COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPREME JUDICIAL COURT
No. 12674

T.D.,

Plaintiff-Appellee,

v.

J.O.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE ESSEX PROBATE AND FAMILY COURT DEPARTMENT OF THE TRIAL COURT

BRIEF OF THE WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS THE MASSACHUSETTS LAW REFORM INSTITUTE AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT, J.O.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE STATUTES

OTHER AUTHORITIES

The Women's Bar Association of Massachusetts ("WBA") and the Massachusetts Law Reform Institute ("MLRI"), as amici curiae, respectfully submit this brief in response to the Court's invitation for amicus briefing.

I. INTERESTS OF AMICI

The WBA is a sixteen-hundred-member statewide organization whose mission is to support the advancement of women in the legal profession and in a just society. With members in all stages of their careers and in settings from law firms and corporations to government and legal services, we are proud that for more than four decades, the WBA has submitted, filed, and joined many *amicus curiae* briefs in state and federal courts on legal issues that have a unique impact on women, including cases involving same sex marriage, sexual discrimination, family law, domestic violence, and employment discrimination. The WBA has also been active in advocating for issues that impact the administration of justice and equal access to justice in the legal system, particularly in matters where fundamental rights are at stake. Therefore, the WBA has an interest in the outcome of this case, and it represents an appropriate issue on which the WBA can offer its guidance.

The MLRI is a statewide public policy and advocacy center dedicated to improving economic and social opportunities for low-income residents of the Commonwealth. The MLRI engages in legislative, administrative and judicial

advocacy on behalf of low-income Massachusetts residents. As the lead advocate of the Domestic Violence Legal Assistance Program (DVLAP, a special project of the Massachusetts Legal Assistance Corporation), the MLRI coordinates statewide family law advocacy and provides support for legal aid programs and community collaborators, including attorneys in domestic violence service providers, throughout the state. This includes providing trainings, materials and updates on key family law issues including domestic violence (which is present in a majority of legal services family law cases), participating in family law and domestic violence collaboratives and coalitions, and participating in amicus curiae briefs on these issues.

Other than the amici, its members, and its counsel—no person or entity contributed to the brief or contributed money intended to fund preparation of submission of the brief. For example, no party or party's counsel contributed to the brief or contributed money intended to fund preparation of submission of the brief.

II. STATEMENT OF THE ISSUES

For purposes of this brief, the amici present the following restatement of the issues in this case:

1. Whether the court must consider all evidence of domestic violence, including any that occurred before the entry of a custody order, before deciding whether modification of that order is necessary in the child's best interests.

2. Whether, before deciding whether modification of a child custody order is necessary in the child's best interests, the court must find if the preponderance of domestic violence evidence creates the rebuttable presumption that placement in the custody of the abusive parent is not in the child's best interests.

III. STATEMENT OF THE CASE

For purposes of this brief, the amici adopt the Statements of the Case set forth in the Defendant-Appellant's Brief J.O.

IV. STATEMENT OF THE FACTS

For purposes of this brief, the amici adopt the Statement of the Facts set forth in the Brief of the Defendant-Appellant J.O.

V. SUMMARY OF ARGUMENT

"[A]buse by a family member … is a violation of the most basic human right." *Custody of Vaughn*, 422 Mass. 590, 595 (1996). The right to be free from abuse cannot be waived; evidence of abuse should never be ignored. That is why Massachusetts law requires the court to consider all evidence of abuse in every custody determination. The lower court's failure to comply with that fundamental requirement, before modifying a child custody order, was clear error.

First, the Act Relative to Consideration of Domestic Violence in Custody and Visitation Proceedings (the "Custodial Presumption Act" or the "Act") imposes safeguards to protect children from abuse, in part, by limiting a judge's discretion on whether to consider to consider evidence of abuse. Under its plain meaning, the Custodial Presumption Act mandates that, in deciding any child custody order, the court must consider all evidence of past or present domestic violence. The court must then decide whether the preponderance of evidence demonstrates a pattern of abuse or a serious incident of abuse. And upon such findings, the court must apply a rebuttable presumption against placing a child in the custody of an abusive parent. These safeguards guide the determination of what custody order would serve the child's best interests.

Second, the history and purpose of the Act, and the persistence of abuse, underscore the need for the court to enforce the Act in every custody matter. Since

at least 1990, this Court has acknowledged the danger that domestic violence poses to children and recommended that courts be required to (1) consider evidence of past and present abuse and (2) apply a rebuttable presumption that the custody of an abuser is not in the child's best interest. New empirical data, which become available after the Act became law, reaffirms the need for enforcement of the plain meaning of the Act for the protection of children.

Finally, the lower court's legal error—of failing to apply the statutory safeguards that ensure a custody order serves the child's best interests—should not be condoned. Res judicata cannot justify exclusion of new evidence when an action for greater custody is brought by an abusive parent. Parents can neither waive nor preclude consideration of the child's best interests. Massachusetts' interest in breaking the cycle of domestic violence justifies consideration of any new evidence of domestic violence in every child custody decision.

VI. ARGUMENT

A. The Plain Language of the Custodial Presumption Act Requires the Court to Consider All Evidence of Domestic Violence and Apply the Rebuttable Presumption Against Placing a Child in the Custody of an Abusive Parent When the Preponderance of Evidence Demands.

