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March 16, 2018

Hon. Tani Cantil-Sakauye, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: American Civil Liberties Union of Southern California's *Amicus Curiae* Letter in Support of Petition for Review in *Seeleevia Yousif v. Superior Court*, California Supreme Court Case No. S247064

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, and in order to encourage this Honorable Court to grant review to ensure that California's lower courts do not discriminate against victims of domestic violence on the basis of their national origin or limited English-language proficiency (hereinafter, "LEP"), the American Civil Liberties Union of Southern California ("ACLU SoCal") respectfully submits this letter in support of Petitioner Seeleevia Yousif's Petition for Review or, in the Alternative, Grant-and-Transfer (the "Petition").[1] The Petition raises issues of statewide importance that are fundamental to the safety and welfare of LEP victims of domestic violence.

In the underlying case, the trial court awarded partial legal custody of a three-year-old to his father, who strangled and smacked the child's mother before kicking her and the child out of the house. Despite an explicit finding that the father committed an act of domestic violence, the

[1] This *amicus curiae* letter was authored by ACLU SoCal and its counsel, and was not authored in whole or in part by counsel for any party. No one other than ACLU SoCal and its counsel has made any monetary or pro bono contribution to the preparation or submission of this letter.

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trial court reached this dangerous result on the basis, in part, that the father's English-language proficiency was superior to the mother's. The trial court's error is best summarized in the trial court's own words: "despite the Court's finding that there was domestic violence . . . the Court does believe that father has rebutted the presumption against joint legal custody in the following ways . . . *the evidence indicates that father's English language is more fluent.*" (Reporter's Transcript of Proceedings (Case No. DS59250) at 171:19-172:3 (emphasis added) (hereinafter the "Trans.").) The mother sought appellate review via petition for writ of mandate, which was summarily denied.

This Court should grant review because California's courts may not lawfully consider a parent's English-language proficiency when applying the rebuttable presumption that "an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child." Cal. Fam. Code § 3044(a). As the Petition states, a parent's English-language ability is not one of the factors enumerated by statute tending to rebut the presumption; therefore, it was improper for the court to consider Ms. Yousif's English proficiency. Cal. Fam. Code § 3044(b)(1)-(7). Further, as this letter argues, the trial court's consideration of Ms. Yousif's language skills was in violation of Federal Title VI guidance, the Equal Protection Clause, and the First Amendment. Finally, if left uncorrected, the trial court's decision sets a dangerous precedent: LEP victims of domestic violence will be discouraged from seeking protection in California's courts for fear that their inferior English-language skills will result in shared custody of their beloved children with their English-speaking abusers.

Just as the United States Supreme Court decades ago granted certiorari of a discriminatory "child custody decision [] not ordinarily a likely candidate for review" in order to reaffirm "the Constitution's commitment to eradicating discrimination based on race" (*Palmore v. Sidoti*, 466 U.S. 429, 431-32 (1984)), this Court should grant the Petition to eliminate national origin and/or language discrimination in custody determinations and to ensure LEP victims of domestic violence and their children equal protection of law.

I. ACLU SOCAL'S INTEREST IN THE CASE

ACLU SoCal is an affiliate of the ACLU, a national, nonprofit, nonpartisan civil liberties organization with more than 1,000,000 members dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nation's civil rights law. Since their founding, both the national ACLU and ACLU SoCal have had an abiding interest in the promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions, including the rights of due process and equal protection of the laws. ACLU SoCal is committed to protecting the rights of immigrants and Californians of all

backgrounds, and to ensuring that individuals are not punished on the basis of their national origin or language ability. This particular case has the potential to significantly impact an especially vulnerable population: LEP survivors of domestic violence. ACLU SoCal urges this Honorable Court to grant review in order to ensure that California's presumption against awarding custody of children to those who have committed domestic abuse will be enforced regardless of the parent's English-language ability.

II. THIS COURT SHOULD GRANT REVIEW TO PREVENT JUDICIAL VIOLATIONS OF THE EQUAL PROTECTION CLAUSE AND TITLE VI OF THE CIVIL RIGHTS ACT.

