IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**PEOPLE OF THE STATE OF CALIFORNIA**,
Plaintiff and Respondent,

v.

**RUN PETER CHHUON AND SAMRETH SAM PAN,**

Defendants and Appellants.

No. S105403

(Los Angeles County Superior Court No. KA032767)

**CAPITAL CASE**

# APPLICATION OF THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY; SIX ADDITIONAL RACIAL JUSTICE CENTERS; AND UNDERSIGNED LAW PROFESSORS FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RUN PETER CHHUON; AMICUS CURIAE BRIEF

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On Appeal from a Judgment of the Superior Court of the State of California in and for the County of Los Angeles,
The Honorable Robert J. Perry, Judge

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**APPLICATION TO FILE AMICUS CURIAE BRIEF**

Under California Rules of Court, rule 8.520, subdivision (f), the following parties respectfully request permission to file the attached amicus curiae brief in support of appellant Run Peter Chhuon:

- The Korematsu Center for Law and Equality at the University of California, Irvine School of Law;
- The Center for Law, Equity and Race at Northeastern University School of Law;
- The Center on Law, Race & Policy at Duke University School of Law;
- The Center for Civil Rights and Critical Justice at Seattle University School of Law;
- The Center for Security, Race and Rights at Rutgers Law School;
- The Gibson-Banks Center for Race and the Law at the University of Maryland Francis King Carey School of Law;
- The Center on Race, Inequality, and the Law at New York University School of Law;
- Devon Carbado, the Elihu Root Professor of Law at New York University School of Law;

- Rachel D. Godsil, a Distinguished Professor of Law and Chancellor's Scholar at Rutgers Law School;
- Jerry Kang, the Ralph and Shirley Shapiro Distinguished Professor of Law at the University of California, Los Angeles School of Law; and
- L. Song Richardson, a Chancellor's Professor of Law at the University of California, Irvine School of Law.

Chhuon argues that the California Legislature's decision not to include a separate prejudice analysis on appeal for violations of the Racial Justice Act (RJA) does not violate article VI, section 13 of the California Constitution. The Korematsu Center, the six additional racial justices centers, and the undersigned law professors seek to assist the Court by providing their collective expertise on implicit racial bias and the challenges it presents to the courts, challenges that the California Legislature has sought to remedy with the RJA.

The Korematsu Center for Law and Equality is a research and advocacy center at the University of California, Irvine School of Law dedicated to advancing justice and equality, with a particular interest in ensuring the fair administration of justice in matters concerning race, ethnicity, and national origin. Its mission includes combating systemic discrimination and bias, which directly aligns with the RJA's goal of eradicating racial bias from California's criminal justice system. The Korematsu Center's interest lies in ensuring the proper interpretation and application of the RJA to fulfill its legislative purpose. The Korematsu Center does not, in this brief or otherwise, represent the official views of the University of California, Irvine School of Law.

The Center for Law, Equity and Race (CLEAR) was established by Northeastern University School of Law in 2021 to address challenges from the role of the law and legal systems in creating and perpetuating racial inequalities and disparities. CLEAR addresses the challenge by providing interdisciplinary, hands-on advocacy, learning opportunities, research, legislative engagement, and community outreach. As a result, CLEAR has a strong interest in ensuring that there is not discrimination against any protected groups within the criminal legal process. The Center for Law, Equity and Race joins this brief to provide important context for the position that recognition of implicit bias is essential to improving fairness within the criminal legal system. Additionally, CLEAR has a strong interest in the removal of court-imposed barriers that have the effect of neutering the intended purpose of legislation, such as the California Racial Justice Act (CRJA), to provide criminal defendants the opportunity to demonstrate that their cases were infected with racial bias. CLEAR does not, in this brief or otherwise, purport to represent the official views of Northeastern University or Northeastern University School of Law.

The Center on Law, Race & Policy at Duke University School of Law (the "Center") is a nonpartisan, nonprofit university-based center that supports research, public engagement, teaching, and programs related to race, law, policy, and people. The Center has an ongoing commitment to fostering racial equity by promoting material change in law and public policy, focusing on education, knowledge production, and

community engagement. Accordingly, the Center has an interest in RJA fulfilling its legislative purpose towards more equitable outcomes. The Center does not, in this brief or otherwise, represent the official views of Duke University or Duke University School of Law.

