailed findings of fact when issuing mutual domestic violence restraining orders.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth in Appellant's Opening Brief ("AOB"). (AOB 11-21.)

ARGUMENT

I. LGBTQ SURVIVORS OF INTIMATE PARTNER VIOLENCE FACE BIAS FROM LAW ENFORCEMENT AND THE JUDICIARY THAT LEADS TO DISPROPORTIONATE ISSUANCE OF UNWARRANTED MUTUAL DOMESTIC VIOLENCE RESTRAINING ORDERS

A. LGBTQ Communities Experience Intimate Partner Violence at Similar or Elevated Rates to Heterosexual or Cisgender People and Face Unique Barriers To Seeking Help.⁵

improperly issued DVROs. According to the 2010 National Intimate Partner and Sexual Violence Survey, 28.8% of women report having suffered negative impacts from IPV (such as missing work or school, fearing for their safety, or seeking housing/legal support), compared with 9.9% of men. (National Intimate Partner and Sexual Violence Survey, accessed at https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf). Because women are statistically more likely than men to be experience negative impacts from IPV, the improper overuse of mutual DVROs disproportionately penalizes women who seek protection from IPV through the court system.

⁵ IPV among LGBTQ people includes violence within same-sex relationships and relationships where both partners are transgender (these categories can overlap), but also includes IPV where one partner identifies as heterosexual or cisgender and the other partner does not, such as between

An extensive body of research reveals that LGBTQ people experience IPV at rates similar to those of heterosexual women, with some studies indicating that bisexual women experience higher rates of IPV than heterosexual women.⁶ The 2010 National Intimate Partner Violence and Sexual Violence Survey (“NISVS”) found that of the 16,507 respondents, 44% of lesbian women, 61% of bisexual women, 26% of gay men, and 37% of bisexual men had experienced IPV at some point in their lives.⁷ The 2015 U.S. Transgender Survey found that of the more than 27,000 transgender and non-binary respondents, 54% had experienced IPV at some point in their lives.⁸ Similarly, in a Lambda Legal survey of LGBTQ people, more than one out of ten respondents (11%, or 251 respondents) had survived IPV in the previous five years. The percentages of certain

a bisexual woman and a heterosexual man or between a cisgender woman and a transgender man. (See Barret, Domestic Violence in the LGBT Community (2015) Encyclopedia of Social Work <<http://socialwork.oxfordre.com/view/10.1093/acrefore/9780199975839.001.0001/acrefore-9780199975839-e->> (as of June 5, 2018).

⁶ See Guadalupe-Diaz, *An Exploration of the Difference in Help-Seeking of LGBQ Victims of Violence by Race, Economic Class and Gender* (2013) 9 Gay & Lesbian Issues and Psychology Rev. 15; Brown & Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People: A Review of Existing Research* (November 2015) The Williams Institute <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf>> (as of June 5, 2018).

⁷ Walters & Breiding, *The National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation* (September 2013) National Center for Injury Prevention and Control, Centers for Disease Control and Prevention <https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf> (as of June 10, 2018).

⁸ Herman et al., *The Report of the 2015 U.S. Transgender Survey* (December 2016) National Center for Transgender Equality <<https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>> (as of June 5, 2018).

respondent groups who experienced IPV are higher than the survey sample as a whole, including: TGNC people (28%), people of color (32%), low-income people (42%), and people under 30 (43%).⁹

In seeking help related to IPV, LGBTQ people face the same barriers that non-LGBTQ people do, such as the financial inability to leave abusive partners or the lack of ability to access shelters, but LGBTQ people also experience barriers directly related to their identities. Specific barriers include lack of knowledge of and actual lack of resources for LGBTQ survivors of IPV, fear of homophobia and/or transphobia among service providers, and low levels of confidence in law enforcement and the courts.¹⁰

Furthermore, manipulation of power and control dynamics and tactics of abuse, use of privilege, and isolation can have a unique or amplified impact for LGBTQ survivors. The most widely used tool for explaining IPV, the Power and Control Wheel, describes how abusive partners use a variety of techniques to assert power and dominance.¹¹ But the Power and Control Wheel for Lesbian, Gay, Bisexual, and Trans Relationships, adapted by Roe & Jogondinsky, identified the unique power and control techniques that manifest in LGBTQ relationships.¹² LGBTQ-specific techniques include threats or actions to non-consensually disclose a

⁹ Lambda Legal, *Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security* (2014) <<https://www.lambdalegal.org/protected-and-served>> (as of June 5, 2018).

¹⁰ See Brown & Herman, *supra*, at 16–18.

¹¹ See Barret, *supra*.