The trial court's English language preference violates the Equal Protection Clause and Title VI of the Civil Rights Act. No court may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." *Hernandez v. New York*, 500 U.S. 352, 371 (1991). Similarly, Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance." 42 U.S.C. § 2000(d). This Court should grant review to ensure that California's courts will not disregard the civil rights of LEP parents by applying discriminatory English-language preferences to custody determinations.

Both the United States Supreme Court and this Court have indicated that state action premised on language ability may violate the Equal Protection Clause. This Court ruled that the Equal Protection Clause was violated by a California constitutional provision that conditioned the right to vote upon English literacy and thereby disenfranchised those literate in Spanish but not in English. *Castro v. State of Cal.*, 2 Cal.3d 223 (1970). Similarly, in *Katzenbach v. Morgan* the United States Supreme Court held that a New York State law that denied LEP Puerto Rican immigrants the right to vote by enforcing an English-language literacy test was inconsistent with the Voting Rights Act of 1965, which Act constituted a valid Congressional enforcement of the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). And in *Meyer v. Nebraska*, a law prohibiting the teaching of languages other than English in Nebraska schools was held unconstitutional because it violated the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390 (1923). There, the Supreme Court broadly held that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, *but this cannot be coerced by methods which conflict with the*

Constitution – a desirable end cannot be promoted by prohibited means." *Id.* at 401 (emphasis added). The same principles should have constrained the trial court in this case.

Setting aside the question whether speaking English at home is desirable for children in California, the trial court's means of effectuating that result is prohibited. It cannot be that the Equal Protection Clause protects the voting rights of LEP individuals or the education of individuals in languages other than English, but simultaneously tolerates the separation of parent from child on the basis that the parent does not presently speak fluent English. This Court should grant the Petition to subject the trial court's English-language preference to strict scrutiny.

The trial court's custody determination also contravenes federal guidance. As the Petition notes, the United States Department of Health and Human Services and the United States Department of Justice have issued joint guidance prohibiting exactly this result and establishing that English-language preferences in custody determinations are *per se* violations of Title VI of the Civil Rights Act of 1964. *See* Depts. of Health and Human Services and Justice, *Joint Guidance on Child Welfare and Title VI* (2016) <https://www.justice.gov/opa/file/903996/download> [as of March 16, 2018].

The Joint Guidance provides that:

> "Title VI's prohibition against national origin discrimination includes discrimination based on a person's birthplace, ethnicity, ancestry, culture related to national origin, or ability to speak English. This means that people cannot be subjected to discrimination because English is not their primary language . . . Prohibited treatment under Title VI, for example, could include the removal of a newborn from a limited English proficient (LEP) mother. . . ."

Id. at p. 4. "Recipients of federal financial assistance [including California's courts] may not discriminate on the basis of national origin, which includes discriminating against LEP individuals, who have a limited ability to speak, read, write, or understand English." *Id.* at 7. That guidance confirms case law establishing that national origin and language discrimination constitute equal protection violations and violations of Title VI. *See*, *e.g.*, *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926) (statute prohibiting maintenance of books in any language other than English or Spanish denies equal protection of law to Chinese merchants); *Lau v. Nichols*, 414 U.S. 563, 566-569 (1974) (recognizing Title VI right to English-language education for LEP Chinese students who were otherwise "effectively foreclosed from any meaningful education"); *Asian American Bus. Group v. City of Pomona*, 716 F. Supp 1328, 1332 (C.D. Cal. 1989) (law restricting use of non-English alphabetical characters discriminates on basis of

national origin). Similar to those decisions, scholarly work confirms that language discrimination is prevalent in United States history, and can be the functional equivalent of forbidden national origin discrimination. *See, e.g.*, Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L. L. Rev. 293, 325, 328 n. 225 (1989) ("Language is an automatic signaling system, second only to race in identifying targets for possible privilege or discrimination" (citing Karl W. Deutsch, *The Political Significance of Linguistic Conflicts*, Les Etats Multilingues 7 (1975)); *see also* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Min. L. Rev. 269, 328-50 (1992) (documenting English language preferences in United States history).