The Center for Civil Rights and Critical Justice (CCRCJ), based at Seattle University School of Law, works to achieve a legal system where both historical and present-day racism, oppression, and marginalization no longer control outcomes or otherwise contribute to inequality. CCRCJ educates future lawyers to be agents for social change and racial equality in all areas of the law, advocates for advancement of the law to achieve equal justice, and produces research to drive effective reform by revealing systems of oppression and exclusion. CCRCJ does not, in this brief or otherwise, represent the official views of Seattle University. CCRCJ has a special interest in ensuring the criminal legal process accounts for and remedies the operation of explicit and implicit racial bias. CCRCJ faculty advocates have contributed to significant changes in Washington's criminal law to ensure it accounts for implicit racial bias in police seizure, juror selection, prosecutorial misconduct, and sentencing.

The Center for Security, Race and Rights (CSRR) at Rutgers Law School engages in research, education, and advocacy on law and policy that adversely impact the civil and human rights of America's diverse Muslim, Arab, and South Asian communities. We do so through an interfaith, cross-racial, and interdisciplinary approach. One theme CSRR focuses on is the

criminalization of Muslim identity through United States and global national security laws and policies. It has a special interest in supporting laws that help to reduce the impact of explicit and implicit bias in the criminal justice system. CSRR does not, in this brief or otherwise, represent the official views of Rutgers Law School.

The Gibson-Banks Center for Race and the Law ("the Gibson-Banks Center") at the University of Maryland Francis King Carey School of Law ("Maryland Carey Law") works collaboratively to reimagine and transform institutions and systems of racial and intersectional inequality, marginalization, and oppression. Through education and engagement, advocacy, and research, the Gibson-Banks Center examines and addresses racial inequality and advances racial justice in a variety of areas, including the criminal justice system. The Gibson-Banks Center's interest is ensuring that racial inequalities and biases do not exist in state and federal criminal justice systems, including cases that could result in the death penalty. The proper interpretation and application of the RJA is an important and substantial step in realizing a fairer criminal justice system. This amicus brief is submitted on behalf of the Gibson-Banks Center and not on behalf of Maryland Carey Law, the University of Maryland, Baltimore, the University System of Maryland, or the State of Maryland.

The Center on Race, Inequality, and the Law at New York University School of Law works to confront and upend the laws, policies, and practices that fuel racial inequality and undermine

the fair administration of justice. The Center fulfills its mission through public education, research, advocacy, and litigation. Those efforts include supporting mechanisms to remedy the influence of implicit bias on criminal proceedings. Neither this brief, nor the Center on Race, Inequality, and the Law, purport to represent the views of New York University School of Law or New York University.

Devon Carbado, an award winning teacher and scholar, is the Elihu Root Professor of Law at NYU School of Law & Distinguished Research Professor at UCLA School of Law. He is a leading scholar in various branches of antidiscrimination law, constitutional criminal procedure, and their intersection with implicit bias. He has given numerous lectures on these topics to a range of audiences, including federal and state courts. His scholarship appears in leading law reviews, including at Berkeley, Cornell, Harvard, Texas, UCLA, and Yale.

Rachel D. Godsil is a Distinguished Professor of Law and Chancellor's Scholar at Rutgers Law School. Professor Godsil is the author and co-author of book chapters, reports, and articles on the risks of implicit bias in policing, criminal prosecution, and for judges as well as co-author of peer-reviewed social science articles examining the efficacy of interventions to address bias. She has developed in-person and asynchronous trainings for juries, judges, court officers, and court staff.

Jerry Kang is the Ralph and Shirley Shapiro Distinguished Professor of Law at UCLA. He is a leading scholar on the legal implications of implicit bias and has co-authored with both

scientists credited with discovering the field (Anthony Greenwald and Mahzarin Banaji). He has given hundreds of lectures on the topic to varied audiences, including to federal and state prosecutors, federal and state judicial conferences, and federal and state government agencies (e.g., EEOC, DOJ EOIR judges, OFCCP, SSA ALJs). His 2022 Traynor Lecture on implicit bias is widely used for judicial education.