¹² Texas Council on Family Violence, Power and Control Wheel for Lesbian, Gay, Bisexual and Trans Relationships, adapted from the Power & Control Wheel Developed by Domestic Abuse Intervention Project (undated) <https://lgbt.wiscweb.wisc.edu/wp-content/uploads/sites/175/2017/01/LGBTQ_Power_and_control_wheel.pdf> (as of June 5, 2018).

partner's sexual orientation, gender identity, or HIV status; to take away children based on a partner's sexual orientation or gender identity; or to control access to clothing or medical care for transgender partners. These tactics may also include accusing a partner of being inauthentic or insincere about their sexual orientation or gender identity, and intimidating a partner into fearing that they will not be believed by those from whom they could seek help because of their sexual orientation or gender identity, or that they will be treated as an abusive partner because of their identity.¹³

Another unique issue in IPV in LGBTQ relationships is the use of the threat of “outing” one partner's sexual orientation and/or gender identity as a means to control them or to cause harm. For many LGBTQ people, the process of coming out is an ongoing or daily event. LGBTQ people may choose to come out to different people and groups at various times, in diverse ways, or not at all. Considering potential discrimination and bias, many LGBTQ people must make ongoing assessments of the safety and importance of being out in daily circumstances such as with friends, at work, in a faith community, or at a child's school. An LGBTQ person may choose not to be out with certain groups of people or organizations, even while simultaneously “out” in other situations.¹⁴ When there are the dynamics of IPV in a relationship, the act or threat of a non-consensual outing can be wielded as an exertion of power and control that may impact the help-seeking efforts of LGBTQ survivors.¹⁵

¹³ See Barret, *supra*; see also Power and Control Wheel, *supra*.

¹⁴ Harper et al., *Competencies for Counseling with Lesbian, Gay, Bisexual, Queer, Questioning, Intersex and Ally Individuals* (2012) Association for Lesbian, Gay, Bisexual, and Transgender Issues in Counseling <<https://www.counseling.org/docs/ethics/algbtic-2012-07>> (as of June 8, 2018).

¹⁵ See Ard & Makadon, *Addressing Intimate Partner Violence in Lesbian, Gay, Bisexual, and Transgender Patients* (2011) 26(8) *J. of General Internal Medicine* 630.

Additionally, standard IPV screening tools may be ineffectual for LGBTQ people, as well as inadequate as a method to distinguish between LGBTQ abusive partners and survivors of IPV.¹⁶ Men are less likely than women to access services for IPV, such as shelters, because of the belief, and often the reality, that they will not be welcome.¹⁷ Many transgender women are excluded from necessary services simply because of their gender identity.¹⁸ Although research has examined the challenges and barriers to help-seeking among gay and lesbian victims of IPV, very little research has addressed the help-seeking behaviors of transgender survivors of IPV.¹⁹ However, trust in the police and the courts is generally very low among LGBTQ people.²⁰

B. LGBTQ Survivors of Intimate Partner Violence Are at a Higher Risk of Receiving an Unwarranted Mutual Restraining Order Because Bias by Police Officers Increase Rates of Mutual Arrest for Intimate Partner Violence in LGBTQ Communities.

When LGBTQ survivors of domestic violence do reach out to the police for help they are frequently arrested along with their abusive partners.²¹ During incidents of IPV, same-sex couples are 10 to 30 times more likely to both be arrested when law enforcement is involved than

¹⁶ Ford et al., *Intimate Partner Violence Prevention Services and Resources in Los Angeles: Issues, Needs, and Challenges for Assisting Lesbian, Gay, Bisexual and Transgender Clients* (2013) 14(6) Health Promotion Practice 841, 842.

¹⁷ Waters et al., *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Intimate Partner Violence in 2016* (2017) National Coalition of Anti-Violence Programs < https://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf > (as of June 5, 2018).

¹⁸ *Ibid.* at 13.

¹⁹ See Guadalupe-Diaz & Jasinski, *supra*.

²⁰ Lambda Legal, *supra* note 10.

²¹ See Waters et al., *supra*, at 33.

different-sex couples.²² A 2015 report on IPV between LGBTQ people, including people living with HIV, and their partners found that 57% of IPV survivors who called the police experienced police misconduct, including being unjustly arrested.²³ According to a study in the Journal of Interpersonal Violence:

The data also show several potentially disturbing patterns. Specifically, with regard to same-sex partners, incidents involving female couples were 31.9% less likely, and male couples 30.7% less likely, to result in at least one arrest. The lack of aggressive policing in same-sex relationships is supported in the literature and may reflect police desires not to “get involved” in handling disputes in relationships with which they may lack as much familiarity and/or empathy. This lack of aggressive intervention is compounded by the findings on dual arrest in these incidents. Specifically, female couples were 39.1 times more likely and male couples 52.8 times more likely to be subject to dual arrests. This strongly suggests that officers are not trained to identify primary aggressor roles in same-sex relationships, or that a degree of prejudice still exists in responding to incidents involving these couples. The combination of both fewer arrests and markedly more dual arrests suggests that primary aggressor statutes, are not nearly as effective in addressing intimate partner violence in same-sex incidents as they are in heterosexual cases. It appears that for one of these reasons or a combination thereof, *officers are far more likely in single sex dyads to arrest both parties and let a judge make a determination of guilt.*²⁴

²² Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates* (2008) National Criminal Justice Reference Service <<https://www.ncjrs.gov/pdffiles1/nij/222679.pdf>> (as of June 5, 2018).

²³ Ahmed et al., *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2014* (2015) National Coalition of Anti-Violence Programs <https://avp.org/wp-content/uploads/2017/04/2014_HV_Report-Final.pdf> (as of June 5, 2018) (hereinafter Ahmed et al.).

