Written Testimony of the Article 10 Family Defense Organizations in New York City:
The Bronx Defenders, Brooklyn Defender Services,
Center for Family Representation, and
Neighborhood Defender Service of Harlem
Presented to
The New York Advisory Committee to the U.S. Commission on Civil Rights

Subject: The New York Family Policing System
and Its Impact on Black Children and Families

August 19, 2023

This testimony is submitted jointly by the Bronx Defenders (BxD), Brooklyn Defender Services (BDS), Center for Family Representation (CFR) and the Neighborhood Defender Service of Harlem (NDS) (collectively the "family defense organizations"). Our offices are the primary providers of mandated legal representation to parents who are eligible for no-cost representation in Article 10 cases filed in family court in the Bronx, Brooklyn, Manhattan and Queens. Collectively we represent thousands of parents each year. Since 2007, when New York City first contracted with family defense organizations to represent parents, we have represented more than 43,000 parents in family court, touching the lives of close to 100,000 children, the vast majority of whom are Black and Latine and live in under-resourced, low-income communities in New York City.

Together, we have created a nationally-recognized model of representation for parents charged with neglect or abuse and at risk of family separation, by providing comprehensive, interdisciplinary representation to parents through teams of attorneys, social workers and parent advocates. Our model has been recognized as the most effective model of representation of its kind.[1] Together, through our collaborative teams working with and empowering parents, we have prevented thousands of children from needlessly entering and languishing in the foster system and have reduced the foster system census in New York City by almost 50%.[2] We thank the

[1] *See* Commission on Parental Legal Representation, Interim Report to Chief Judge DiFiore 27-28 (February 2019), available at https://www.ils.ny.gov/files/2019%20Commission%20on%20Parental%20Legal%20Representation%20Interim%20Report.pdf; *see also* Martin Guggenheim & Susan Jacobs, *A New National Movement in Parent Representation*, 47 CLEARINGHOUSE REV. 44, 45 (2013), available at https://cfrny.org/wp-content/uploads/2021/03/A-New-National-Movement-in-Parent-Representation-Clearinghouse-Review.pdf.

[2] *See* Martin Guggenheim and Susan Jacobs, *Providing Parents Multidsciplinary Legal Representation Significantly Reduces Children's Time in Foster Care,* American Bar Association (June 3, 2019), available at

Commission for the opportunity to submit written testimony about our experience and observations as defenders on the impact of New York's family policing system on Black children and families.

Our offices have followed the leadership of directly-impacted people and adopted the phrase "family policing system" to describe what has traditionally been called the "child welfare system" or the "child protection system," to reflect the system's prioritization of and roots in exploitation, surveillance, punishment, and control rather than genuine assistance to and support of families living in poverty.[3] The family policing system includes so-called "child welfare" agencies like New York City's Administration for Children's Services ("ACS") and their caseworkers and attorneys, foster agencies and their case planners and attorneys; the current system of mandated reporters, such as schools, medical, and mental health professionals; the family legal system, which includes family court judges, court attorneys and the attorneys for the litigants, such as children and parents, whose roles are inextricably intertwined with the system within which we work.

Our testimony aims to share what we have observed as the harm caused by this system that has the power to separate families and keep families separated, and to destroy the legal, emotional, and psychological bonds of families. We strive to meet our ethical obligation to provide high quality legal representation to parents in these high-stakes cases. Our efforts include working to address the underlying issues that drive families into this system: anti-Black racism, structural poverty, and issues stemming therefrom, including, among other things, lack of access to quality health and mental health treatment, lack of basic income and necessities, and lack of appropriate education and services for children with disabilities. We also aim to reduce the harm of the consequences of system involvement, such as criminal charges, housing and income loss, education issues and inability to adjust immigration status.

Just as our modern police systems descend from slave patrols,[4] the family policing system is rooted in our country's history of using family separation as a tool to control, punish, and plunder Indigenous, Black, immigrant, and low-income families and communities.[5] From the enslavement

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https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/providing-parents-multidisciplinary-legal-representation-signifi/

[3] *See* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, The Imprint (June 16, 2020), available at https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480.

