Juvenile Law Center
and well-being of youth

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October 28, 2020

The Honorable Tani Cantil-Sakauye, Chief Justice
California Supreme Court
350 McAllister St.
San Francisco, CA 94102

Re: **Amicus Curiae Letter in Support of Petition for Review per Rule 8.500(g)**
In re J.E., Case No. S265077, COA Case No. A156839, Superior Ct. No. J1900105

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rule of Court 8.500(g), we write on behalf of Juvenile Law Center in support of the Petition for Review filed in the above-captioned case, *In re J.E.* Juvenile Law Center supports the *Amicus* letter filed by the Pacific Juvenile Defender Center and writes separately to expand on the impropriety of the court's arbitrary and racially-biased interpretation of California Penal Code Section 26.

This case epitomizes the particular vulnerability of Black youth who come into contact with the law when statutes fail to adequately circumscribe what information the court can consider in making a subjective determination about the child's understanding of their conduct. We ask this court to grant review to ensure an equitable interpretation of Penal Code 26 that precludes arbitrary and racially biased decision-making.

Interest of Juvenile Law Center

Juvenile Law Center advocates for rights, dignity, equity, and opportunity for young people in the child welfare and justice systems through litigation, appellate advocacy, and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting young people advance racial and economic equity and are rooted in research, consistent with the unique developmental characteristics of youth and young adults, and reflective of international human rights values.

Reasons Why Review Should Be Granted

I. Section 26's Lack Of Guidance On What The Court Should Consider In Determining Whether A Child Understood The Wrongfulness Of Her Actions Invites Arbitrary And Racially-Biased Decision-Making

This case presents the question of whether a seemingly race-neutral statute, Penal Code Section 26, was interpreted in a racially biased way where the standard for determining whether a child understands the wrongfulness of her conduct is vague. California recognizes a rebuttable presumption that a child under age 14 is incapable of committing a crime. Cal. Pen. Code § 26; *People v. Cottone*, 303 P.3d 1163, 1168-69 (Cal. 2013). If the State can show by clear and convincing evidence that the child under age 14 understood the wrongfulness of her conduct, only then can the court impose delinquency liability. *Id*. at 1169. To conclude that the child understood the conduct's wrongfulness, the court must make an individualized determination. Yet, Section 26 does not define what must be part of such an individualized consideration, leaving the court to use its subjective biases to determine whether J.E. understood the wrongfulness of her actions. In the instant case, the court relied upon J.E.'s age and what it believed "most 13-year-olds know is wrong." (Ct. App. Op. at 6.) However, J.E.'s interaction with the police can be explained by several other considerations, including her own racial trauma and personal inexperience with law enforcement. Absent statutory guidance on how to interpret Section 26, racial bias infected the court's decision to impose liability on thirteen-year-old J.E.

Since 2016, the California Penal Code has required "respect for racial, identity, and cultural differences, and development of effective, noncombative methods of carrying out law enforcement duties in a diverse racial, identity, and cultural environment." Cal. Penal Code § 13519.4 (West 2016). The State has mandated racial and cultural diversity training for officers since 1990. Cal. Penal Code § 13519.4 (West 1990). The Code finds any kind of racial or identity profiling to be "abhorrent" and "a great danger to the fundamental principles" of the state Constitution. Cal. Penal Code § 13519.4 (d)(2) (West 2017). The legislature has declared that any kind of racial profiling will alienate people from law enforcement and hinder community policing efforts, while causing "law enforcement to lose credibility and trust among the people whom [it] is sworn to protect and serve." *Id.* at (d)(3). However, this commitment to racial equity has historically failed to protect Black youth. In the instant case, when approaching a 13-year-old Black child, the police officers instructed her that she was not under arrest and then proceeded to follow and question her, resulting in her "objective[ly] . . . frenzied mental state." (Ct. App. Op. at 11 (Streeter, J., concurring and dissenting.))

Absent guidance on what factors to consider when determining whether J.E. understood the wrongfulness of her conduct, the court relied on generalizations and a biased understanding of Black youth to deem 13-year-old J.E. understood the wrongfulness of her conduct and should therefore be subject to liability. First, the court

improperly assumed J.E.'s age was close enough to 14 to warrant imposing liability, and second, the court used race-based stereotypes to find that J.E.'s interaction with the police was based on an understanding of the criminal justice system that she did not have.

A. At 13 Years Old, J.E. Was Improperly Perceived As Older And More Culpable For Her Conduct

J.E. was 13 years old at the time she was pulled over by the police. California law does not impose criminal conduct upon children under 14 unless they understand the wrongfulness of their actions. While making this determination, the court improperly imposed liability reasoning that she was almost 14 years old. (Ct. App. Op. at 6.)