²⁴ Hirschel et al., *A 10-Year Study of the Impact of Intimate Partner Violence Primary Aggressor Laws on Single and Dual Arrest* (November

When faced with IPV among LGBTQ people, police officers and trial courts commonly employ assumptions and stereotypes about who is the victim and who is the abusive partner in a particular relationship, which can lead to improperly issued DVROs or mutual DVROs. For example, there is a common mistaken belief regarding IPV that the physically larger or more dominant partner is always the perpetrator of the violence.²⁵ An assessor may misidentify an abusive partner if they view a partner who presents in a more stereotypically masculine manner as an abusive partner, and a partner who presents in a more stereotypically feminine manner as a victim.²⁶ Among same-sex couples, police officers and courts often label IPV as “mutual battering,” particularly when one partner resists or defends themselves against the violence.²⁷ There is a tendency to assume that there is no power differential within same-sex couples in the way that it is often believed to exist within different-sex couples.²⁸

The various factors that differ between IPV among LGBTQ people and IPV among heterosexual and/or cisgender people are often not specifically considered by police officers or courts. These factors can weigh heavily on the determination of whether a party acted as a primary aggressor and not primarily in self-defense and thus on whether mutual domestic violence restraining orders can permissibly be issued in a

2017) 32(22) J. of Interpersonal Violence 1, 28 (emphasis added) (internal citations omitted).

²⁵ See Harada, *Additional Barriers to Breaking the Silence: Issues to Consider When Representing a Victim of Same-Sex Domestic Violence* (2011) 41 U. Balt. L. F. 150, 153 (hereinafter Harada).

²⁶ See Stapel & Goggin, *Lesbian, Gay, Bisexual, Transgender, and Queer Victims of Intimate Partner Violence* in *Lawyer’s Manual on Domestic Violence: Representing the Victim* (Rothwell Davis et al., edits., 6th ed. 2015) p. 244.

²⁷ Haranda, *supra*, fn. 10 at 161.

²⁸ *Ibid.*

particular case. Also, police officers and the courts often do not consider the different ways that IPV manifests within LGBTQ relationships including the power and control techniques that are specific to or more prevalent among LGBTQ people, which can lead to improperly issued DVROs or mutual DVROs.

Law Enforcement Bias

Bias against LGBTQ people and misunderstanding of intimate partner violence in LGBTQ relationships by police officers and the court may lead to misapplication of primary aggressor assessments. The court is to consider the same factors that peace officers are to consider in determining whether to arrest a party as a primary aggressor. (Cal. Pen. Code § 836(c)(3)). The initial police report and subsequent police involvement in the matter, and the facts and statements in police reports, can greatly influence the court's understanding of the history of IPV and the relationship of the couple. Police bias against LGBTQ people and the risk of violence or harassment by police officers when help is sought are reasons that LGBTQ survivors of intimate partner violence do not contact the police to report violence. When LGBTQ survivors do contact the police for help, they commonly report that police officers provide inadequate responses or attempt to minimize the violence.

Additionally, as detailed below, the minimization of violence against LGBTQ people in general, and specifically in response to intimate partner violence, by police officers and the risk of violence by police officers is a barrier for LGBTQ survivors to even seek police assistance. LGBTQ people frequently report verbal harassment, other hostile behaviors, and misarrest or unwarranted dual arrest (when both victim and abusive partner are arrested) when attempting to seek assistance from the police regarding

IPV.²⁹ Fear of mistreatment by staff and other participants at non-LGBTQ-specific IPV services or programs and reports of negative experiences with these programs are significant barriers to accessing help for LGBTQ people.³⁰ Negative interactions with and perceptions of the police, both generally and in the specific context of cases involving intimate partner abuse, keep transgender people subjected to abuse from asking for help from the police.³¹

Scholars Xavier L. Guadalupe-Diaz & Jonathan Yglesias summarized the constellation of challenges facing LGB IPV survivors:

While there is little research examining social influences on LGB perceptions of domestic violence laws, it has been well-documented that LGB [survivors of IPV] perceive the criminal justice system as an inaccessible and largely ineffective help-seeking option maintained by heterosexist and heteronormative frameworks. These perceptions have been repeatedly validated in the research, specifically illustrating an inherent homophobia present within the court systems, law enforcement protocols and responses, and the very language of legal codes, which structure and maintain such systems-based approaches. In particular, lack of access to legal recourse affects [survivors of IPV] who may also feel reluctant to report to the police because of fear of partner retaliation, the perceived “uselessness” of police involvement, or overall community perceptions of the police; these negative perceptions of the police may be more intense in nonwhite communities. Furthermore, there is a longstanding history of homophobic police abuse including the criminalization of LGB Americans. Given this history between the police and the

²⁹ Ahmed et al., *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Intimate Partner Violence in 2013* (2014) National Coalition of Anti-Violence Programs <http://avp.org/wp-content/uploads/2017/04/ncavp2013ipvreport_webfinal.pdf> (as of June 7, 2018).

³⁰ See Ford et al., *supra* note 17 at 842.

³¹ See Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System* (Winter 2013) 48 Harv. C.R.–C.L. L. Rev. 51.

LGB community, domestic violence legal recourses may appear further out of reach.