[4] *The Origins of Modern Day Policing*, NAACP, available at https://naacp.org/find-resources/history-explained/origins-modern-day-policing; *The Links Between Slavery, Policing, and Racism*, NYU Press Blog, available at https://www.fromthesquare.org/the-links-between-slavery-policing-and-racism/.

[5] The family policing system's origins are in the separation of enslaved Black children and parents to profit from their labor, and in the government-supported separation of indigenous children from their parents meant to destroy the Indigenous communities whose land the government was seeking to colonize. The System continued with "Orphan Trains" of the late 1800s and early 1900s, when The Children's Aid Society, still in operation in New York City today, involuntarily separated thousands of poor Italian and Irish immigrant children from their families, and sent those children to the Midwest to work in indentured servitude. Family connections in these impacted

of Black Americans and Indigenous indoctrination schools, to the Orphan Train movement, family separation has been used to disguise this country's deep commitment to white supremacy and social hierarchy, as benevolent social welfare. Family separation has been and continues to be a political choice, one that allows all of us to look away from the anti-Black racism, structural inequality that keeps marginalized families--Black, Indigenous, poor--on the margins.[6]

Research from all corners, from the Federal Children's Bureau,[7] to the National Council for Juvenile and Family Court Judges,[8] to independent nonprofits,[9] to public statements and reports issued by ACS itself,[10] demonstrate that Indigenous, Black and Latine families are disproportionately represented in reports to, investigations of, and prosecutions by the family policing system and that Indigenous, Black and Latine children are disproportionately represented in the foster system. These outcomes, demonstrated reliably and consistently across a variety of social science research,[11] are a result of structural racism masquerading as social betterment. In fact, even New York City's family policing agency knows this to be true; an internal ACS racial

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communities were considered inferior and therefore breaking those connections was considered to their, and more importantly, to society's benefit.

[6] The family policing system that ensnares families today is rooted in, and indeed is a perpetuation of this history, but it did not become the well-funded machine that it is until public assistance programs were slashed in the 1980s and 1990s in response to Black families demanding equal access to social programs through the civil rights struggles of the 1960s. These cuts were coupled with billions of dollars in new funding for the foster system. *See* MOVEMENT FOR FAMILY POWER ET AL., *WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR: HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S DRUG WAR* 15-18 (2020), https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277. In 1981, the federal foster system budget stood at less than $500 million. By 2003, it was at $4.5 billion. With this huge increase in funding of a system rooted in family separation, alongside this dramatic cut in resources to families living in the margins, family policing agencies targeted the Black community, using the same racist and classist ideology motivating the war on drugs and the cuts to public assistance. In New York City today, for every white child in the foster system, there are 12.6 Black children and 5.8 Latine children. Off. of Child. & Fam. Servs., Disproportionate Minority Representation 2022, https://ocfs.ny.gov/reports/sppd/dmr/Disparity-Rate-Packet-2022-County-Comparison.pdf.

[7] Child Welfare Practice to Address Racial Disproportionality and Disparity, Bulletins or Professionals (April 2021), Children's Bureau, https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

[8] Disproportionality Rates For Children Of Color In Foster Care (Fiscal year 2015), National Council of Juvenile and Family Court Judges, https://www.ncjfcj.org/wp-content/uploads/2017/09/NCJFCJ-Disproportionality-TAB-2015_0.pdf.

[9] Racial Disparities, Family Policy Project, https://familypolicynyc.org/data-brief/racial-disparities/ (last accessed July 24, 2023).

[10] *See* Testimony of ACS Commissioner David Hansell to the New York City Council General Welfare Committee on "Oversight—Racial Disparities in the Child Welfare System" (October 28, 2020), https://www.nyc.gov/assets/acs/pdf/testimony/2020/GWCommitteeHearing.pdf. See also, Demographics of Children and Parents at Steps in the Child Welfare System, Fiscal year 2022, https://www.nyc.gov/assets/acs/pdf/data-analysis/2022/demographics-children-fy-2022.pdf.