L. Song Richardson is a Chancellor's Professor of Law at the University of California, Irvine School of Law. She is a nationally recognized expert on the impact of implicit racial biases on decision-making and judgment. She has consulted widely on issues of implicit bias, race, and policing, working with various public and private entities to address racial and gender disparities. Her work on the topic appears in leading law reviews and she is a member of the American Law Institute.

September 24, 2025

RESPECTFULLY SUBMITTED:

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## AMICUS CURIAE BRIEF

### INTRODUCTION

The criminal justice system is a cornerstone of our democratic system of governance, and it is essential to ensuring a free and secure civil society. But public confidence in the criminal justice system is not a given. Rather, it depends on the system living up to its promise of equal justice under the law, and it crumbles in the face of racial prejudice.

Our legal system has long recognized the problem that racial prejudice poses for our criminal justice system, and over the long history of our nation, our courts have made great progress in confronting racial bias in its *explicit* forms. But not all racial bias comes in explicit form. Indeed, while some forms of prejudice and stereotyping are easily recognized and condemned, others operate in the shadows, quietly shaping our perceptions, decisions, and actions without our awareness.

As will be described below, decades of social scientific research confirm the existence of the subtle but pervasive form of implicit bias. The Racial Justice Act (RJA) is the Legislature's

attempt to confront it. As the Legislature observed, racial bias, in both implicit and explicit forms, has had a devastating effect on our criminal justice system, and the fact that it has gone largely unchecked has undermined public confidence in the state's system of justice and deprived Californians of equal justice under law. (Assembly Bill No. 2542 ["AB 2542"], Stats. 2020, ch. 317, § 2, subds. (a)-(j).) Thus, in passing the RJA, the Legislature recognized that addressing the problem of implicit bias required a new solution, one different than the approach courts usually use in addressing errors.

The RJA addresses this challenge by taking a pragmatic approach. It does not require the entire criminal justice system to be free of all implicit bias, which is an impossible standard. Instead, it ties a violation to specific, discernible conduct, such as a trial actor's exhibition of racial bias or use of racially discriminatory language or an exhibition of bias. (Pen. Code § 745, subds. (a)(1), (a)(2).) Yet, because the effect of such conduct is largely unquantifiable in a *specific* case, the RJA eschews the need for a traditional prejudice analysis. (§ 745, subd. (e).)

Indeed, racial bias presents a fundamentally different kind of problem than the errors that courts typically address. With evidentiary or instructional errors, for example, courts are generally equipped to identify the specific error, assess its impact, and weigh its significance against the totality of the evidence. (See *People v. Blackburn* (2016) 61 Cal.4th 1113, 1133.) With racial bias, however, particularly implicit bias, the harms are both more pervasive than standard trial errors but also more

difficult to quantify. (See, e.g., Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom* (2017) 126 Yale L.J. 862, 876; Morehouse & Banaji, *The Science of Implicit Race Bias: Evidence from the Implicit Association Test* (2024) 153 Daedalus 21, 24.)

The reason that implicit bias is so different than standard trial errors is that implicit biases are not subject to direct introspection—in other words, we cannot ascertain whether we have implicit biases and to what degree simply by asking ourselves for a sincere response. Accordingly, implicit biases operate beneath conscious awareness, making it effectively impossible to isolate the precise influence of, for example, a single racially loaded comment or racial stereotype on an individual juror. (Morehouse & Banaji, *supra*, 153 Daedalus at pp. 23-25; see also Hu & Hancock, *State of the Science: Introduction to Implicit Bias Review 2018-2020* (2024) The Kirwan Institute for the Study of Race and Ethnicity at pp. 4-7.) As a result, implicit racial bias has contributed to systemic disparities in judicial outcomes in ways that are seen in the aggregate but difficult to isolate with certainty in individual instances. (Grosso, et al., *Understanding Processes that Produce Racial Disparities in California Death Sentences: A Review of the Literature* (2025) 65 Santa Clara L.Rev. 39, 56-79 [surveying how race affects capital charging and sentencing through prosecutors, defense attorneys, juries, and judges].)

