

No. 20-1627

In the
Supreme Court of the United States

RICHARD DUCOTE, ESQ., VICTORIA MCINTYRE, ESQ., & S.S.,
Petitioners,

v.

S.B.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME

WENDY J. MURPHY, ESQ.
WOMEN'S AND CHILDREN'S
ADVOCACY PROJECT
CENTER FOR LAW AND SOCIAL
RESPONSIBILITY
NEW ENGLAND LAW | BOSTON
154 STUART STREET
BOSTON, MA 02116
617-422-7410
WMURPHY@NESL.EDU
MA BBO#550455

The Women's and Children's Advocacy Project and other amici hereby seek leave to file their brief out of time. In support hereof, Movant states that they filed their electronic brief on time, on June 21, 2021, and erroneously believed the Court's order regarding electronic filing of briefs because of COVID did not require the filing of a hard copy. As soon as Movants learned that a hard copy brief was required, they submitted a copy of their brief by mail. This hard copy brief was filed out of time.

CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court grant them leave to file their brief out of time.

Respectfully submitted,

Counsel for Movants,

/s/ Wendy J. Murphy

**WENDY J. MURPHY
NEW ENGLAND LAW | BOSTON
154 STUART STREET
BOSTON, MA 02116
617-422-7410
WMURPHY@NESL.EDU
MA BBO#550455**

CERTIFICATE OF SERVICE

I, Wendy J. Murphy, hereby certify that the foregoing Motion for Leave to File Brief as Amicus Curiae and proposed Brief of Amici Curiae were served on all parties of record through the ECF filing system.

/s/Wendy J. Murphy
Wendy J. Murphy

CERTIFICATE OF COMPLIANCE

I, Wendy J. Murphy, hereby certify that Amici's proposed brief complies with Supreme Court Rules 29, 33.1, 34 and 37. Consistent with the requirements of Rule 37.5, this motion contains 109 words.

/s/ Wendy J. Murphy
Wendy J. Murphy

Date: August 17, 2021

No. 20-1627

In the
Supreme Court of the United States

RICHARD DUCOTE, ESQ., VICTORIA MCINTYRE, ESQ., & S.S.,
Petitioners,

v.

S.B.
Respondent.

ON PETITION FOR A WRIT OF CERTORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF AMICI CURIAE,
WOMEN'S AND CHILDREN'S ADVOCACY PROJECT,
ET AL.

WENDY J. MURPHY, ESQ.
WOMEN'S AND CHILDREN'S
ADVOCACY PROJECT
CENTER FOR LAW AND SOCIAL
RESPONSIBILITY
NEW ENGLAND LAW | BOSTON
154 STUART STREET
BOSTON, MA 02116
617-422-7410
WMURPHY@NESL.EDU
MA BBO#550455

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTERESTS OF AMICI CURIAE.....	vi
SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	1
I. THE PETITION SHOULD BE GRANTED SO THE COURT CAN ADDRESS WIDESPREAD SEX BIAS IN FAMILY COURTS	
CONCLUSION.....	9

TABLE OF AUTHORITIES

Authorities	Page
Bam, D., <i>Making Appearances Matter: Recusal and the Appearance of Bias</i> , 2011 BYU L. Rev. 943 (2011).....	5
Bemiller, M., <i>When Battered Mothers Lose Custody: A Qualitative Study of Abuse at Home and in the Courts</i> , 5 J. Child Custody, 228-55 (2008).....	5
Berg, R., <i>Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts</i> , 29 Law & Ineq. 5 (2011).....	6
Burnett, L., <i>The Global Context of the Civil Rights Movement</i> , Cross Cultural Solidarity, http://crossculturalsolidarity.com/the-global-context-of-the- civil-rights-movement/	3
Chesler, P., <i>Mothers on Trial: The Battle for Children and Custody</i> . (Chicago Rev. Press, 2d.ed. 1986, 2011).....	6
Danforth, G. & Welling, B., <i>Achieving Equal Justice for Women and Men in the California Courts</i> , JUDICIAL COUNCIL OF CALIFORNIA ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS (1996), http://www.courtinfo.ca.gov/ programs/ access/documents/freport.PDF	8
Dragiewicz, M., <i>Gender Bias in the Courts: Implications for Battered Mothers and Their Children</i> . In Hannah, M. & Goldstein, B. (Eds.) <i>Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues</i> , 5:1-5:18. (2010).....	6
Florida Supreme Court, <i>Report of the Florida Supreme Court, Gender Bias Study Commission Executive Summary</i> (March 1990), www.flcourts.org/sct/setdocs/bin/bias.pdf	9