...[L]aw enforcement often views same-gender partner abuse as a mutual fight, diminishing the severity and seriousness of the incident while withholding traditional avenues for victim-based resources and referrals. ...Individuals at many levels of the criminal justice system (police, sergeants, lawyers, judges) fail LGB [people] who have been abused, ultimately reinforcing a reluctance to interact with these systems altogether. *The very same minimization and perpetuation of abuses contributes to the reluctance of those occupying other marginalized sexual [and gender] identities (gay, lesbian, bisexual, transgender, queer) from pursuing and accessing domestic violence legal recourses.*³²

Lambda Legal's national community survey of LGBT people found a pattern of inadequate responses from police officers when LGBT respondents reported they were victims of physical assault or IPV.³³ One-fourth of the 1,682 respondents who had in-person contact with police reported at least one type of misconduct or harassment by the police officer, including profiling, false arrests, verbal or physical assault, or sexual harassment or assault.³⁴ Of the 238 respondents who experienced physical assault, nearly two-thirds (62%) reported experiencing at least one incident in which police failed to fully address their complaints about physical assault. HIV-positive respondents and transfeminine³⁵ respondents reported

³² Guadalupe-Diaz & Yglesias, "Who's Protected?" *Exploring Perceptions of Domestic Violence Law by Lesbians, Gays, and Bisexuals* (2013) 25(4) J. Gay & Lesbian Social Services 465, 466, 472 (emphasis added) (internal citations omitted) (hereinafter Guadalupe-Diaz & Yglesias).

³³ See Lambda Legal, *Protected and Served?*, *supra*.

³⁴ *Ibid.*

³⁵ Transfeminine is a broad term used to describe people who were assigned the sex "male" at birth, but whose gender identity is along the feminine spectrum of gender. This can encompass those who have medically transitioned and those who have not and may include (but is not limited to)

having experienced police neglect of physical assault at higher rates: 73% of HIV-positive personal assault victims and 70% of transfeminine respondents said they experienced police neglect of their physical assault complaint, compared to 59% of HIV-negative physical assault victims and 60% percent of cisgender (non-TGNC) assault victims.³⁶ Of the 251 respondents who experienced IPV, 41% reported experiencing at least one incident in which police failed to fully address their complaints about IPV.³⁷ Some respondents were even more likely to report experiencing police neglect of IPV than others. Of those who reported IPV to the police, an inadequate response was reported by 48% of African-American respondents, 49% of TGNC respondents (56% of transfeminine and 46% of transmasculine respondents), and 54% of HIV-positive respondents.³⁸ Personal experiences of police bias or neglect, and reports of such experiences shared throughout a community, create circumstances where individuals are less likely to seek assistance from law enforcement in the future. Negative and violent experiences with the police are exacerbated for LGBTQ survivors of color, LGBTQ survivors with disabilities, undocumented survivors, and other communities who hold multiple marginalized identities that are frequently subjected to violence by police.³⁹ LGBTQ respondents of color were five times more likely to be asked about their immigration status by law enforcement than white survey respondents. (*Ibid.*)

Research shows that when LGBTQ people do report IPV to police, they frequently experience discriminatory treatment, hostility, and in some

those who identify as a trans woman, as transgender female, as a non-binary person, etc. Lambda Legal, *Protected and Served?*, *supra*.

³⁶ Lambda Legal, *Protected and Served?*, *supra*.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ See Waters et al., *supra*, at 13.

instances physical violence.⁴⁰ An early study detailed negative experiences endured by lesbian DV survivors who sought help from law enforcement officers: “Of the few respondents who had police interventions, all reported their ineffectiveness. One respondent reported being called a ‘queer devil’ by the police while another described that the police “basically took the attitude, ‘so two dykes are trying to kill each other; big deal.’”⁴¹ LGBT people experiencing IPV often express a fear of “revictimization” by police as a reason they choose not to contact the police.⁴²

Because of this, for many LGBTQ people who have experienced violence, the criminal legal system does not feel like a safe or viable option for seeking help. Personal experiences of police bias or neglect, and reports of such experiences shared throughout a community, create circumstances where individuals are less likely to seek assistance from law enforcement in the future. Studies confirm that legal and police remedies are often the least sought forms of help and the least helpful among LGB victims of same-sex IPV.⁴³ In the 2015 US Transgender Survey, a majority (57%) of the over 27,000 respondents said that they would not be comfortable calling the police for help.⁴⁴

Judicial Bias

Once LGBTQ people are in court as part of a proceeding that could lead to the issuance of a DVRO, they face not only bias from law enforcement, but bias within the court itself. Legal scholars Joey Mogul,

⁴⁰ See Ahmed et al., *supra*, at 9–11.

⁴¹ Guadalupe-Diaz & Jasinski, *supra*, at 775 (internal citations omitted).

⁴² *Ibid.*

⁴³ Lambda Legal, *Protected and Served?*, *supra*.

⁴⁴ James et al., *The Report of the 2015 U.S. Transgender Survey: Executive Summary* (December 2016) National Center for Transgender Equality 12 <<https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>> (as of June 5, 2018).