Implicit bias thus poses a subtle, serious, and systemic threat to judicial integrity, and it is this threat that the

Legislature sought to remedy in passing the RJA without requiring a separate, traditional prejudice analysis. (Stats. 2020, ch. 317, § 2, subds. (i)-(j).) As this brief will explain, a traditional harmless error analysis—which demands proof of a decisive effect in an individual case—is fundamentally ill-suited for the systemic and subtle harms of implicit bias that the RJA was designed to address. Accordingly, we urge this Court to uphold the RJA's per se reversal rule as a legitimate exercise of the Legislature's "plenary law-making authority." (*People v. Simmons* (2023) 96 Cal.App.5th 323, 338.)

## I. Implicit racial bias poses a unique challenge for the criminal justice system, particularly when these biases are triggered by subtle racial cues.

### A. What implicit bias is and how it is triggered

Our brains necessarily think through simplifying categories. For example, when we encounter a human being, we process them through multiple social categories, which include for example their age, gender, and race. For each social category, we have an "attitude" – an overall evaluative valence that ranges from positive to negative (often called a "prejudice"). We also have "stereotypes" – traits that we probabilistically associate with the category. In sum, we automatically classify individuals (e.g., a defendant) into larger groups (e.g., Black), which then activates our attitudes (e.g., mildly negative) and stereotypes (e.g., more likely to be violent), which guide how we perceive and evaluate that person. (Kang, *What Judges Can Do About Implicit Bias* (2021) 57 Ct. Rev. 78, 78.)

Attitudes and stereotypes, which are biases, can be "implicit," which means that we can't know that we have them simply by asking ourselves. Implicit biases are mental associations that operate automatically, influencing our understanding, actions, and decisions without our full awareness or control. (Morehouse & Banaji, *supra*, 153 Daedalus at pp. 23-25.) These implicit biases are distinct from explicit, conscious biases, and they can be held even by individuals who consciously reject discriminatory beliefs. (Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L.Rev. 1124, 1128-1135.) Implicit bias is, in fact, a pervasive feature of ordinary cognition, affecting every individual within society, including all actors operating within the criminal justice system. (*Id*. at p. 1135-1152 [describing the impact of implicit association between Blackness and criminality at distinct stages of criminal process].)

The formation of implicit biases stems from lifelong exposure to cultural messages, societal stereotypes, and historical contexts, which are often absorbed and processed by the brain without direct introspection. (See Meltzoff & Gilliam, *Young Children & Implicit Racial Biases* (2024) 153 Daedalus 65, 67-74 [description bias acquisition in young children].) These biases can be activated through a process known as "priming," whereby environmental cues—including both explicit and implicit references to racial and ethnic stereotypes—trigger unconscious associations. (Morehouse & Banaji, *supra*, 153 Daedalus at pp. 23-25; see also Liu & Jones, *Introduction: Implicit Bias in the Context of Structural Racism* (2024) 153 Daedalus 8, 11.) In other

words, the activation of implicit biases occurs *automatically*, without a person realizing that certain biases have been triggered. (See *ibid.*; see also Kang & Lane, *Seeing Through Colorblindness: Implicit Bias and the Law* (2010) 58 UCLA L. Rev. 465, 481-490; Kang, *Trojan Horses of Race* (2005) 118 Harv. L.Rev. 1489, 1497-1539.)

Once activated, implicit biases can shape our perceptions, influence the way we interpret ambiguous information, and affect our judgments and behaviors in ways that are often imperceptible to us. (Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom* (2018) 2018 Mich. St. L.Rev. 1243, 1253-1275.) For example, certain words or images can function as "dog whistles" or "code words" that trigger existing racial biases, explicit and implicit, influencing how we understand certain facts or arguments without our always being aware that prejudices or stereotypes are being triggered. (*Ibid.*; see also *People v. McWilliams* (2023) 14 Cal.5th 429, 451, conc. opn. of Liu, J. [citing empirical research on implicit bias]; Chew, *Seeing Subtle Racism* (2010) 6 Stan. J.C.R. & C.L. 183, 201 ["Unlike explicit racism, implicit and subtle forms of racism are, by their nature, difficult to observe directly."]; Quaranto, *Dog Whistles, Covertly Coded Speech, and the Practices that Enable Them* (2022) Synthese 200 [dog whistles are "expressions sending a signal pitched too high for some to hear."].)

While the operation of implicit bias operates outside one's subjective awareness, its existence and influence are scientifically measurable, with tangible effects in the real world.