Finally, permitting family courts to consider English-language proficiency in rebutting the section 3044 presumption also risks a more amorphous, but no less pernicious, form of harm: injecting unconscious bias into custody determinations. The Supreme Court rejected a similar custody determination as a violation of the Equal Protection Clause in *Palmore v. Sidoti*, 446 U.S. at 431. In that case, a Florida trial court awarded custody of a child to the father because the mother married an African American man. The Florida trial court found, in a passage that echoes the trial court here, that "despite the strides that have been made in bettering relations between the races in this country, it is inevitable that [the child] will, if allowed to remain [with her mother] . . . suffer from the social stigmatization that is sure to come." *Id.* This prediction of harm based upon society's discriminatory views was a violation of the Equal Protection Clause. *Id.* at 433. The United States Supreme Court held that "[t]he Constitution cannot control such prejudices but neither can it tolerate them . . . the law cannot, directly or indirectly, give them effect." *Id.* Thus, the unconscious or private biases that the Florida trial court sought to protect the child from were not "permissible considerations for removal of an infant from the custody of its natural mother." *Id.* In Ms. Yousif's case the trial court reinforced societal biases against LEP parents when it determined that despite the father having perpetrated an act of domestic violence against Ms. Yousif, her limited English proficiency tended to rebut the presumption that joint custody is detrimental to her son. Cal. Fam. Code § 3044(a). For the same reasons set forth in *Palmore*, it is a violation of the Equal Protection Clause to weight section 3044 determinations against LEP parents because of societal biases in favor of English speakers.

Review should be granted to analyze the question whether the trial court's custody determination considered language ability in a manner that violates the Equal Protection Clause and/or the Civil Rights Act, and to reassure LEP parents that California's statutory presumption against awarding custody to those with a history of domestic abuse will not be rebutted on the basis of the victim's limited English-language proficiency.

III. THIS COURT SHOULD GRANT REVIEW TO PREVENT JUDICIAL VIOLATION OF THE FIRST AMENDMENT.

The First Amendment protects all LEP parents' rights to express themselves in their native tongues, or in the languages of their choice: "Speech in any language is still speech, and the decision to speak in another language is a decision involving speech alone." *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir. 1995) (vacated for lack of standing by *Arizonans for Official English*, 520 U.S. 43 (1997)); *see also Meyer*, *supra*, at 401-403. "Choice of language is a form of expression as real as the textual message conveyed. It is an expression of culture." *Asian Am. Bus. Grp. v. City of Pomona*, 716 F.Supp. 1328, 1330 (C.D. Cal. 1989). Because a person's choice of language conveys meaning, government conduct that draws distinctions based on that choice imposes a facially content-based restriction that is automatically subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, ___ U.S. ___, 135 S.Ct. 2218, 2228 (2015) (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505 (1993)). Accordingly, this Court should apply strict scrutiny to the trial court's custody determination, and in conducting that review there is "no need" for this Court "to consider the [trial court's] justifications or purposes." *Id.* at 2227.

In this case, the court explicitly "encouraged and congratulated mom for working on her English," but nonetheless awarded partial custody of Ms. Yousif's child to his father because "*the evidence indicates that father's English language is more fluent.*" (Trans. at 171:19-172:3) (emphasis added). This decision weighed against Ms. Yousif not the manner of her parental communication, but rather the language used for expression – the *content* – of her speech.[2] California's courts cannot threaten diminished custody of children in order to compel LEP victims of domestic violence to express themselves in English without being subjected to strict scrutiny, yet that is the result of the Court of Appeal's summary denial of Ms. Yousif's petition for writ of mandate.