In Massachusetts, a child's welfare is the paramount concern in every custody determination. *See, e.g.*, *Perry v. Perry*, 278 Mass. 601, 604 (1932) (in awarding custody, welfare of children is given paramount weight); *Smith v. Smith*, 361 Mass. 855 (1972) (in custody cases, governing principle is the welfare of the child); MASS. GEN. LAWS ch. (hereinafter "G.L. ch.") 208 §§ 28, 31, 31A; G.L. ch. 209 § 38; G.L. ch. 209C § 10(e) (all making the child's best interest determinative in custody disputes). Custody proceedings must focus on what is in the best interest of the child, not rewarding or punishing the parents:

> [An action to modify a custody order] is not a proceeding to discipline the respondent for her shortcomings. It is not a proceeding to reward the petitioner for any wrong which he may have suffered. It is a proceeding solely with reference to the custody of a [child]. The governing principle by which the court must be guided in deciding the issues raised is the welfare of the child. That is so both as matter of law and as matter of humanity. Every public and private consideration establishes this as the dominating rule.

Hersey v. Hersey, 271 Mass. 545, 555 (1930). Ultimately, the parents' own self interests must yield to the child's best interest.

In a landmark decision, this Court recognized that abuse is no ordinary consideration: "[A]buse … is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical security, free from the fear that brute force will determine the conditions of one's daily life." *Custody of Vaughn*, 422 Mass. 590, 595 (1996). It also recognized that "[t]he very frequency of domestic violence in disputes about child custody may have the effect of inuring courts to it and thus minimizing its significance." *Id*. at 599. It held "[d]omestic violence is an issue too fundamental and frequently recurring to be dealt with only by implication." *Id*. at 599. Accordingly, it required findings "specifically to the effects of domestic violence on the child and the appropriateness of the … custody award in light of those effects." *Id*. at 600. "Requiring … explicit findings … will serve to keep these matters well in the foreground of the judges' thinking." *Id*. at 599-600. Even before the Custodial Presumption Act, this Court established that, where the record raises concerns, a child custody order could not stand without adequate findings as to domestic violence.

1. The Plain Language of the Custodial Presumption Act Requires the Court to Consider All Evidence of Abuse—Past and Present—in Reaching Every Child Custody Decision.

The Custodial Presumption Act, enacted in 1998, provides:

> In issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child.

G.L. ch. 208 § 31A. As explained below, the plain language of the Act limits the discretion of the court, requiring the court to consider all evidence of abuse in every custody determination, in order to serve the best interests of children.

First, the Act limits the court's discretion in whether to consider evidence of abuse: the court "*shall* consider evidence of … abuse …." *Id.* (emphasis added). The use of the word "shall" demonstrates a clear legislative intent to require consideration of evidence of abuse. *See Hashimi v. Kalil*, 388 Mass. 607, 609 (1983) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation."); *Commonwealth v. Cook*, 426 Mass. 174, 181 (1997) ("the general rule [is] that the of the word 'shall' is mandatory…."). The Act further expressly requires the court to consider evidence of abuse "as a factor contrary to the best interest of the child." G.L. ch. 208 § 31A. That protective purpose reinforces the mandatory nature of the Act's directive to consider abuse. *See Hashimi*, 388 Mass. at 610 ("[A] general rule exists that directions to public

officers for the protection of rights are mandatory."). The court must consider evidence of abuse, as contrary to the child's best interest.

Second, the Act does not distinguish between abuse occurring before and abuse occurring after a custody determination: "the probate and family court shall consider evidence of *past or present* abuse …." G.L. ch. 208 § 31A (emphasis added). Thus, the Act prohibits limiting evidence of abuse based on a temporal restriction. The court must consider evidence of abuse—regardless of the timeframe of its occurrence.

Third, the court must consider all evidence relevant to abuse in order to determine whether "abuse," as defined in the statute, has occurred. The Act defines abuse as including not only any act that causes bodily injury, but also any act that attempts to cause bodily injury or places another in reasonable fear of imminent bodily injury. *See id.*[1] Without considering all evidence relevant to abuse, the court cannot determine whether abuse has occurred.

Fourth, the Act plainly states that the court must consider all evidence of abuse "[i]n issuing *any* temporary or permanent custody order." *Id*. (emphasis added). The inclusion of the word "any" demonstrates an intent to require consideration of evidence of abuse in every child custody order. *See, e.g.,*

[1] The Custodial Presumption Act concerns acts perpetrated by a parent against the other parent or a child. *See* G.L. ch. 208 § 31A.

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed 1997) 53 (defining "any" as "EVERY—used to indicate one selected without restriction"); *Cabot CSC Corp. v. Aearo Techs. LLC*, No. 16-P-767, 2017 WL 1842570, at *7, 91 Mass. App. Ct. 1120 (2017) ("[T]he word 'any' means 'all' or 'every' and imports no limitation."). Moreover, the Act imposes identical abuse-related provisions on child custody decisions in all contexts. *See* G.L. ch. 208 § 31A (divorce); G.L. ch. 209 § 38 (husband and wife); G.L. ch. 209C § 10(e) (children born out of wedlock). Thus, the court must consider all evidence of abuse before deciding any child custody order.