Black youth have historically been seen as older and more culpable than their white peers. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 528 (2014). Black children "enjoy fewer of the basic human protections afforded to their peers because the category 'children' is seen to be a less essential category (specifically, less distinct from adults) when it is applied to Black children." *Id*. at 528, 539-40. The study confirmed the researchers' hypothesis "that Black children would be seen as less innocent as well as older than their other-race peers [and] when children are seen as less distinct from adults, they would also receive fewer protections in both laboratory and field settings [which] ultimately result in increased violence toward them relative to their peers in criminal justice contexts." *Id*. at 528, 539-40.

Black girls, in particular, "bear the brunt of a double bind." REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD, 14 (2017). They are viewed as more adult than their white peers, may be more likely to be disciplined for their actions, and are more vulnerable to discretionary authority. *Id*. This perception of Black girls as less innocent and older contributes to the "more punitive exercise of discretion by those in positions of authority, greater use of force, and harsher penalties." *Id*. at 1. "Black girls are viewed as more adult than their white peers *at almost all stages of childhood*, beginning most significantly at the age of 5, peaking during the ages of 10 to 14, and continuing during the ages of 15 to 19." *Id*. at 8. Black girls are viewed as exhibiting more mature social behaviors, while perceived as not being academically sophisticated. *Id*. at 5. Thus, when "authorities in public systems view Black girls as less innocent, less needing of protection, and generally more like adults, it appears likely that they would also view Black girls as more culpable for their actions and, on that basis, punish them more harshly despite their status as children." *Id*. at 8.

B. Youth As Young As J.E. Are Not Developmentally Capable Of Regulating Their Emotions In Stressful Situations

Research confirms youth are impulsive with a tendency to over-emphasize short-term gains over possible long-term consequences and are susceptible to coercion.

Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice*, 7 VICTIMS & OFFENDERS 428, 432-37 (2012). Youth, when faced with conditions that cause intense emotion or stress, tend to make poor decisions. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 455 (2013). Adolescent decision-making is particularly susceptible to influence from emotional and social factors. Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1184, 1188 (2012). In hot emotional contexts, youth decision-making tends to be driven more by the socio-emotional parts of the brain than by the cognitive controls, *id*. at 1188, making adolescents more likely to act emotionally and impulsively without engaging in a formal decision-making process. *See* Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 211 (2011). "Thus, adolescents are more likely than children and adults to make risky decisions in emotionally 'hot' contexts." Blakemore & Robbins, *supra*, at 1187.

The stress of a police encounter may be particularly problematic for minors. Research has established that even casual police encounters can increase stress in adolescents. *See* Michael J. McFarland et al., *Police Contact and Health Among Urban Adolescents: The Role of Perceived Injustice*, 238 SOCIAL SCI. & MED. 1, 1, 7-8 (2019); Tove Peterson, *Complaints as Opportunity for Change in Encounters Between Youths and Police Officers*, 2 Social Inclusion 102, 105–06 (2014) ("In some of the cases the youths merely express uneasiness at the police presence, not for any special reason, but rather because you never know what might happen if the police are present; they might just search you or check you out even if there is no reason for doing so, according to the youths."). Youth may react by attempting to avert the encounter or feel compelled to stay and respond to questions. In the instant case, when told she was expressly not under arrest, J.E. acted as a confused child, with an ingrained fear of police. (*See, e.g.*, Ct. App. Op. at 8 (Streeter, J., concurring and dissenting.).

C. J.E. Behaved As A Reasonable Black Child Would Who Had No Personal Experience With Law Enforcement

In *J.D.B. v. North Carolina*, the United States Supreme Court held that the Fifth Amendment *Miranda* custody determination must be based on a "reasonable child" rather than a reasonable adult standard. 564 U.S. 261, 271-72 (2011). The reasonable child test is particularly applicable to the Fourth Amendment seizure inquiry due to the similarities with the Fifth Amendment *Miranda* custody determination; the two tests are indeed "virtually identical." Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. L. REV. 1513, 1527-28 (2018). In both instances, the inquiry rests on whether a reasonable person would feel free to terminate the encounter and leave, or feel pressure to stay. *See* Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North*

Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles be Far Behind?, 47 Harv. CR-CL L. Rev. 501, 503 (2012).