Greene, N., <i>How Great Is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States</i> , 112 W. Va. L. Rev. 873 (2010)	3
Jackson, V., <i>Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse</i> , 65 Mont. L. Rev. 15-40 (2004).....	4
Kreiger, N., <i>Discrimination and Health Inequalities</i> , 44 Int'l J. Health Servs, no.4, 643-710 (2014).....	4, 5
Kreiger, N., <i>Embodying Inequality: A Review of Concepts, Measures, and Methods for Studying Health Consequences of Discrimination</i> , 29 Int'l J. Health Servs, no.2, 295-352 (1999).....	4
Massachusetts Supreme Judicial Court, <i>Gender Bias Study of the Court System in Massachusetts</i> , 24 New Eng. L. Rev. 745 (1990).....	5
Meier, J. & Dickson, S., <i>Mapping Gender, Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation</i> , 35 Minnesota Journal of Law and Inequality, no.2, 311-34 (2017).....	6
Meier, J., <i>Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions</i> , A.U. J. Gender, Soc. Pol. & the Law, 11:2, 657-731 (2003).....	6
Meier, J., <i>U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What do the Data Show?</i> , 42 J. Soc. Welfare and Family Law, no.1, 92-105 (2020).....	5
Michigan State Bar, <i>Final Report of the State Bar of Michigan Task Force on Race/Ethnic and Gender Issues in the Courts and the Legal Profession</i> (January 23, 1998)	10

- Mindthoff, A., et al.,
How Social Science Can Help Us Understand Why Family Courts May Discount Women's Testimony in Intimate Partner Violence Cases, 53 Family Law Quarterly, no.3, Fall 2019.7
- Minnesota Supreme Court,
Report of the Minnesota Supreme Court Task Force on Gender Fairness in the Courts (1989), Reprinted: 15 Wm. Mitchell L. Rev. 829 (1989)10
- Neustein, A., & Leshner, M.,
From Madness to Mutiny - Why Mothers are Running from Family Court and What Can Be Done About It, Northeastern University Press (2005).....6
- New Jersey Supreme Court,
The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts (1984), Reprinted: Wikler, N. & Schafran, L., 9 Women's Rights L. Rep. 129 (1986).....10
- New Jersey Supreme Court,
Learning from the New Jersey Supreme Court, Task Force on Women in the Courts: Evaluation, Recommendations, and Implications from the Other States (1989), Reprinted: 12 Women's Rights L. Rep. 313 (1991).....10
- Pennsylvania Supreme Court,
Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (2003).....9
- Polikoff, N.D.,
Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations, 14 WOMEN'S RTS. L. REP. 175-84 (1992).....6
- Schafran, L. & Wikler, N.,
Gender Fairness in the Courts: Actions in the New Millennium, National Judicial Education Program (2007),
<https://www.legalmomentum.org/sites/default/files/reports/gender-fairness-in-courts-millennium.pdf>7

- Sloteetal, K.,
*Battered Mothers Speak Out: Participatory Human Rights
 Documentation as a Model for Research and Activism in the United
 States*, 11 Violence Against Women, 1367 (2005).....7
- Stahly, G. B.,
*Protective Mothers in Child Custody Disputes: A Study of Judicial
 Abuse*, In *Disorder in the Courts: Mothers and Their Allies Take
 on the Family Law System: A Collection of Essays* (2004)7
- Suchanek, J. & Stahly, G.B.,
*The Relationship Between Domestic Violence and Paternal
 Custody in Divorce*, Ann. Meeting W. Psychol. Ass'n (1991).....7
- Willson, T.,
 Domestic Violence in Maryland: More From the Gender Bias
 Report, <http://www.voiceofwomen.com/articles/violence.html> (1989)....8

INTERESTS OF AMICI CURIAE

The issues before the Court are of great concern to amici listed below, who have a particular interest in ensuring equal justice under law for all persons, especially women. This brief will provide the Court with research demonstrating the systemic and intolerable prevalence of sex bias in family courts nationwide.