Finally, a parent cannot override the Act's mandate to consider evidence of abuse merely by moving to modify a child custody order. Regardless of who seeks the modification, the court may only modify a child custody order when "modification is necessary in the best interests of the children." G.L. ch. 208 § 28. Under the Act, evidence of abuse must be considered as a factor contrary to the child's best interest. Without considering all evidence contrary to that interest, the court cannot determine whether modification is necessary in the child's best interest.

In summary, the Act requires the court to consider both past and present abuse as a factor contrary to the child's best interest. Without considering all evidence of abuse, the court cannot determine whether a custody order would serve

the child's best interest. Accordingly, the court lacks authority to refuse to consider evidence of abuse and, instead, must consider all evidence of abuse before deciding any child custody dispute.

2. New Evidence of Abuse Triggers the Requirement to Consider Whether the Preponderance of Evidence Demands Application of the Rebuttable Presumption Against Placing a Child in the Custody of an Abusive Parent.

The Custodial Presumption Act provides: "A … finding, by a preponderance of evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interest of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent." G.L. ch. 208 § 31A.

Again, the court must consider all evidence of abuse—past or present—in any custody proceeding. After considering this evidence, the court must "make detailed and comprehensive findings of fact on the issues of domestic violence …." *Custody of Vaughn*, 422 Mass. at 599-600. Under the Act, a finding of a "pattern or serious incident of abuse" creates the rebuttable presumption. G.L. ch. 208 § 31A. Thus, whenever there is evidence of abuse, the court must consider whether there is either a serious incident of abuse or a pattern of abuse.

Not all serious incidents of abuse will create physical evidence. The Act defines a "serious incident of abuse" to include not only any act causing serious bodily injury, but also any act attempting to cause serious bodily injury or placing

another in reasonable fear of imminent serious bodily injury. *See id.* The Act further defines a "serious incident of abuse" to include any act that causes another to engage in sexual relations by force, threat, or duress. *See id.* While an act putting someone in fear of serious bodily injury, attempting to cause serious bodily injury, or creating duress to obtain sex may not be overt, the Act requires it to create the rebuttable presumption. A preponderance of evidence establishing even one serious incident of abuse creates the presumption that it is not in the child's best interest to be placed in the custody of the abusive parent.[2] *Id.*

While a "pattern of abuse" is not defined, the plain meaning of "pattern" may require more than one incident of domestic violence. A court may not be able recognize an existing pattern of abuse if it refuses to consider past incidents of abuse. The court must consider all of the evidence of abuse to determine whether there is a pattern of abuse that creates the presumption. A preponderance of evidence establishing a pattern of abuse creates a presumption that it is not in the child's best interest to be placed in the custody of the abusive parent. *Id.*

While the presumption may be rebutted, the Act requires a court awarding custody to an abusive parent to enter "written findings as to the effects of the abuse on the child" and "provide for the safety and well-being of the child." *Id.* A

[2] The Custodial Presumption Act defines an "abusive parent" as a "parent who has committed a pattern of abuse or a serious incident of abuse." G.L. ch. 208, § 31A.

decision without a written rationale will not suffice. Most importantly, the court must "demonstrate that [the order awarding child custody to an abusive parent] is in the furtherance of the child's best interests." *Id.* Thus, a court may only place a child in the custody of an abusive parent when, after considering the effects of the abuse on the child, it can demonstrate that the custody of the abusive parent is nonetheless in the child's best interest.

In an action to modify a child custody order, either parent may properly present new evidence of abuse. As in a first action, evidence of abuse triggers the court's statutory obligations and limits the court's discretion. Again, the court must consider all evidence of abuse—past and present—as contrary to the child's best interest. Without first considering all evidence of abuse, the court cannot determine whether modification would serve the child's best interest. And new evidence of abuse may effect the preponderance of evidence. Accordingly, if any new evidence of abuse is offered in a modification action, the court must consider whether a pattern or serious incident of abuse creates a presumption against awarding custody to the abusive parent.

B. The History and Purpose of the Custodial Presumption Act and the Persistence of Abuse Affirm The Act's Plain Meaning and Its Importance.

The history and purpose of the Custodial Presumption Act, and the persistence of abuse, affirm the Act's plain meaning and its importance. *See, e.g.*, *Zaleski v. Zaleski*, 469 Mass. 230, 239 (2014).

1. Gender Bias Study Revealed Serious Problems in Custody Disputes and Recommended Remedial Action.

In 1986, Chief Justice Hennessey appointed the Gender Bias Study Committee "to determine the extent and nature of gender bias in the Massachusetts judiciary and make recommendations to promote equal treatment of men and women." *Gender Bias Study of the Court System in Massachusetts*, 24 NEW. ENG. L. REV. 745 (1990) (hereinafter, the "Study"). The resulting 1990 Study revealed disturbing and dangerous truths about child custody and abuse in Massachusetts. Overall, refuting a pervasive misperception in the area of child custody, the Study found that the "interests of fathers are given more weight than *the interests of* mothers and *children*." *Id.* at 824-25 (emphasis added).