(Morehouse & Banaji, *supra*, 153 Daedalus at pp. 26-32 [describing measurements of implicit bias].) To quantify implicit bias, researchers cannot simply ask an individual survey questions because that individual cannot give an accurate answer; researchers must instead employ indirect methods, such as the Implicit Association Test (IAT). (See Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity* (2009) 97 J. Personality & Soc. Psychol. 17, 19-20.) After decades of research, it is clear that IAT measurements correlate with actual behavior and decision-making in statistically significant ways, even though the effect size may be "small to moderate" in isolation. (Kang, *Little Things Matter a Lot: The Significance of Implicit Bias, Practically & Legally* (2024) 153 Daedalus 193, 194; see also Greenwald et al., *Implicit-Bias Remedies: Treating Discriminatory Bias as a Public Health Problem* (2022) Psych. Science in the Pub. Interest 7, 11).

By demonstrating the existence of implicit bias, researchers have significantly advanced our understanding of how implicit bias affects the criminal justice system. (Holder, *Seeing the Unseen* (2024) 153 Daedalus 15, 15-16.) Indeed, through hundreds of studies, we have come to understand that no actor in the justice system is immune to the effects of implicit racial bias. (Grosso, et al., *supra*, 65 Santa Clara L.Rev. at pp. 56-79; Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1135-1152.) And it is precisely the pervasiveness of implicit racial bias, along with its subtlety, that most seriously challenges our criminal justice system. (Stats. 2020, ch. 317, § 2, subd. (a).)

### B. How implicit bias is measured

Implicit bias, by its nature, is not susceptible to introspection or self-reporting, and individuals often remain unaware of its presence or influence. (Greenwald & Newkirk, *Roles for Implicit Bias Science in Antidiscrimination Law* (2024) 153 Daedalus 174, 175-177.) Accordingly, implicit bias must generally be measured through indirect instruments and other experimental paradigms that are designed to bypass a person's conscious awareness and thereby reveal automatic, unconscious mental associations. (Glaser, *Disrupting the Effects of Implicit Bias: The Case of Discretion & Policing* (2024) 153 Daedalus 151, 152-155.)

A prominent example of such a tool is the IAT, discussed above. (Glaser, *supra*, 153 Daedalus at pp. 152-155.) The IAT looks at how quickly people sort different items into categories, a process that can reveal the unconscious connections that people make between ideas. (Greenwald et al., *Implicit-Bias Remedies*, *supra* at pp.12-15; see also Greenwald et al., *Best Research Practices for Using the Implicit Association Test* (2022) Behav. Res. Methods 1161, 1162-1163). Indirect methods like the IAT work because they provide a window into the cognitive processes, such as the strength of associations an individual may hold between racial groups and behavioral traits, that operate beyond an individual's conscious awareness or deliberate intention. (*Ibid*.; see also Kubota, *Uncovering Implicit Racial Bias in the Brain: The Past, Present & Future* (2024) 153 Daedalus 84, 87-93 [discussing neuroscientific research on implicit bias]; Glaser,

*supra*, 153 Daedalus at pp. 152-155; Greenwald & Newkirk, *supra*, 153 Daedalus at pp. 174-177.) Specifically, by presenting stimuli rapidly and by requiring quick categorization, these tests reduce the opportunity for conscious deliberation or self-censorship, thereby revealing ingrained, automatic responses. (Glaser, *supra*, 153 Daedalus at pp. 152-155; Kubota, *supra*, 153 Daedalus at pp. 85-87.)

Predictive validity studies, which show correlation between IAT measurements and biased judgments and decisions, have been undertaken in all manner of contexts and settings, in laboratories and out in the field. (Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at p. 194; see also Glaser, *supra*, 153 Daedalus at p. 155 ["Be it in hiring, health care, voting, policing, or other consequential decision-making, implicit biases have been shown to be influential, implicating the need for effective interventions to promote nondiscrimination."]; Grosso, et al., *supra*, 65 Santa Clara L.Rev. at pp. 56-79 [effects of bias at stages of criminal proceedings].)