Women's and Children's Advocacy Project

New England Law | Boston, Boston, MA

National Family Violence Law Center

George Washington University,* Washington, D.C.

Stop Abuse Campaign

Bronx, NY

National Organization for Men Against Sexism

Denver, CO

Battered Mothers Custody Conference

Latham, NY

Domestic Violence Legal Empowerment and Appeals Project

Washington, D.C.

Woman's Coalition

San Diego, CA

Child Justice

Silver Spring, MD

Engendered Collective

New York, NY

Protective Mothers of Solano County

Sacramento, CA

The Mama Bear Effect

Burlington, MA

New Jersey Crime Victims Law Center

Sparta, NJ

Westchester County Family Court Reform Initiative

Tarrytown, NY

Mother-Child Human Rights Foundation-Mothers ReVolution

Zwolle, Netherlands

The Nurtured Parent

Woodcliff Lake, NJ

Equal Means Equal

Los Angeles, CA

Jane Does Well

Wellesley, MA

Incest Survivors Speakers' Bureau of California

Davis, CA

INTRODUCTION

This case arises out of a Pennsylvania family court dispute involving the custody of a child, in which the court issued a gag order only against the mother and her attorneys, forbidding them to speak or communicate publicly about the case. A similar gag order was not issued against the father and his attorneys.

SUMMARY OF ARGUMENT

The biased gag order at issue here exemplifies pervasive and systemic sex bias in family courts nationwide. Amici urge the Court to grant the petition so that it may address the widespread and intolerable problem of bias against women in family courts.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED SO THE COURT CAN ADDRESS WIDESPREAD SEX BIAS IN FAMILY COURTS

This Court’s commitment to unbiased decision-making is emblazoned on the exterior of its building where the words “Equal Justice Under Law” are inscribed. These words were approved by the Court’s Justices in 1932, no doubt because the Court believes biased justice is intolerable in civilized society. Indeed, scholars have long noted the myriad of harmful consequences that flow from even the appearance of judicial bias. Greene, N., *How Great Is America’s Tolerance for Judicial Bias? An Inquiry into the Supreme Court’s Decisions in Caperton and Citizens United, Their Implications for Judicial*

Elections, and Their Effect on the Rule of Law in the Uni, 112 W. Va. L. Rev.

873 (2010) (internal citations omitted):

biased decision-making erodes confidence in the justice system, causing citizens to “distrust and cease to see courts as places where justice is done ... The rule of law [is] the loser if parties dispute adverse judgments as rendered in biased courts. Far worse, negative perceptions about the justice system encourage citizens to resort to violent, extralegal, and possibly criminal practices to secure their rights. If private citizens perceive that judges are not impartial, it is likely that courts will not be relied upon as the ultimate fora for dispute resolution.

Id. at 886-87. See also, Burnett, L., *The Global Context of the Civil Rights Movement*, Cross Cultural Solidarity, <http://crossculturalsolidarity.com/the-global-context-of-the-civil-rights-movement>.

While perfect justice in every case may be impossible, there should be little doubt that systemic injustice perpetrated by the courts themselves is unacceptable, yet family courts across the United States are routinely engaging in sex bias, often causing women to endure worse legal treatment than men. This case presents an important opportunity for the Court to address the insidious problem of sex bias in family courts.

Sex bias is a form of discrimination, which is defined as “the process by which a member, or members, of a socially defined group is, or are, treated differently (especially unfairly) because of their membership in that group.” Kreiger, N., *Discrimination and Heath Inequalities*, 44 Int’l J. Health Servs, no.4, 643-710, 650 (2014), citing, Jary, D. & Jary, J., *Collins Dictionary of Sociology* (2d ed. 1995). It involves not only “socially derived beliefs” but also

“patterns of dominance and oppression, viewed as expressions of a struggle for power and privilege.” Kreiger, N., *Embodying Inequality: A Review of Concepts, Measures, and Methods for Studying Health Consequences of Discrimination*, 29 Int’l J. Health Servs no.2, 295-352 (1999) (citations omitted). When an individual or group suffers discriminatory harm, they suffer injury to their dignity, autonomy, and humanity. See Jackson, V., *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L.Rev. 15-40 (2004).