First, the Study found that courts routinely ignored abuse of the mother in awarding child custody. "In determining custody and visitation, many judges and family service offices do not consider violence toward women relevant." *Id.* at 825. "Over a quarter of the family law attorneys reported that child custody awards rarely or never consider the father's violence against the mother." *Id.* at

842. "Nearly half of the attorneys reported that, in cases in which a woman alleges that she has been abused, court-affiliated mediators sometimes or often make remarks indicating that such abuse is not relevant to the determination of child custody and visitation issues." *Id.*

The Study found that ignoring abuse of a parent harms children. "Research studies indicate that witnessing, as well as personally experiencing, abuse within the family causes serious harm to children." *Id.* "[A] boy who witnesses his father beating his mother is more likely to be become a wife abuser than if he were abused himself." *Id.* Similarly, "there is a strong correlation between wife abuse and child abuse." *Id.* at 843. "These facts make it crucial that the abuse of any family member be taken into account when determining abuse and visitation." *Id.*

The Study found that ignoring abuse of a parent effectively sanctions that abuse. "Shared legal custody is being ordered … even when there is a history of spouse abuse." *Id.* at 839. "[O]rdering a battered woman to share legal custody with her abuser can threaten her security." *Id.* at 841. "[B]attering is part of a pattern of conduct that seeks to establish total control over a woman." *Id.* "Shared legal custody provides a court-mandated opportunity for the abuser to continue exercise control, divorce and protective orders notwithstanding." *Id.*

The Study found that courts disbelieve child sexual abuse allegations. *See id.* at 825 ("A majority of the probate judges surveyed agreed that '[m]others

allege child sexual abuse to gain a bargaining advantage in the divorce process.'"); 844 (Attorneys in a focus group agreed: "Women and children who allege sexual abuse are simply not believed.'"). But two-thirds of child sexual abuse allegations in the context of a parental custody dispute were substantiated. *Id.* at 845. And "failure to substantiate a case of alleged sexual abuse does not necessarily mean abuse did not occur or that a falsehood was involved." *Id.*

The Study also found that "changes in living situations brought about by a divorce may prompt a child to disclose … sexual abuse for the first time." *Id.* at 844. And "experts note that under the stress of divorce, a parent may become abusive for the first time …." *Id.* Finally, "[r]esearch shows that it is clearly not in a parent's self-interest to bring a charge of child sexual abuse [because that charge creates] a substantial risk of losing custody." *Id.* at 845.

In light of its troubling revelations, the Study recommended that the law be amended to (1) establish a presumption against awarding legal custody to an abusive parent and (2) require courts to consider past or present abuse of any family member in determining the best interests of the child in any order concerning custody. *Id.* at 849-50. Nearly a decade passed before these recommendations were adopted.

2. The Custodial Presumption Act Was Enacted to Deter Placement of Children in the Custody of Abusive Parents.

By 1997, the Study's recommendations had gained support in the executive and legislature. In 1997, Governor Weld made protecting children a priority—declaring it "especially urgent that we help children in homes where there is partner abuse." Joint Session, State House News Service (Jan. 16, 1997). "[E]ven if a child is not being beaten, the violence he sees will leave its mark …." *Id.* He introduced a bill that would require the court to "consider evidence of past or present abuse … as a factor contrary to the best interest of the child." House No. 3383: "An Act Relating to Child Custody and Domestic Violence" (Feb. 1997). The bill also included the recommended presumption against awarding child custody to an abusive parent. *Id.* The purpose of the bill was to "protect children from the continuing negative impact of domestic violence." Transmittal Ltr., House No. 3383 (Commonwealth of Mass. Executive Dept. Feb. 13, 1997). After a series of amendments, the bill was resubmitted as House Bill No. 4951 in June 1997.

The resubmitted bill was intended to "make it harder for parents who abuse their spouses to win custody of their children in the event of divorce." "Child Custody Bill Will Top House Agenda," STATE HOUSE NEWS SERVICE (Sept. 9, 1997) (comments by Senate Majority Leader Finneran). The legislature approved the resubmitted bill. In 1998, Governor Cellucci signed the Custodial Presumption

Act into law, announcing "[t]his new law will prevent dangerous batterers from getting custody of their kids and guarantee that judges make abuse a top priority when determining custody and visitation rights." *Cellucci Signs Strong Domestic Violence Bill For Kids, Denies Child Custody for Batterers*, Press Release (Commonwealth of Mass. Executive Dept. July 22, 1998), at 1. "[W]here there is evidence of abuse, it will now be presumed that those abusers do not get custody of their children." *Id.* "This … will help put an end to this cycle of violence and help children grow up … free from abuse." *Id.*

3. This Court Found Custodial Presumption Act Provisions Constitutional Because a Child's Best Interests Eclipse the Parents' Interests.

Before the Custodial Presumption Act became law, the Senate asked this Court to consider whether the proposed rebuttal presumption provisions would violate due process. Order, Senate No. 2022 (Nov. 13, 1997). This Court found that they would not. *See Opinion of the Justices to the Senate*, 427 Mass. 1201, 1202 (1998). The explanation is illuminating.

First, "parents' interests in their relationships with their children are not absolute, because '[t]he overriding principle in determining [the rights of a parent to custody] must be the best interest of the child.'" *Id.* at 1203. "To allow a child to experience or witness domestic violence 'is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical

security, free from the fear that brute force will determine the conditions of one's daily life.'" *Id.* at 1206 (citation omitted). "Therefore, the child's interest in being free from such abuse outweighs any interest a child has in family integrity." *Id.* "Because a child's interest in being free from the effects of domestic violence is extremely significant, proof by a preponderance of the evidence appears to be a sufficient standard to allow the rebuttable presumption to attach in custody disputes between parents." *Id.* at 1206-07.