Just as youth matters to constitutional analysis, so too does race. Police oppression of Black people is pervasive throughout American history—from police enforcing fugitive slave codes and "Jim Crow" laws, failing to protect Black people from lynching and other civilian violence, Civil Rights era violence often perpetrated by police, to present day mass incarceration and the increasing number of police killings of Black people. *E.g.*, Henning, *supra*, at 1530 (citing Mia Carpiniello, Note, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion" Terry Stops*, 6 MICH. J. RACE & L. 355, 361-62 (2001)). Black children's perception of the police arises from both their Blackness and their youth. *Id*.

"In every critical era, . . . [Black people] have perceived police to be proponents of discrimination and subordination through violence and intimidation." Henning, *supra*, at 1530. Research and commonsense confirm that this mistrust is well founded. Data shows that Black people are disproportionately arrested for certain crimes. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 3-5 (2013), https://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf. This is true even as to Black youth. Although Black youth made up only 16.7% of all youth in the United States in 2017, they accounted for 35% of all juvenile arrests, 35% of juvenile court referrals, 40% of detained youth, 40% of youth formally processed by the juvenile court, 37% of adjudicated youth, and 54% of youth judicially waived to criminal court. OJJDP, EASY ACCESS TO JUVENILE POPULATIONS: 1990-2019, https://www.ojjdp.gov/ojstatbb/ezapop/; OJJDP STATISTICAL BRIEFING BOOK (JUVENILE ARRESTS), 2017, https://www.ojjdp.gov/ojstatbb/crime/qa05104.asp?qaDate=2017&text=yes; OJJDP STATISTICAL BRIEFING BOOK (JUVENILE ARREST RATE TRENDS), http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05274; OJJDP, EASY ACCESS TO JUVENILE COURT STATISTICS: 1985-2018, https://www.ojjdp.gov/ojstatbb/ezajcs/.

From an early age, Black children are steeped in the notion that police pose a danger. Black youth who have encountered police "complain that police are mean and disrespectful and do not know how to talk to others, especially Black people." Henning, *supra*, at 1532. "When youth watch any of the recent police shootings or assaults captured on video, they see officers who are visibly hostile and rude, creating such a negative tone that virtually any child would be afraid." *Id*. "These experiences, combined with developmental features of adolescence, leave Black youth particularly vulnerable to the psychological pressures of police presence." *Id*. at 1532-33.

For that reason, adults in the Black community routinely instruct their children how to behave when stopped by police to mitigate potential harm: "no sudden movements, don't question why you're being stopped, comply with all verbal commands, never raise your voice." Arienne Thompson Plourde and Amelia Thompson, *The Talk: Surviving Police Encounters While Black*, UTNE READER(Summer 2017), https://www.utne.com/community/police-racial-discrimination-zm0z17uzcwil. "The talk" is widely understood as a necessary part of Black parenting. After the killings of Michael Brown, Tamir Rice, Freddie Gray, Trayvon Martin, and far too many others, this talk has become a routine warning for Black children. German Lopez, *Black Parents Describe "The Talk": They Give to Their Children about Police*, VOX (August 8, 2016), https://www.vox.com/2016/8/8/12401792/police-black-parents-the-talk. Yet, J.E.'s mother stated that she never had "The Talk" with J.E. about how to interact with law enforcement officers. (Ct. App. Op. at 5 (Streeter, J., concurring and dissenting.)) As such, the court was "left to surmise about how a young person of J.E.'s age, of J.E.'s race, in J.E.'s community, may be expected to react when faced with a sudden show of law enforcement authority." (*Id*. at 8 (Streeter, J., concurring and dissenting.)) However, the court inappropriately determined that a 13-year-old Black child should be able to regulate her emotional response and fear of police and have the capacity to understand the wrongfulness of her actions.

For the foregoing reasons, Juvenile Law Center requests that the Court grant the pending petition for review.

Respectfully,

/s/ Jessica R. Feierman
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cc: See attached Proof of Service

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE

Re: *In re J.E.,* S265077

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of Philadelphia, Commonwealth of Pennsylvania. My business address is 1800 JFK Blvd., Ste. 1900B, Philadelphia, PA 19103. On the date listed below, I served the AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW (CAL. RULES OF COURT, RULE 8.500(g)) on each of the following, by placing true copies enclosed in sealed envelopes with postage fully prepaid in a U.S. Post Office box addressed as follows:

Contra Costa County Juvenile Court
725 Court Street
Martinez, California 94553
Attn: Hon. John C. Cope

And by transmitting a PDF version of the document via electronic service through TrueFiling on the parties listed below:

Office of the Attorney General
Counsel for Respondent

Erin W. Keefe
Counsel for Petitioner

Clerk of the Court
California Court of Appeal
First District, Division Four

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 28, 2020 at Philadelphia, Pennsylvania.

/s/ Jessica R. Feierman
Declarant