Kay Whitlock, and Andrea Ritchie have noted that “[a]nonymous surveys conducted by judicial commissions and bar associations to determine the level of bias or prejudice suffered by gay and lesbian court users and employees found that homophobic prejudices continue to permeate courthouses around the country. These studies...universally concluded that the majority of gay and lesbian litigants experienced courthouses as hostile and threatening environments, whether in criminal or civil cases.”⁴⁵

LGBTQ people also report hearing discriminatory comments about sexual orientation or gender identity in court as well as being “outed” against their will while in court.⁴⁶ In Lambda Legal’s community survey, 965 respondents had been involved with the court system in some capacity over the previous five years.⁴⁷ Nineteen percent of those respondents indicated they had heard negative comments about sexual orientation, gender identity, or gender expression come from judges, attorneys, or court staff.⁴⁸ People of color and transgender people reported higher incidences of negative language: While 19% of respondents overall heard these anti-LGBTQ comments, 53% of transgender and gender-nonconforming people of color and 66% of transgender women reported experiencing such comments while using the courts.⁴⁹

The community survey also solicited information regarding the level of trust respondents had in a range of government institutions. Only 28% of transgender and gender-nonconforming respondents “generally trusted” the courts, which was even lower than the 38% who indicated generally

⁴⁵ Mogul et al., *Queer (In)Justice: The Criminalization of LGBT People in the United States* (2011) at 72, 74.

⁴⁶ Lambda Legal, *Protected and Served?*, *supra*.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

trusting the police.⁵⁰ Of court-involved respondents, 16% reported that their LGBTQ identity was raised in court when sexual orientation and gender identity were not relevant to the case at hand; and 11% reported that it was disclosed in court against their will.⁵¹ Among that 11%, again certain groups of LGBTQ people experienced higher rates of being involuntarily “outed” in court.⁵² Respondents of color (14%, particularly Latinx at 18%), respondents with physical or mental disabilities (which may include HIV) (16%), low-income respondents (20%), and transgender or gender non-conforming respondents (21%) reported the highest rates.⁵³

Concerns about being able to access the courts and fear of mistreatment if one chooses to do so impede LGBTQ people’s ability to seek legal assistance to stop IPV. When LGBTQ people do seek legal recourse they are faced with police officers and courts that are often hostile to them. This bias or lack of understanding can lead to inappropriate legal standards being applied to their situation. Proper adherence to Family Code Section 6305 through consideration of the factors required to determine whether someone is a primary aggressor and whether they are acting in self-defense allows for an appropriate assessment that can mitigate bias.

II. WRONGLY-ISSUED MUTUAL DOMESTIC VIOLENCE RESTRAINING ORDERS HAVE WIDE-RANGING, SEVERE COLLATERAL CONSEQUENCES FOR SURVIVORS OF DOMESTIC VIOLENCE

Beyond restraining the enjoined person from contact with the victim, a restraining order carries wide-ranging, severe collateral consequences impacting other aspects of the enjoined person’s life. Given the vast impact of an entered restraining order, it is imperative that courts issue DVROs

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

only upon a judicial finding that the enjoined person acted as a primary aggressor under the circumstances and was not acting in self-defense, as required under Family Code Section 6305.

Every DVRO issued in California is reported to the U.S. Department of Justice and entered into the California Law Enforcement Telecommunication System (CLETS). Typical background checks will note whether the subject has ever received a DVRO. (See, e.g., Sacramento Superior Court, *Domestic Violence Restraining Order Information for the Restrained Party*, <<https://www.saccourt.ca.gov/restraining-orders/domestic-violence-restrained-party.aspx>> (as of May 21, 2018) [“[A]ll the information about [DVROs] will appear on background checks conducted by the DOJ. The DOJ conducts background checks for local, state and federal agencies as well as some private employers.”].) The identification of a DVRO on a background check report can result in adverse employment actions, denial or loss of professional licenses, rejection from college or university, and loss of housing, as further described *infra*. And, a violation of a DVRO can trigger criminal and immigration consequences, including up to one year in jail and deportation.

Restraining a survivor runs counterproductive to the purposes of a DVRO, as a survivor of abuse is less likely to contact the police for help if they are also enjoined by a DVRO. Even when a survivor who has been enjoined does contact the police, the police are often unsure which party to arrest for the DVRO violation, and end up arresting both or neither party. Such practices dilute the effective functioning of DVROs, and should be avoided unless both parties have been found to be abusive, just as the drafters of the current Family Code Section 6305 intended.

Furthermore, subjecting a person to probation-like terms, such as restrained movements and attached collateral consequences, absent any findings that the person has violated any law, infringes on their

constitutional due process rights. Appellate courts have consistently held that trial courts abuse their discretion when they issue mutual restraining orders without making requisite findings of fact that the individual has committed abuse and was not acting in self-defense. (*Nora v. Kaddo* (2004) 116 Cal.App.4th 1026, 1029; *J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 974–975; see also *Monterroso v. Moran* (2006) 135 Cal.App.4th 732, 736 [trial court has no statutory power to issue mutual restraining order without the required findings of fact].) Because Family Code Section 6305 unambiguously requires findings of fact, appellate courts reviewing factually deficient restraining orders have avoided reaching the constitutional due process question. (See *J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 974–975 [substantial evidence did not support the issuance of mutual restraining orders, so court need not reach the remaining due process argument].)