Second, "[t]he State, as parens patriae, has a 'compelling interest in protecting the physical and psychological well-being of minors.'" *Id.* at 1208. "Because the purpose of [the presumption] is to prevent children from witnessing or experiencing domestic violence, a standard of proof greater than a preponderance of evidence would prevent many victims of abuse from proving the existence of domestic violence at custody proceedings, and a greater number of children could end up in the custody of a perpetrator of domestic violence." *Id.* at 1209.

4. <u>New Data Underscores the Importance of Enforcing the Custodial Presumption Act in Every Custody Matter.</u>

Since the Custodial Presumption Act became law in 1998, our understanding of the effects of domestic violence has expanded. New studies reveal that abuse causes more serious harm than empirical evidence had previously established. They also reveal that the problems that led to the Act persist. Enforcement of the

Act remains essential to achieve its goal of breaking the cycle of domestic violence.

a) Dangers of Exposure to Domestic Violence

Approximately 1 in 15 children are exposed to intimate partner violence each year. *See, e.g.*, Hamby *et al.*, "Children's Exposure to Intimate Partner Violence and Other Family Violence," NATIONAL SURVEY OF CHILDREN'S EXPOSURE TO VIOLENCE: JUVENILE JUSTICE BULLETIN 1-12, 1 (U.S.D.O.J. 2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232272.pdf. Children exposed to domestic violence are at profound risk, whether or not they are personally abused. Children exposed to domestic violence may suffer from anatomical and physiological alterations in their brain structure, depression, anxiety, post-traumatic stress disorder, psychosocial maladaptation, aggressive behavior, and diminished intellect. *See* Tsavoussis *et al.*, "Child-Witnessed Domestic Violence and Its Adverse Effects on Brain Development: A Call for Societal Self-Examination and Awareness," 2 FRONTIERS IN PUBLIC HEALTH 1-5, 1 (2014); Evans *et al.*, "Exposure to Domestic Violence: A Meta-Analysis of Child and Adolescent Outcomes," 13 AGRESSION AND VIOLENT BEHAVIOR 131-40, 132 (2008); Koenen *et al.*, "Domestic Violence is Associated with Environmental Suppression of IQ in Young Children," 15 DEVELOPMENT AND PSYCHOLOGY 297-311 (2003). A study of over 1,000 pairs of twins in England and Wales found that "[c]hildren exposed

to high levels of domestic violence had IQs that were, on average, 8 points lower than unexposed children." *Id.* at 297. IQ was lowered even when the children were not directly maltreated. *Id.* at 302-06. In other words, domestic violence lowers children's IQ, regardless of who was the target of the violence. Any abuse must be considered adverse to a child's welfare because it may permanently psychologically and physically impair the child.

b) Reasons for Delay in Reporting Domestic Violence

Conventional wisdom suggests that, if there were abuse, a survivor would be eager and able to report the abuse in the first child custody dispute with the abuser. Study after study proves conventional wisdom wrong.

Fear of More Violence. One obvious explanation for delay in reporting domestic violence is fear of more violence—directed either at the survivor or at the survivor's children. The period following separation is particularly dangerous. Campbell *et al.*, "Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study," 93 AM. J. PUB. HEALTH 1089-1097, 1092 (2003). "Parental separation or divorce does not prevent abuse to children or their mothers. On the contrary, physical abuse, harassment, and stalking of women … sometimes … greatly escalate after separation." Saunders *et al.*, "Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns," NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE

AGAINST WOMEN 1-20, 4 (2007) https://vawnet.org/sites/default/files/materials/files/2016-09/AR_CustodyREVISED.pdf.

Coercion and Control. Abuse is about control. *See, e.g.*, Callaghan *et al*., "Beyond 'Witnessing': Children's Experiences of Coercive Control in Domestic Violence and Abuse," 33 J. OF INTERPERSONAL VIOLENCE 1551-1581, 1560-63 (2018). For example, a 2006 study found that women who feared future violence routinely agreed to shared custody arrangements in order to avoid protracted hostile negotiations over the children. Hardesty e*t al.*, "How Women Make Custody Decisions and Manage Co-Parenting With Abusive Former Husbands," 23 J. OF SOCIAL AND PERSONAL RELATIONSHIPS 543-63, 550-51 (2006). Studies demonstrate that coercive control often continues after separation and that children may become a tool for the abusive parent to continue controlling the surviving parent. Ver Steegh *et al*., "Calculating Safety: Reckoning with Domestic Violence in the Context of Child Support Parenting Time Initiatives," 53 FAMILY COURT REVIEW 279-291, 282 (2015) ("Perpetrators of coercive controlling domestic abuse often threaten to pursue custody, initiate and prolong proceedings, and use contact with children to intimidate and harass the other parent.").