[11] Detlaff, A.J., & Boyd, R., *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, The ANNALS of the American Academy of Political and Social Science, 692 (1), 253-274 (2020), *available at* https://journals.sagepub.com/doi/10.1177/0002716220980329; Jude Mary Cénat, Sara-Emilie McIntree, Joana N. Mukunzi, Pari-Gole Noorishad, *Overrepresentation of Black Children in the Child Welfare System: A Systematic Review to Understand and Better Act*, Children and Youth Services Review, Volume 120 (2021), *available at* https://www.sciencedirect.com/science/article/abs/pii/S019074092032137X?via%3Dihub.

equity audit "described a 'predatory system that specifically targets Black and brown parents' and subjects them to 'a different level of scrutiny.'"[12]

All of these processes create a dynamic that entangles low-income Black families into a system that, more often than not, punishes them and tears them apart.

I. The Family Policing System Perpetuates Anti-Black Racism at Every Level Leading Black Families to be Surveilled, Controlled, and Policed Disproportionately

Data supports what we know from our experience as advocates fighting alongside parents targeted, policed, and punished by the family policing system: racism is a defining feature of the family policing system's operation and function. From its nearly singular focus on surveilling, controlling and policing racially marginalized and low-income communities and its implicit views on those communities, to its approach to and interactions with these families, the racial disparities that the system produces are broad and deep. In New York City, Black children account for roughly 22% of the children under the age of eighteen in the city,[13] but a staggering 50.6% of the children separated from their families in the foster system.[14] In contrast, roughly 26% of the children in New York City are white,[15] but white children comprise less than 6% of the foster population.[16] What is more, Black children in New York City are worse off at every stage of the family policing process: Black children are 6.66 times more likely than a white child to be the subject of a family policing system investigation;[17] Black children are 1.24 times more likely than a white child to be in an indicated family policing investigation; Black families are 1.49 times more likely than white families to be subject to court-ordered surveillance by the family policing system;[18] Black families are more likely to be separated rather than be mandated to engage in services than non-Black

[12] Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of its Own Workers Say Yes*, New York Times (Nov. 22, 2022), available at https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html.
[13] Child Population, Citizens Committee for Children, https://data.cccnewyork.org/data/table/98/child-population#11/18/62/a/a (last accessed May 31, 2023).
[14] *Watching The Numbers: Covid-19's Continued Effects on The Child Welfare System*, Annual Data Report, Center for New York City (Mar. 2023), http://www.centernyc.org/reports-briefs/2021/2/4/watching-the-numbers-2022-monitoring-new-york-citys-child-welfare-system-hx4nf-jgzwt.
[15] *Child Population, supra* note 13.
[16] *Watching the Numbers: Covid-19's Continued Effects on The Child Welfare System*, Annual Data Report *supra* note 14.
[17] NYC ACS Commissioner Jess Dannhauser Talking Points, NY Advisory Committee Meeting May 19, 2023, Committee Detail No. CD-2129685, https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/3d000001GNZ4/bZWSVvhmsEkX8XL_OehqKh3O3c5XgEJgHtbysv_yoew.
[18] *Id.*

families;[19] Black children are 1.21 times more likely to be placed in the foster system;[20] and Black children experience longer stays in the foster system.[21]

And to be clear, class inequality, though it often tracks racial inequality, is not the sole explanation here. A recently published data brief makes clear that living in a class-privileged neighborhood does not shield Black children from family policing investigations.[22] In other words, data show that "Black children are extraordinarily vulnerable to investigations no matter how rich or poor the neighborhood they live in."[23] What is more, if poverty alone correlated to family policing system involvement, then Black and Latine children would experience family policing intervention at twice the rate of white and Asian children.[24] Instead, data show that Black and Latine children experience family policing intervention six-fold and five-fold, respectively, more times than white and Asian children.[25]

Consistent with the data, even family policing agents have identified racism as a pervasive issue.[26] In response to a racial equity audit ACS commissioned in 2020, ACS staff identified ACS as "a system that actively destabilizes Black and [Latine] families and makes them feel unsafe."[27] Echoing the reflections of the families targeted by ACS, ACS staff observe that ACS is "a predatory system that specifically targets Black and [Latine] parents and applies a different level of scrutiny to them throughout their engagement with ACS," as such creating a system in which "safety is a privilege of race" and indeed, race is used as an "indicator of risk."[28] What is more, while ACS's stated mission is to "promote[] and protect[] the safety and well-being of New York City's children and families," and its motto is "[k]eeping children safe & [s]upporting families,"[29] its practice does just the opposite. ACS staff have made clear that the racism and anti-Blackness embedded in ACS "hinders the safety of Black and [Latine] families."[30]