Nevertheless, seminal due process cases illustrate that minimal due process mandates that trial courts make factual determinations prior to imposing restrictions on an individual’s liberty or property interests. In *Wolff v. McDonnell* (1974) 418 U.S. 539 (1974), the Supreme Court held that due process required findings of fact prior to imposing prison discipline - both to ensure fairness and also to “protect the inmate against collateral consequences based on a misunderstanding of the original proceeding.” (*Id.* at p. 565; see also *Mathews v. Eldridge* (1976) 424 U.S. 319, 345-46 [in a disability benefits proceeding, due process requires a summary of evidence relied upon prior to the termination of disability benefits]; *Morrissey v. Brewer* (1972) 408 U.S. 471, 487 [in a parole revocation proceeding, due process requires factfinders provide the individual with a written statement of the evidence relied on and the reasons for revoking parole prior to its revocation]; *Goldberg v. Kelly* (1970) 397 U.S. 254, 271 [in a welfare benefits proceeding, due process

requires a statement of reasons and evidence relied on prior to terminating welfare benefits].) Similarly, here, the trial court restrained appellant's freedom of movement and triggered wide-ranging collateral consequences without making any factual findings based on presented evidence that the person committed abuse and should be restrained by a DVRO. Such measures run far afoul of federal and state due process protections.

A. Loss of Employment and Employment Opportunities

Wrongfully issued DVROs run a high risk of causing wrongful adverse employment consequences for the restrained individuals. Some employers require background checks as a condition of employment, or may run a background check on a current employee as part of an investigation, even without the employee's permission or knowledge. (Civ. Code § 1786.16(2) [employer need not obtain permission to run a background check on a current employee suspected of wrongdoing or misconduct].) The presence of a restraining order on a background check report may foreclose employment opportunities for a potential employee or cause a current employee to lose their job. (See *Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 852, reh'g denied (Sept. 19, 2016), review denied (Nov. 9, 2016) [Appellant testified that he had been unable to get a job with a restraining order on his record]; see also *In re Marriage of S.G. and F.R.* (Cal. Ct. App., Aug. 18, 2017, No. D071554) 2017 WL 3573785, at *3⁵⁴ [husband testified that DVRO had interfered with his employment opportunities and he was now unemployed]; *People v. Castro* (Cal. Ct. App., Dec. 6, 2016, No. H043068) 2016 WL 7105001, at *1 [appellant testified that he has "been having a hard time finding a job. [He] had a job offer and they took the job away after they did a background check . . .".];

⁵⁴ Unpublished cases are cited in this Brief for illustrative purposes only and do not carry precedential weight.

In re Marriage of Chapman (Cal. Ct. App., May 17, 2006, No. B182714) 2006 WL 1331236, at *2 [Broman testified that the restraining order had affected her ability to obtain employment that requires a background check]; *Rhoderick v. Hicks* (Cal. Ct. App., June 25, 2003, No. G030484) 2003 WL 21464895, at *1 [restraining order on background check precluded Hicks from becoming a firefighter or law enforcement officer]; *Bowler v. Van Ellis* (Cal. Ct. App., Oct. 7, 2015, No. B259173) 2015 WL 5845887, at *5 [Van Ellis testified that employers in higher education require background checks as part of the application process, noting that “the restraining order will show up on background checks by prospective employers, and effectively prevent him from obtaining employment ‘for the rest of his life.’”]; *Carpenter v. Pavich* (Cal. Ct. App., Aug. 24, 2015, No. B256398) 2015 WL 5004895, at *1 [Pavich testified that he worked for a government contractor that regularly performed background checks, and thus the restraining order would negatively impact his employment in the future].)

Further, due to the prohibition on carrying firearms and ammunition embedded in DVROs in California, persons subject to a restraining order may face blanket disqualification from certain jobs that require possession or transportation of firearms or ammunition, including serving in many law enforcement or private security roles, working in a retail store that sells firearms, driving a truck that delivers firearms or ammunition, or staffing a bar, convenience store, or other establishment that contains a firearm for protection.⁵⁵ (Judicial Council form DV-130, Restraining Order After

⁵⁵ The court may exercise discretion and grant an exemption from such requirements upon a showing that the firearm is necessary as a condition of continued employment and the employer cannot reassign the respondent to another position. (Fam. Code § 6389(h).)

Hearing (rev. July 1, 2014) at p. 5, boldface omitted [“You cannot have guns, firearms, and/or ammunition.”].)

Seeking to protect employees and others from a person adjudged to be violent may be a good reason for an employer to require background checks and take adverse employment action on the basis of a revealed restraining order. However, applying such restrictions to a person whom the court did not deem an abusive partner based on detailed factual findings further extends the injustice of the unwarranted DVRO by burdening their current and future employment prospects.

B. Rejection from Higher Education or Denial of Professional License

Applicants for higher education may be required to disclose the entry of a restraining order against them, which could negatively impact their chances of admission.⁵⁶ Even where they are not ingrained in the admissions process, some colleges and universities require background checks for students who participate in particular extracurricular activities, such as sports.⁵⁷

Similarly, licensed professions, such as law and medicine, often require some form of a background check, either during the application to school, application for the license, or both. The Association of American Medical Colleges recommends that all medical schools conduct background

⁵⁶ See Vallas et al., *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children, A Two-Generation Approach* (2015) Cent. for Am. Progress 1, 5 (finding that 66 percent of colleges and universities use background checks in the admissions process).

⁵⁷ Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations* (2008) 34 J.C. & U.L. 419, 439 (some colleges and universities conduct background checks on prospective student athletes).

checks.⁵⁸ The American Bar Association lists a violation of a restraining order as conduct that could negatively impact a determination of moral fitness for a bar license.⁵⁹ Thus, entry of an unjustified DVRO can create unjustified obstacles to the restrained individual's education and job prospects.