Fear of Losing Custody. Survivors of domestic violence fear that court personnel will interpret reports of domestic violence as a ploy to gain advantage in a custody dispute. Saunders *et al.*, NATIONAL ONLINE RESOURCE CENTER ON

VIOLENCE AGAINST WOMEN at 6-8. Studies reveal that the fear that abuse allegations will not be believed is well-founded. *Id.* at 7 ("[N]egative stereotypes about women, especially about their credibility, seem to encourage judges to disbelieve women's allegations about child abuse."). And regardless of belief, the risks associated with reported abuse may be ignored. *E.g.*, Sicafuse, "Decision-Making in Custody Cases Involving Domestic Violence: A Review of the Literature," RESOURCE CENTER ON DOMESTIC VIOLENCE: CHILD PROTECTION AND CUSTODY 9-11 (2016), https://www.ncjfcj.org/sites/default/files/REVISED%20DV%20lit%20review-4.29.pdf. A 2004 Massachusetts study found that "family courts … often ignore risks posed by abusive men in awarding child custody and visitation," despite the fact that these arrangements "provide a context for abusive men to continue to control women and their children." Silverman *et al.*, "Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis," 94 AM. J. PUB. HEALTH 951-57, 951 (2004). Despite the Massachusetts presumption against awarding custody to an abusive parent, the Silverman study found that eighteen of the thirty-nine child custody determinations granted joint or sole physical custody to an abusive male ex-partner. *Id.* at 953.. Indeed, a 2005 study found "mediators recommended primary physical custody for the father significantly more often in DV cases than in non-DV cases." Johnson *et al.*, "Child Custody Mediation in Cases of Domestic Violence," 11 VIOLENCE

AGAINST WOMEN 1022-1053, 1047 (2005). In sum, survivors may choose not to report abuse during a child custody dispute because they *correctly believe* that reporting abuse may make the abuser more likely to gain custody.

Traumatic Brain Injury. The correlation between traumatic brain injury (TBI) and domestic violence offers another reason for delayed reporting. Notably, 19-75% of survivors of domestic violence have suffered a TBI. Haag *et al.*, "Battered and Brain Injured: Traumatic Brain Injury Among Women Survivors of Intimate Partner Violence—A Scoping Review," TRAUMA, VIOLENCE, AND ABUSE 1-18 (forthcoming 2019) (review manuscript at 3). TBI is associated with symptoms such as memory loss, impaired judgment, and dementia. *Id.* at 2. For many survivors, the physical effects of violence may make reporting abuse difficult, if not impossible, for months or even years.

Children's Delay in Reporting. As survivors themselves, children often delay in reporting violence—even to their own non-abusive parent. *See, e.g.*, *Adoption of Karla*, 46 Mass. App. Ct. 64, 69 (1998) (older daughter delayed reporting parental neglect/abuse); *see also* Arai *et al.*, "Hope, Agency, and the Lived Experience of Violence: A Qualitative Systematic Review of Children's Perspective on Domestic Violence and Abuse," TRAUMA, VIOLENCE, AND ABUSE 1-12 (forthcoming 2019) (review manuscript at 8). (children may delay in reporting because they have difficulty recounting traumatic events). Accordingly,

the non-abusive parent may not know about child abuse that occurred before the first custody decision.

All of the foregoing explain why—contrary to conventional wisdom—survivors are likely to be afraid or unable to report abuse, especially in the first child custody dispute. Survivors who report abuse for the first time after the first child custody order should not be punished because their report may appear untimely.

C. There Is No Legal Justification for Modifying a Custody Order Without Considering All Evidence of Abuse.

1. The Modification of the Child Custody Order—Issued Without Considering All Evidence of Abuse and Determining Whether a Presumption Applies and Without Adequate Findings—was Clear Error.

Here, Appellee attempts to circumvent the plain meaning of the Custodial Presumption Act and fails to recognize its proper application in this case. All of the statutory interpretation tools lead to the same conclusions: the court must consider all evidence of past and present abuse as contrary to the child's best interest, and then determine whether there has been a serious incident of abuse or a pattern of abuse. If so, the court must apply a rebuttable presumption that placing a child in the custody of the abusive parent is not in the child's best interest.

The divorce court, before issuing the original child custody decision, considered evidence of abuse. With respect to domestic violence allegations in the divorce hearing, it found:

> [T]he parties have both engaged in physical assault upon the other during the early part of the marriage which culminated in *a particularly egregious occurrence of father assaulting mother* in Florida in 2011. Following that incident, father engaged in anger management counseling at his own initiative and there have been no further incidents.

Divorce Order Findings and Rationale, August 13, 2015, at App. 66 (emphasis added). Despite the history of physical assaults and Appellee's particularly egregious assault, the court made no findings as to whether there had been a serious incident of abuse, whether there was a pattern of abuse, or the effect of the abuse on the child. In short, the original findings as to abuse were inadequate.

In the Modification Order at issue in this appeal, the trial court recites the domestic violence findings from the original custody decision almost word-for-word:

> [I]n support of the Judgment of Divorce, the Court found that both parties had engaged in physical assaults upon the other during the early years of the marriage which culminated in an assault by the Father against the Mother in Florida in 2011. The Court found that following that incident Father voluntarily engaged in anger management counseling and there were no further incidents between the parties after that date.

Modification Judgment, April 6, 2018, at App. 45-46 (rationale). The rationale fails to include any findings as to whether there was a serious incident of abuse,

whether there was a pattern of abuse, or the effect of the abuse on the child prior to the divorce. The rationale also omits the original characterization of the Father's 2011 assault on the Mother as "particularly egregious." Despite expressly acknowledging that the Father sought sole legal custody to prevent further allegations of domestic violence, the court still awarded the Father sole legal custody. *See id.* at App. 47 (rationale), 42.