Through decades of research using tests like the IAT, the scientific community has demonstrated the existence of implicit bias across diverse populations and domains. (Ratliff & Smith, *The Implicit Association Test* (2024) 153 Daedalus 51, 54-57; see also Greenwald & Newkirk, *supra*, 153 Daedalus at pp. 174-177; Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at pp. 193-201; Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1128-1132.) Studies consistently reveal that implicit biases have statistically significant effects on behavior and

decision-making, confirming that implicit biases are not merely theoretical constructs but rather have tangible, real-world consequences. (Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at pp. 193-201.) Indeed, while the effect in any single instance may sometimes be characterized as "small to moderate," the cumulative impact of these subtle influences can be far-reaching. (*Ibid.*; see also Grosso, et al., *supra*, 65 Santa Clara L.Rev. at pp. 56-79 [effects of bias at stages of criminal proceedings].)

That said, it is important to understand what these measures *do not* demonstrate. While indirect measures reliably detect *implicit* associations, they provide little insight into an individual's explicit beliefs, intentions, or motivations. (See Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1132-1135.) In other words, a strong implicit bias score does not necessarily indicate explicit prejudice or a conscious intent to discriminate. (*Ibid.*; see also Eisenberg & Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers* (2004) 53 DePaul L.Rev. 1539, 1540 ["But ideological commitment need not translate into racially unbiased evaluations, as a large accumulation of literature discussing social and cognitive psychology demonstrates."].) Instead, a strong implicit bias score reveals only the presence of certain automatic, unconscious associations. (*Ibid.*) This is precisely why implicit bias presents such a challenge for the legal system: the system has historically been geared towards rooting out racial prejudice in its *explicit* forms, yet racial bias persists in *implicit* forms even among those

who consciously reject racial discrimination. (Stats. 2020, ch. 317, § 2, subd. (i).)

### C. Why implicit bias poses a fundamental problem for criminal trials

As noted above, implicit bias is both pervasive in the aggregate, measurable in individuals through tests like the IAT, but largely untraceable in specific examples of decision-making out in the real world. That is, unlike more overt forms of prejudice, implicit bias operates beyond conscious detection, often rendering its influence imperceptible to those who are affected by it. (Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1128-1135.) And because implicit biases are so difficult to detect, they can subtly but powerfully influence various stages of the criminal justice process. (Grosso, et al., *supra*, 65 Santa Clara L.Rev. at pp. 56-79.)

Indeed, even though implicit bias operates on an unconscious level, it is no mere theory. Instead, implicit bias has a tangible effect on real-world judgments and behaviors. (Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at pp. 193-201.) Scientific research consistently demonstrates this phenomenon in multiple domains, confirming that implicit biases (1) are triggered by certain words, images, or actions, and (2) influence how individuals perceive information and make decisions in various parts of life. (*Ibid.*; see also Greenwald & Newkirk, *supra*, 153 Daedalus at pp. 174-182; Grosso, et al., *supra*, 65 Santa Clara L.Rev. at pp. 56-79; Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America* (2019) 53 U.C. Davis L.Rev. 839, 873-879 [discussing how subtle

racial cues such as rap music or prison photos featuring a disproportionate number of Black prisoners made study participants less willing to address harsh punishment laws].)

Still, the very nature of implicit bias means that its specific impact on any *individual* decision or verdict is generally unquantifiable. (Greenwald & Newkirk, *supra*, 153 Daedalus at pp. 174-182.) Accordingly, while scientific methods can confirm that implicit bias affects outcomes in the aggregate, it is impossible to pinpoint precisely how implicit bias might have influenced a *particular* result or to discern what the resolution of a given trial would have been if not for the introduction of implicit racial biases. (*Ibid.*; see also Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at pp. 193-201; Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1128-1135.)

Put another way, the difficulty in detecting implicit bias distinguishes it from the discrete evidentiary or instructional errors that courts address on a daily basis. That is, with conventional trial errors, courts are more readily able to identify the mistake, assess its impact on the proceedings, and weigh its significance against the totality of the evidence to determine prejudice. (*Blackburn*, *supra*, 61 Cal.4th at p. 1133 ["This court and the high court have applied harmless error analysis to a wide range of errors and have recognized that most errors can be harmless."].)