Although individuals are responsible for most discriminatory acts and bias offenses, discrimination can also occur through institutional actions, as when discriminatory laws and policies are created by state entities, such as lawmakers and the courts. Kreiger, *Discrimination and Health Inequities*, supra at 648-50. The state, including the courts, “can enforce, enable, or condone discrimination, or, alternatively, it can outlaw discrimination and seek to redress its effects.” Id. at 650. As judges play a vital role in ensuring respect for the law and public confidence in the courts, they should be especially careful to avoid even the appearance of bias. Bam, D., *Making Appearances Matter: Recusal and the Appearance of Bias*, BYU L. Rev. 943, 968 (2011), yet a wealth of research demonstrates pervasive and widespread bias against women in family courts.

A recent ten-year, national study of more than 4,000 family court cases found pervasive gender bias in custody decisions. When mothers reported

child abuse by the fathers and fathers responded by accusing mothers of alienating them from their children, the mothers were more likely to lose custody, but when fathers reported child abuse by mothers and mothers responded by accusing fathers of alienating them from their children, the fathers were not more likely to lose custody. Meier, J., *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What do the Data Show?*, 42 J. Soc. Welfare and Family Law, no.1, 92-105 (2020).

Numerous other studies and scholars have identified gender bias in family courts. Bemiller, M., *When Battered Mothers Lose Custody: A Qualitative Study of Abuse at Home and in the Courts*, 5 J. Child Custody, 228-55 (2008) (finding gender bias against mothers in family court); Berg, R., *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 Law & Ineq. 5, 24-25 (2011) (finding gender bias against mothers in family court); Dragiewicz, M., *Gender Bias in the Courts: Implications for Battered Mothers and Their Children*. In Hannah, M. & Goldstein, B. (Eds.) *Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues*, 5:1-5:18. (2010) (finding gender bias in custody decisions); Meier, J. & Dickson, S., *Mapping Gender, Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 Minnesota Journal of Law and Inequality, no.2, 311-34 (2017); Chesler, P., *Mothers on Trial: The Battle for Children and Custody*. (2d ed. 1986) (In

82% of disputed custody cases fathers achieved sole custody despite the fact that only 13% had been involved in childcare activities prior to divorce); Meier, J., *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, A.U. J. Gender, Soc. Pol. & the Law, 11:2, 657-731, 662, Appendix, (2003) (36 of 38 trial courts awarded joint or sole custody to alleged *and adjudicated* male batterers); Neustein, A., & Leshner, M., *From Madness to Mutiny - Why Mothers are Running from Family Court and What Can Be Done About It*, Northeastern University Press (2005) (documenting numerous cases where abusive fathers are favored in custody disputes); Polikoff, N.D., *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 14 WOMEN'S RTS. L. REP. 175-84 (1992) (finding that judges evidence a strong "paternal preference" in contested custody cases); Stahly, G. B., *Protective Mothers in Child Custody Disputes: A Study of Judicial Abuse*, In *Disorder in the Courts: Mothers and Their Allies Take on the Family Law System: A Collection of Essays* (2004) (finding that prior to divorce, 94% of non-abusive mothers were the primary caretaker and 87% had custody at the time of separation, however, when the father was alleged to have abused his child, only 27% of mothers won custody; 97% of mothers reported that court personnel ignored or minimized reports of abuse and that they were punished for trying to protect their children. Most mothers lost custody in ex parte proceedings where they were not notified or present and

where no court reporter was present. 65% reported that they were threatened with sanctions if they “talked publicly” about the case. Eleven percent of the abused children attempted suicide); Suchanek, J. & Stahly, G.B., *The Relationship Between Domestic Violence and Paternal Custody in Divorce*, Ann. Meeting W. Psychol. Ass’n (1991) (in family court cases where violence against the mother was alleged, usually in support of a restraining order, fathers were twice as likely to seek sole physical and legal custody of the children and just as likely to win); Schafran, L. & Wikler, N., *Gender Fairness in the Courts: Actions in the New Millennium*, National Judicial Education Program (2007), <https://www.legalmomentum.org/sites/default/files/reports/gender-fairness-in-courts-millennium.pdf>; Slotte et al., K., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 Violence Against Women, 1367, 1368–69 (2005); Mindthoff, A., et al., *How Social Science Can Help Us Understand Why Family Courts May Discount Women’s Testimony in Intimate Partner Violence Cases*, 53 Family Law Quarterly, No. 3, Fall 2019.