Here, the findings *alone* reveal that the trial court's issuance of the modification order constituted clear error.[3] The trial court failed to determine whether the Father's "particularly egregious" assault on the Mother was a serious incident of abuse. Likewise, the trial court failed to determine whether the history of assaults, which it acknowledges, formed a pattern of abuse. The court's failure to consider whether the preponderance of evidence established a serious incident of abuse or a pattern of abuse either of which would require application of the rebuttable presumption against placing the child in appellee's custody, constituted reversible error. Even worse, the court failed to determine whether the

[3] A child custody order cannot stand without adequate findings as to domestic violence. *Custody of Vaughn*, 422 Mass. at 600. Otherwise, for purposes of this brief, the amici adopt the standard of review set forth on page 29 of Appellee's Brief.

modification was necessary in the child's best interest and awarded custody to the Appellee.[4] G.L. ch. 208 § 28.

Instead, the court should have considered new evidence of past abuse, including (1) Appellee's new admissions of abuse before the divorce in a transcript of a June 2016 restraining order hearing; (2) Appellee's new admission of unprovoked incidents of physical violence, witnessed by the child; and (3) the child's new disclosure of a 2013 incident in which Appellee's abuse resulted in injury to the child. *See* Appellant Br. at 15, 33, 12. The court committed reversible error by failing to consider new evidence of past domestic violence, and whether the new and/or older domestic violence evidence in this case gave rise to the presumption that Appellee's custody is not in the child's best interest.

Here, Appellee's own arguments on appeal suggest still more reversible errors. Appellee concedes that the court may have found him to be an abusive parent. *See* Appellee Br. at 39, 42 ("the present case where the rebuttable presumption was established and rebutted, and custody was granted to the alleged abuser."). When the court places a child in the custody of an abusive parent, it

[4] The inadequate findings from the original custody decision do not excuse the trial court from satisfying the statutory requirements with respect to its issuance of a modification order. The trial court was obligated to get the information necessary to determine whether the modification was necessary in the child's best interest. G.L. ch. 208 § 28.

must present "written findings of fact as to the effects of the abuse on the child," "provide for the safety and well being of the child," and "demonstrate that [awarding custody to the abusive parent] is in the furtherance of the child's best interests." G.L. ch. 208 § 31A. But here, there are no findings as to the effects of Appellee's abuse on his child. Even worse, the court did the opposite of providing for the safety and well-being of the child. For example, by barring contact between Appellant and the child when the child is in Appellee's custody for less than five nights, the court created a barrier to the child reporting abuse to Appellant. *See* Modification Judgment at App. 42-44. If Appellee was found to be an abusive parent, the court committed reversible error by failing to protect the safety and well-being of the child, not demonstrating the order was in furtherance of the child's best interest, and by not including the statutorily-required written findings on the effects of Appellee's abuse on the child.

2. The Doctrine of Res Judicata, Erroneously Relied on by Appellee, Does Not Preclude Consideration of All Evidence of Abuse—Past and Present—in Modification Actions.

In this appeal, Appellee attempts to use an equitable doctrine, res judicata, to override his child's best interest in favor of his own interests. Res judicata neither supports Appellee's argument nor overrides the statutory requirement to consider all of the evidence of abuse in determining the child's best interests as to custody.

When deciding any custody dispute, the child's best interest are paramount. *See Perry*, 278 Mass. at 604.

Remarkably, Appellee argues that the original 2015 findings as to domestic violence before the divorce are incomplete and unclear. According to Appellee, the full extent of the abuse allegations and evidence is not apparent from the divorce findings. *See* Appellee Br. at 15, fn 8 ("the full extent of the domestic violence allegations and evidence considered by the trial court … is not readily apparent …."). Appellee admits that the original findings were not clear on "[w]hether the divorce judgment was based on a finding that the presumption [against awarding custody to an abusive parent] did not apply, or whether it was based on a finding that the presumption had been rebutted …." *Id.* at 39.

Despite the admittedly-scanty findings as to domestic violence, Appellee argues that res judicata precludes consideration of new evidence of his past abuse. *See id.* at 34 ("the 2015 domestic violence findings … were res judicata"). According to Appellee, the 2015 abuse findings "must now be presumed to be correct." *Id.* at 36.

Appellee misunderstands res judicata. "'[R]es judicata' includes both claim preclusion and issue preclusion." *Kobrin v. Board of Registration in Medicine*, 444 Mass. 837, 843 (2005). Appellee only argues claim preclusion. *See, e.g.*, Appellee Br. at 29 ("res judicata—and particularly its 'claim preclusion' aspect").

"Claim preclusion requires three elements: '(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, (3) prior final judgment on the merits.'" *Kobrin*, 444 Mass. at 843. Claim preclusion "applies only where both actions were based on the same claim." *Heacock v. Heacock*, 402 Mass. 21, 24 (1988). For example, although both may seek money, a tort action seeking damages for injuries suffered during a marriage is not identical to a divorce action seeking support. *See Heacock*, 402 Mass. at 24.