The trial court's decision cannot withstand strict scrutiny. Reasonable minds can and indeed do differ from the court's opinion that it is beneficial for a child to speak English at home. *See, e.g.*, Victoria Marian and Anthony Shook, *The Cognitive Benefits of Being Bilingual*, Cerebrum, Oct. 31, 2012, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3583091/> [as of

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[2] ACLU SoCal is not advocating the position that California's trial courts can *never* consider the content of parental speech in making custody determinations. For example, content-based consideration of violent, threatening, and/or obscene parental communication might survive strict scrutiny. Rather, ACLU SoCal is advocating the position that California's trial courts cannot favor one parental language over another when making custody determinations without such language favoritism satisfying strict scrutiny.

March 16, 2018]. The trial court's award of partial custody of Ms. Yousif's son to a person with a history of abuse because of Ms. Yousif's expression in Chaldean is a direct violation of her First Amendment right to speak in the language of her choice, and a punishment for her LEP speech within her own home. More broadly, the trial court's application of an English-language preference to a custody determination threatens the First Amendment right of all LEP parents to express themselves in their native tongues.[3] Review should be granted to protect the First Amendment rights of LEP parents.

IV. THIS COURT SHOULD GRANT REVIEW BECAUSE THE TRIAL COURT'S RULING ENDANGERS LEP PARENTS.

A person's superior English-language proficiency can become a tool of abuse and control against LEP victims. *See* Nat. Center on Domestic and Sexual Violence, *Immigrant Power and Control Wheel* <https://goo.gl/i4F8Qi> [as of March 16, 2018] (listing, *inter alia* "Not allowing her to speak English" and "Isolating her from friends, family, or anyone who speaks her language" as tools of abuse). The trial court's ruling should be reviewed because it reinforces those mechanisms of abuse and control, and transforms the trial court into an instrumentality of continuing abuse. For example, if an English-speaker abuses an LEP parent, the LEP parent may rightly fear that California's courts will award her endangered child to a person who has abused her, on the basis of her limited English-language proficiency, and for that reason avoid California's courts. English-proficient abusers may therefore infer that there are less severe consequences for abusing LEP victims than for abusing English-speaking victims, a result anathema to the statutory goal of preventing domestic violence.

This outcome is perverse. California's courts should reinforce recourse to the law, especially for the most vulnerable. In fact, preventing recurrent acts of domestic violence is the specific purpose of the Domestic Abuse Prevention Act. *Quintana v. Guijosa*, 107 Cal.App.4th 1077, 1079 (2003). It is also the policy behind the rebuttable presumption that awarding even joint custody to a person with a history of domestic abuse is detrimental to a child. Cal. Fam. Code § 3044(a); *see also* § 3020(a)-(c) (prioritizing safety over joint parenting). But the trial court's ruling, if it evades review, reinforces the power of domestic batterers, endangers LEP victims, and implies impunity for English-speakers who abuse LEP victims.

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[3] The result is also detrimental to California's interest in a multilingual citizenry. As the Ninth Circuit discussed in *Yniguez*, *supra*, a diversity of viewpoints and a diversity of speech is "not a sign of weakness but of strength." *Yniguez*, 69 F.3d at 936 (citing *Cohen v .California*, 403 U.S. 15, 25 (1971)). Similarly, the Supreme Court has regarded multilingualism as "helpful and desirable." *Meyer*, 262 U.S. 400. This Court should affirm that enlightened position.

In conclusion, ACLU SoCal urges the Court to grant review, and to hold that English-language preferences may not be applied to custody determinations by California's courts.

Respectfully submitted,

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PROOF OF SERVICE

I, Michael V. Mancini, declare as follows:

1. I am a resident of the State of California, residing in Los Angeles and employed in Beverly Hills, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 232 North Canon Drive, Beverly Hills, California 90210-5302, and my e-service contact address is mmancini@rmslaw.com.

2. On March 16, 2018, a true and correct copy of AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA'S AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW will be electronically filed with the Court through Truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's electronic filing system.

3. On March 16, 2018, prior to the aforementioned electronic filing, a true and correct hard copy of AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA'S AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW was sent via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Beverly Hills, California, to each of the below:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 16th day of March, 2018, at Beverly Hills, California.

MICHAEL V. MANCINI