In addition to scholars identifying widespread sex bias in family courts, many states have conducted their own research and have identified pervasive sex bias in courts. See Danforth, G. & Welling, B., *Achieving Equal Justice for Women and Men in the California Courts*, JUDICIAL COUNCIL OF CALIFORNIA ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS (1996), <http://www.courtinfo.ca.gov/programs/access/documents/f-report.pdf>

(negative stereotypes about women encourage judges to disbelieve women's allegations of child sexual abuse; gender bias problems are particularly acute in family courts, and most problematic when sexual abuse of children is alleged in custody or visitation proceedings. The report specifically noted "one striking example is the tendency to doubt the credibility of women who make these allegations, and to characterize them as hysterical or vindictive even when medical evidence corroborates a claim of child abuse."); *Report of the Florida Supreme Court Gender Bias Study Commission Executive Summary* (March 1990), www.flcourts.org/sct/sctdocs/bin/bias.pdf, (noting that "Contrary to public perception, men are quite successful in obtaining residential custody of their children when they actually seek it"); Willson, T., Domestic Violence in Maryland: More From the Gender Bias Report, Citing *Report of the Maryland Special Joint Committee on Gender Bias in the Court* (1989) (finding that "too often judges and court employees deny [women's] experiences, accuse the victim of lying, trivialize the cases, blame the victim for getting beaten, and badger the victim for not leaving the batterer ... batterers try to manipulate victims to affect the judicial process. This manipulation of the court process includes batterers and other abusers who misuse the court system in regards to divorce, custody, visitation, and child support as well as domestic violence"); Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts*, 24 New Eng. L. Rev. 745 (1990) (finding that despite the pervasive belief that

mothers are favored in custody disputes, “[f]athers who actively seek custody obtain either primary or joint physical custody over 70% of the time.” *Id.* at 824-25. The study also found that “mothers are held to a higher standard than fathers and that interests of fathers are given more weight than the interests of mothers and children.” *Id.* *Final Report of the State Bar of Michigan Task Force on Race/Ethnic and Gender Issues in the Courts and the Legal Profession* (January 23, 1998) (of the judges responding to the question about whether they consider violence or threatened violence when making custody and visitation decisions, only a little more than half of the judges (58%) indicated that they always considered it. Eleven percent said that they never considered it. In addition, several women said that custody of the children was given to the batterer, sometimes by an *ex parte* order. In one instance it was reported that an abusive husband was awarded custody because he had a “stable income”); *Report of the Minnesota Supreme Court Task Force on Gender Fairness in the Courts* (1989), Reprinted: 15 Wm. Mitchell L. Rev. 829 (1989); *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts* (1984), Reprinted: Wikler, N. & Schafran, L., 9 Women’s Rights L. Rep. 129 (1986); *Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations and Implications for Other States* (1989), Reprinted: 12 Women’s Rights L. Rep. 313 (1991); *Final Report of the*

Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (2003).

As ample research demonstrates widespread and pervasive sex bias in family courts, this Court should seize the opportunity to review this case and issue a ruling recognizing the problem and providing guidance to all judges so they can effectively avoid bias against women in all legal controversies.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

Counsel for amici,

/s/Wendy J. Murphy

WENDY J. MURPHY
NEW ENGLAND LAW | BOSTON
154 STUART STREET
BOSTON, MA 02116
617-422-7410
WMURPHY@NESL.EDU
MA BBO #550455

August 17, 2021

CERTIFICATE OF SERVICE

I, Wendy J. Murphy, hereby certify that the foregoing Motion for Leave to File Brief as Amicus Curiae and proposed Brief of Amici Curiae were served on all parties of record through the ECF filing system.

/s/Wendy J. Murphy
Wendy J. Murphy

CERTIFICATE OF COMPLIANCE

I, Wendy J. Murphy, hereby certify that Amici's proposed brief complies with Supreme Court Rules 29, 33.1, 34 and 37. Consistent with the requirements of Rule 33.1(g)(x), this brief contains 2,172 words.

/s/ Wendy J. Murphy
Wendy J. Murphy

Date: August 17, 2021