Appellee overlooks the identity of the cause of action required for claim preclusion. *See, e.g.*, Appellee Br. at 40 ("res judicata with respect to the claim of custody over the Child."). An action for child custody is not identical to an action to modify an existing child custody order. Accordingly, a child custody decision generally does not give rise to res judicata in an action to modify that decision.[5]

Appellee does not argue the other theory of res judicata, issue preclusion. Under the general rule of issue preclusion, "[w]hen an issue of fact or law is

[5] Appellee appears to concede that the child's best interest override res judicata where the change in circumstance required to modify a child custody order exists. *See* Appellee Br. at 31 ("Thus, res judicata applies to a custody judgment in the same manner it applies to any other judgment *except* to the extent that material and substantial changes in circumstances have occurred since the time of the judgment such that res judicata must then give way to the child's best interests.") (emphasis original).

actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties ….” *Alba v. Raytheon Co.*, 441 Mass. 836, 841–842 (2004); Restatement (Second) of Judgments § 27 (1982) (the general rule of issue preclusion). “The party invoking the doctrine of issue preclusion has the burden of demonstrating that the doctrine applies, and must therefore show that ‘the issue of fact ... actually was litigated and determined in [that party’s] favor in the prior proceeding.’” *Day v. Kerkorian*, 61 Mass. App. Ct. 804, 809 (2004) quoting *Commonwealth v. Bunting*, 401 Mass. 687, 691 (1988).

By definition, issue preclusion does not apply to any issues that were not adjudicated. *See, e.g.*, *Day*, 61 Mass. App. Ct. at 809; *Mongeau v. Boutelle*, 10 Mass. App. Ct. 246, 251 (1980). Here, relevant issues of abuse prior to the divorce were not adjudicated. For example, whether there had been a serious incident of abuse prior to the divorce was not actually litigated and determined. Whether there had been a pattern of abuse prior to the divorce was not actually litigated and determined. Similarly, the effect of the pre-divorce domestic violence on the child was not actually litigated and determined. Since the requisite elements are not met, issue preclusion cannot prevent consideration of domestic violence prior to the divorce as it pertains to a potential modification of the child custody order.

Importantly, "issue preclusion is not available where there is 'ambiguity concerning the issues, the basis of decision, and what was deliberately left open by the judge.'" *Day*, 61 Mass. App. Ct. at 809 quoting *Kirker v. Board of Appeals of Raynham*, 33 Mass. App. Ct. 111, 113 (1992). Here, issue preclusion cannot apply due to the admitted ambiguity in the original domestic violence findings. *See, e.g.*, Appellee Br. at 15, fn 8 ("[T]he full extent of the domestic violence allegations and evidence considered by the trial court at the time of the parties' divorce is not readily apparent …."); 35 ("Mother has not afforded this court with any way to evaluate the extent of the domestic violence allegations addressed during the divorce trial"); 39 (acknowledging it is not clear "[w]hether the divorce judgment was based on a finding that the presumption [against awarding custody to an abusive parent] did not apply, or whether it was based on a finding that the presumption had been rebutted ….").

Even if domestic violence issues had been clearly adjudicated, which is not true in this case, issue preclusion would still not apply. Issue preclusion does not preclude relitigation of an issue when the potential adverse impact of the original determination warrants a new determination. *See* Restatement (Second) of Judgments § 28(5)(a) (exceptions to the general rule of issue preclusion). The potential adverse impact of an abuse determination in a custody decision—both on the child and on the Commonwealth, more generally—warrants a new

determination. *See Adoption of Karla*, 46 Mass. Ap. Ct. at 70 (finding that concerns of issue preclusion must inevitably give way to an overriding concern for the welfare of the child); Restatement of Judgments 2d § 28(5)(a) (exceptions to the general rule of issue preclusion).

Finally, Appellee argues Appellant somehow waived "it." *See* Appellee Br. at 36 ("Mother waived it by not adequately raising it below."). But a parent cannot waive her child's best interest, the court's duty to consider all evidence of abuse as adverse to the child's best interest, the court's duty to determine the child's best interest, or the limitation on the court's modification authority to those orders that are necessary in the child's best interest. The court cannot use Appellee's proposed "gotchya" standard as authority for a child custody decision.

The child's interest in freedom from abuse must be considered, and cannot be waived, in any custody decision. Long ago, Massachusetts courts established that "[i]n any proceeding involving the custody of a child concerns of res judicata must inevitably give way to an overriding concern for the welfare of the child." *Cennami v. Dep't of Pub. Welfare*, 5 Mass. App. Ct. 403, 408 (1977). Under the Custodial Presumption Act, the court must consider all evidence of abuse as an adverse factor before it can determine a child custody decision serves the child's best interest.

VII. CONCLUSION

For the foregoing reasons, the plain meaning of the Custodial Presumption Act, as well as its history and purpose, mandate that (1) the court must consider all evidence of domestic violence in a custody modification proceeding, including any evidence of violence that allegedly occurred before the entry of the current custody order and (2) the rebuttable presumption set forth in G. L. ch. 208 § 31A is applicable in modification proceedings.

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Respectfully submitted,

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MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(k) CERTIFICATION

I, Kia L. Freeman, certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including Rules 16-20. Pursuant to Rule 20, this brief is submitted in Times New Roman 14 point font, using Microsoft Word 2010, and includes 7,465 non-excluded words according to the program's word count feature.

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CERTIFICATE OF SERVICE

I certify that on the 19th day of August, 2019, I caused true and accurate copies of the foregoing brief to be filed conditionally herewith in the office of the Clerk of the Supreme Judicial Court and served upon the following counsel through the e-File MA system and by first-class mail:

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