But the difficulty in quantifying the effect of implicit biases renders traditional prejudice analyses inadequate to address the problem, as the Legislature expressly noted when passing the

RJA. (Stats. 2020, ch. 317, § 2, subds. (i)-(j).) In other words, implicit bias is best understood not as an isolated *mistake*, but rather a subtle and pervasive field of *influence*, one whose total impact cannot be adequately captured by conventional review standards designed to focus on specific, particular errors. (See Greenwald & Newkirk, *supra*, 153 Daedalus at pp. 174-182; Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at pp. 193-201.) This unique challenge presented the legislators of California a difficult choice – either (1) ignore implicit bias entirely as legally non-cognizable because of its probabilistic nature or (2) recognize its reality, including its systemic influence, and not demand the sort of proof of "prejudice" that would be impossible to generate except in laboratory conditions. The Legislature reasonably chose the second option and enacted the RJA to provide this more fitting remedy. (Stats. 2020, ch. 317, § 2, subds. (a), (c), (i).)

Indeed, as the Legislature itself observed, implicit bias, just as much as intentional bias, may "inject racism and unfairness into proceedings," thereby undermining the integrity and reliability of the trial process. (Stats. 2020, ch. 317, § 2, subd. (i).) The Legislature further noted that the impact of implicit racial bias at trial "cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record," since "[s]ome toxins can be deadly in small doses." (Stats. 2020, ch. 317, § 2, subd. (a), quoting *Buck v. Davis* (2017) 580 U.S. 100, 122.) This statement fully reflects the scientific consensus that

the harm caused by implicit bias can extend far beyond what we can immediately see. (*Ibid*.)

Ultimately, the unchecked operation of implicit bias, in conjunction with historical, structural, and cultural forces, contributes significantly to racial disparities throughout society, including its criminal justice system, including disproportionate outcomes in capital cases. (Akinyemiju et al., *A Latent Measure of Cultural Racism and Its Association with US Mortality and Life Expectancy* (2025) Nature Human Behavior, 1-3, 8; Grosso, et al., *supra*, 65 Santa Clara L.Rev. at pp. 56-79; Galvan & Payne, *Implicit Bias as a Cognitive Manifestation of Systemic Racism* (2024) 153 Daedalus 106, 110-114.) It erodes public confidence in the justice system, and accordingly, it necessitates a robust legislative response. (Holder, *supra*, 153 Daedalus at pp. 15-16.) The RJA is that legislative response. (Stats. 2020, ch. 317, § 2, subds. (a)-(j).)

## II. The RJA's remedial framework constitutes a sound legislative response to the problem of implicit bias and the many ways these biases can be triggered.

### A. When triggered, implicit bias may pervade an entire trial.

As noted above, when implicit biases are activated, they can pervade the entire structure of a trial. (See Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1135-1152; Grosso, et al., *supra*, 65 Santa Clara L.Rev. at pp. 56-79; see also *Blackburn*, *supra*, 61 Cal.4th at p. 1136 [some errors affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself."].) That is, once activated,

implicit bias cannot be confined to a single, isolated incident or error. (Greenwald & Newkirk, *supra*, 153 Daedalus at pp. 174-177; Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at pp. 193-201.) This may be likened to a filter interposed, such as rose-colored glasses, which when worn, alter everything that we see. In this way, implicit biases may subtly affect every aspect of a criminal trial, fundamentally compromising the integrity of the proceeding. (*Ibid*.)

Importantly, this influence can begin even before the evidence is presented, with jury selection becoming tainted either by the jurors' own biases or through racial triggers subtly introduced by the attorneys. (See Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1142-1145 [discussing how implicit bias affects jurors]; Thompson, *supra*, 2018 Mich. St. L.Rev. at pp. 1277-1285 [discussing difficulties in addressing racial bias in voir dire].)

Similarly, implicit bias can also shape jurors' perceptions throughout the presentation of evidence, influencing how jurors interpret ambiguous information and assess the credibility of witnesses, particularly those who belong to racial or ethnic minority groups. (Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1142-1145; Thompson, *supra*, 2018 Mich. St. L.Rev. at pp. 1277-1285.) And of course, implicit racial biases can be triggered by the arguments of counsel, where subtle language can activate the jurors' existing unconscious biases. (*Ibid*.; see also Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial* (2020) 71 Case W. Res. L.Rev. 39, 50-68 [discussing impact of

racially coded prosecutorial rhetoric on jurors].) Indeed, it is well-documented that calling a Black or Latinx defendant an "animal" or a "predator," claiming that the defendant is a "hardcore gang member," or comparing the defendant to a "Bengal Tiger" is extremely likely to trigger negative racial stereotypes in the minds of listeners. (See generally Pfeiffer & Hu, *Deconstructing Racial Code Words* (2024) 58 Law & Society Review 294 [arguing that racial code words like "animal" perpetuate negative racial stereotypes Black and Latinx people].)