C. Termination of Housing

A person subject to a restraining order can be denied housing or evicted from their housing.⁶⁰ Experts even advise landlords that they *must* evict tenants whom courts have deemed abusive pursuant to the landlord's duty to protect other tenants and invitees from the risk of harm posed by a potentially violent tenant.⁶¹

California has several laws requiring landlords to take measures protecting survivors of IPV, including changing exterior locks and shielding victims from eviction. (Code Civ. Proc., § 1941.5; § 1941.6; § 1161.3.) Pursuant to the federal Violence Against Women Act, tenants in

⁵⁸ Shaw, *Applicant Criminal Background Check Moves Forward*, AAMC Rep. (Wash., D.C.), May 2007, <<http://www.aamc.org/newsroom/reporter/may07/background.htm>> (as of June 5, 2018).

⁵⁹ American Bar Association, *Are You Fit To Be A Lawyer*, <https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_are_you_fit_to_be_a_lawyer.authcheckdam.pdf> (as of May 21, 2018); see also, e.g., *In re Ogilvie* (S.D. 2001) 623 N.W.2d 55, 56 (treating temporary restraining orders obtained by applicant's then-girlfriend in response to alleged domestic abuse as a consideration in determining his eligibility to become a member of the South Dakota bar).

⁶⁰ See generally Rodriguez-Dod & Duhart, *Evaluating Katrina: A Snapshot of Renters' Rights Following Disasters* (2007) 31 Nova L. Rev. 467, 480 ("No known law exists preventing a landlord from conducting a criminal background check before renting to a prospective tenant.")

⁶¹ (Duty of landlord to protect tenant from criminal acts of third party, Cal. Civ. Prac. Real Property Litigation § 26:19; see also Code Civ. Proc., § 1161.3 (landlord may terminate or decline to renew a tenancy if the tenant poses a threat to other tenants, guests, invitees, or licensees).

federally subsidized housing who are survivors of IPV may retain their Section 8 voucher assistance even if their abusive partners are evicted. (24 C.F.R. § 982.315(a)(2); *A.S. v. Been* (S.D.N.Y. 2017) 228 F.Supp.3d 315 [survivor of IPV living in Section 8 housing had a protected property interest in husband’s voucher].)

However, a survivor will not be able to access these protections if a court has erroneously issued mutual DVROs and thus designated them as an abusive partner. Thus, at a time in their life when a survivor should be receiving additional protection and assistance, issuance of a mutual DVRO could easily result in losing their housing and ending up in a more vulnerable position.

D. Criminal Proceedings Resulting in Incarceration and Fines

The violation of a DVRO – even a violation of the stay-away provision, such as non-threatening contact with the other person – can result in criminal prosecution. The Judicial Council form used to issue a restraining order warns:

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.
(Judicial Council form DV-130, Restraining Order After Hearing (rev. July 1, 2014) at p. 5, boldface omitted.)

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.” (See *In re*

Eduardo C. (Cal. Ct. App., May 8, 2017, No. B270365) 2017 WL 1832230, at *2 [a violation of a restraining order is a separate crime, punishable with imprisonment].)

Criminal consequences for violating a DVRO serve a useful deterrent purpose by encouraging abusive partners to keep their distance from those they have abused. But an improperly enjoined survivor who violates a DVRO by, for example, coming within 100 yards of the other party could face up to one year in jail and a \$1,000 fine, despite an absence of judicial findings that they have committed any violent, dangerous, or otherwise illegal act.

E. Immigration Proceedings Resulting in Deportation

A violation of a restraining order could also trigger immigration consequences, including deportation. (See 8 U.S.C. § 1227 [“Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.”]; *People v. Regalado-Godoy* (Cal. Ct. App., Sept. 7, 2016, No. A144357) 2016 WL 4655753, at *3 [as a result of an arrest pursuant to a restraining order violation, deportation proceedings were initiated].)⁶²

Furthermore, most immigration determinations are discretionary; and the existence of a restraining order on a background check could negatively impact an analysis of whether the individual has “good moral character” and is eligible to naturalize. (See *U.S. v. Wang* (N.D. Cal. 2005) 404 F.Supp.2d 1159, 1163 [“An applicant for citizenship must be a person

⁶² See also Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996* (1997) 11 Geo. Immigr. L.J. 303, 315 (violation of a restraining order could result in deportation).

of “good moral character,” as defined by statute.”]; *People v. Castaneda* (Cal. Ct. App., Aug. 14, 2002, No. H022994) 2002 WL 1859304, at *1 [court advised defendant that pleading no contest to violating the restraining order could subject him to deportation or prevent him from becoming a naturalized citizen].)

Finally, it is worth noting that the risk of all the undeserved adverse consequences described above are especially salient when the individual wrongfully restrained is in fact an IPV *victim*. As part of the cycle of power and control, an abusive partner can threaten to contact immigration authorities, law enforcement, an employer, a professional licensing board, and so forth about their partner’s restraining order, and/or can actually do so. Thus, a wrongfully issued mutual DVRO not only exposes the restrained survivor to undeserved collateral consequences across many areas of life, but also provides the abuser additional weapons to use in perpetrating further abuse.