### B. The impact of unremedied implicit bias in criminal proceedings.

When implicit bias is allowed to operate unchecked, its impact on a jury trial or other criminal proceeding can be devastating. (Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at pp. 193-201; Glaser, *supra*, 153 Daedalus at pp. 152-155.) Consider, for example, the following simulation estimating the impact of implicit bias on an expected prison sentence:

> With plausible assumptions (a crime with a mean sentence of five years and a standard deviation of two years), implicit bias effect size of $r = .10$, and a five-round model (involving arrest, arraignment, plea bargain, trial, and sentencing), the simulation found that a Black criminal can expect a probabilistic sentence of 2.44 years versus a White criminal expecting 1.40 years. Remember that we must integrate this individual-level differential over the entire relevant population of criminal cases in any given year, which can run into the tens of thousands. Even if there were only one thousand cases of this sort per year, implicit bias would produce one thousand years of more Black imprisonment annually.

(Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at p. 198.)

Further, the harm caused by implicit bias stems precisely from its unique characteristics: implicit bias is pervasive, powerful, and amply demonstrated in the aggregate, yet it is essentially undetectable in any given individual case. (Greenwald & Newkirk, *supra*, 153 Daedalus at pp. 174-177; Kang, *Little Things Matter a Lot*, *supra*, 153 Daedalus at pp. 193-201; Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1128-1132.) This combination of potency and undetectability can lead to arbitrary outcomes, as the precise influence of bias on a verdict or sentencing decision invariably remains obscured. (Kang, *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L.Rev. at pp. 1135-1152; Grosso, et al., *supra*, 65 Santa Clara L.Rev. at pp. 56-79.) Such arbitrary results, in turn, undermine the public's confidence in the fundamental fairness and impartiality of the justice system. (Holder, *supra*, 153 Daedalus at pp. 15-16.)

The scientific research thus firmly supports the Legislature's conclusion that judicial integrity is compromised when implicit bias operates without an adequate remedy. (Stats. 2020, ch. 317, § 2, subds. (i)-(j).) Indeed, the RJA provides a workable solution to the problem of implicit bias because it requires a violation to be tied to identifiable conduct by specific actors, thereby focusing on triggered, rather than general, implicit racial bias. (§ 745, subds. (a)(1), (a)(2).) But at the same time, the per se reversal rule eliminates the need to try to accomplish the impossible task of identifying the specific effect of a particular RJA violation on a given verdict. (§ 745, subd. (e).) In other words, the science fully supports the Legislature's sound

judgment. Amici—researchers whose careers have been dedicated to studying implicit bias, and the Korematsu Center, joined by racial justice centers from law schools around this country—urge this Court to uphold the RJA's per se reversal rule as a proper exercise of the Legislature's law-making authority. (*Simmons*, *supra*, 96 Cal.App.5th at p. 338.)

We note that per se reversal, just like the approach the Legislature adopted for race-based challenges of peremptory strikes, is not determinative of the ultimate outcome of guilt or innocence. Instead, the pragmatic, judicially workable rule provides, simply, a much-needed measure of fairness.

## CONCLUSION

Amici curiae urge this Court to show deference to the Legislature's judgment in creating a remedy for RJA violations that is consistent with the scientific understanding of how implicit racial bias operates.

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## CERTIFICATE OF WORD COUNT

I, Joseph Doyle, hereby certify in accordance with California Rules of Court, rule 8.360, subdivision (b)(1), that this brief contains 5,940 words as calculated by the Microsoft Word software in which it was written.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Dated: September 24, 2025

Respectfully submitted,

/s/ Joseph Doyle

Joseph Doyle

**DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL**

**Case Name: *People v. Chhuon/Pan*** **Case No.: S105403**

I declare that I am over the age of 18, not a party to this action and my business address is 1120 Bird Avenue, Suite F-185, San Jose, California 95125. On the date shown below, I served the ***AMICUS BRIEF*** to the following parties:

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