III. UNWARRANTED DOMESTIC VIOLENCE RESTRAINING ORDERS UNDERMINE THE EFFECTIVE FULFILLMENT OF THE ORDERS’ PURPOSE.

The California Legislature enacted the current version of Family Code Section 6305 to prevent courts from issuing unwarranted mutual domestic violence restraining orders without first making “detailed findings of fact” that each party acted as a primary aggressor and not primarily in self-defense. In 1995 the Legislature amended Section 6305 to “help ensure that a mutual order is the product of the careful evaluation of a thorough record and not simply the result of the moving party yielding to the other’s importunities or the court deciding that a mutual order is an expedient response to joint claims of abuse.” (*Conness v. Satram* (2004) 122 Cal.App.4th 197, 204.) A primary aggressor assessment seeks to identify

the party who is the most significant aggressor, not necessarily the first aggressor. To make this determination, the court considers: the intent of the law to protect victims of domestic violence from continuing abuse, the threats creating fear of physical injury, the history of domestic violence between the persons involved, and whether either person involved acted in self-defense. (Pen. Code § 836(c)(3)).

Unwarranted mutual restraining orders are counterproductive: they deter survivors from contacting the police due to fear of being arrested themselves for violation of the order. (*Monterroso v. Moran* (2006) 135 Cal.App.4th 732, 737.) The fear of reporting is magnified in immigrant communities, where threats of deportation stop survivors from reaching out for help.⁶³ The court in *Monterroso* cautioned, “Domestic violence is a grievous problem in today’s world, and its victims often have few places to turn. The courts must be sensitive to allegations of domestic violence, root out the truth in each case, and protect victims when possible.” (*Id.* at p. 738 [reversing court’s decision issuing mutual restraining orders without making detailed factual findings].)

Inappropriately issued mutual restraining orders can also complicate the police response to any subsequent report of domestic violence, as they blur responsibility between the two parties, thereby putting survivors in greater danger. (*Day v. Mallinen* (Cal. Ct. App., Feb. 23, 2007, No. A114441) 2007 WL 549922, at *6.) A report issued by the Judicial Council of California Advisory Committee on Gender Bias in the Courts in 1996 warned that mutual restraining orders create “difficult enforcement problems” because the police often do not know whom to arrest if there is a

⁶³ Cora Engelbrecht, “Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation.”, *New York Times*, 2018, available at: <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html> (last visited June 8, 2018).

subsequent altercation, and may end up arresting both parties or neither party.⁶⁴

The same report found that survivors report feeling “confused, humiliated, and degraded by orders restraining them” and that mutual restraining orders send the message that survivors are equally to blame for the abuse and violence. (*Ibid.*) Another writer observed that “[t]he issuance of a mutual order can reinforce the [abusive partner’s] belief that the problem is not [their own] but is the result of external factors. [They] could easily understand a mutual protection order to mean that the court blames the victim as much as the [abusive partner]. [¶] Furthermore, the victim [themselves] can recognize this implicit message.”⁶⁵

Finally, the pattern of trial courts blithely issuing mutual orders could result in a perception that pursuing a DVRO runs a high risk of getting restrained, thereby discouraging people from even attempting to secure a DVRO to protect themselves.

Mutual restraining orders that enjoin both the abusive partner and the survivor deter survivors from contacting the police, complicate police response, and could discourage pursuit of DVROs. To safeguard the proper functioning of DVROs, it is imperative that they only be issued against people adjudged to have acted violently and not in self-defense. Otherwise, an inappropriately issued DVRO penalizes and endangers the very individual it seeks to protect.

⁶⁴ Judicial Council of Cal., Advisory Com. on Gender Bias in the Cts., *Achieving Equal Justice for Women and Men in the California Courts, Final Report* (July 1996) <http://www.courts.ca.gov/documents/f-report.pdf> (as of April 18, 2018).

⁶⁵ Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not* (1992) 67 Ind. L.J. 1039, 1060–1061.

IV. CONCLUSION

For the foregoing reasons, amici respectfully request that this Court reverse the decision below.

Respectfully submitted,

Dated: June 12, 2018

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CERTIFICATE OF COMPLIANCE

The accompanying amicus curiae brief complies with the specifications of California Rules of Court 8.204(c) as follows: The word count of the brief is 7,951 words, including footnotes, based on the count of the word processing system used to prepare the brief. The foregoing amicus curiae brief is in 13-point Times New Roman font.

I certify that the foregoing is true and correct.

Dated June 12, 2018 at Los Angeles, California.

/s/ Amanda Goad
Amanda Goad
Attorney for Amici Curiae

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1313 West 8th Street, Los Angeles, CA 90017. I am employed in the office of a member of the bar of this court at whose direction the service was made.

On June 12, 2018, I served the foregoing document:

PROPOSED AMICUS CURIAE BRIEF OF ACLU OF SOUTHERN CALIFORNIA, ACLU OF NORTHERN CALIFORNIA, LAMBDA LEGAL, AND THE LGBTQ CENTER LONG BEACH IN SUPPORT OF APPELLANT MARIA [REDACTED] on the parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope, addressed as follows:

Luis [REDACTED]
[REDACTED]
[REDACTED]

Anya Emerson
Family Violence Appellate Project
449 15th Street, Suite 104
Oakland, CA 94612

Hon. Nathan D. Ide
Tulare Superior Court
2221 South Mooney Blvd.
#209
Visalia, CA 93291

I caused such envelopes fully prepaid with U.S. Postage to be placed in the United States Mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

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

Executed on June 12, 2018, at Los Angeles, California.

/s/ Geneva Tien
Geneva Tien