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[19] *Narrowing The Front Door to NYC's Child Welfare System, Report and Community Recommendations*, New York City Narrowing the Front Door Work Group (Dec. 2022), https://www.narrowingthefrontdoor.org/_files/ugd/9c5953_86404362d37449fc9d93c19ba2300f7f.pdf.
[20] NYC ACS Commissioner Jess Dannhauser Talking Points, *supra* note 17.
[21] *Narrowing The Front Door to NYC's Child Welfare System, supra* note 19.
[22] *Racial Disparities*, Family Policy Project, https://familypolicynyc.org/data-brief/racial-disparities/ (last accessed July 24, 2023).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *New York City Administration for Children's Services Racial Equity Participatory Action Research & System Audit: Findings and Opportunities (Draft)* (Dec. 2020), https://drive.google.com/file/d/1cdgv8maKgGesji79FRJasnSF08fE6Mo8/view?usp=sharing.
[27] *Id.* at 14.
[28] *Id.* at 14-15.
[29] *About ACS*, NYC Admin. for Children's Servs., https://www.nyc.gov/site/acs/about/about.page, last accessed June 28, 2023.
[30] *See supra* note 26 at 14.

This comports with our experience as public defenders representing parents facing neglect and abuse investigations and prosecutions throughout New York City. While ACS's leadership has acknowledged the racism within ACS and the need to dramatically shift the agency's policies and practices,[31] on the ground, we see how ACS—from caseworkers, to supervisory staff, to the attorneys representing the agency and their supervisors—generally presumes that Black parents are a risk to their children and act swiftly, if not reflexively, to strip Black parents of their ability to make decisions about their children, to separate them from their children, to erase the vital bonds and knowledge they have of their children, and to make it difficult for Black parents to reunite with their children.

a. Racism is deeply entrenched at the front end of the family policing system, shaping who the family policing agency investigates, surveils, prosecutes, and separates.

Beginning with cases called into New York's State Central Register of Child Abuse and Maltreatment (SCR); ACS has readily acknowledged that there are "dramatic racial and ethnic disparities" in SCR reports,[32] and that the lion's share of cases called into the SCR result in unnecessary family policing intervention into the lives of New York City's families.[33] While ACS has noted the need to reduce the number of calls into the SCR[34] and worked with mandated reporters on trainings,[35] ACS has failed to make any policy recommendations to the state as far as we know with respect to reporting to the SCR, mandated or otherwise, that would stem the tide of reporting. Many parents impacted by the family policing system and community-based activists and advocates have called for the abolition of mandated reporting, but ACS has stood silent.

[31] In testimony to the New York City Council in October 2020, then-Commissioner David Hansell recognized that Black and Latine families experience the family policing system "differently at every key decision point as compared to White and Asian families," and acknowledged that ACS had "essential work to do to address racial inequities within ACS" and the so-called "child welfare system." *See* Oversight--Racial Disparities in the Child Welfare System: Hearing before NYC City Council Gen. Welfare Committee, Oct. 2020 (Statement of ACS Commissioner David Hansell), https://www.nyc.gov/assets/acs/pdf/testimony/2020/GWCommitteeHearing.pdf; *see also* Roxana Saberi & Lisa Semel, *In NY, black families more likely to be split by foster care system*, Al Jazeera America (June 25, 2015 5:00pm), http://america.aljazeera.com/articles/2015/6/25/new-york-foster-care-system-racial-disparity.html.

[32] *See supra* note 34 at 5.

[33] *See* Testimony to the New York City Council General Welfare Committee: Hearing before NYC City Council Gen. Welfare Committee, Mar. 13, 2023 (Testimony of ACS Commissioner Jess Dannhauser), https://www.nyc.gov/assets/acs/pdf/testimony/2023/prelim-budget-hearing-fy24.pdf.

[34] *See* Oversight--Racial Disparities in the Child Welfare System: Hearing before NYC City Council Gen. Welfare Committee, Oct. 2020 (Testimony of ACS Commissioner David Hansel), https://www.nyc.gov/assets/acs/pdf/testimony/2020/GWCommitteeHearing.pdf (noting, "[w]hile the SCR may be an essential lifeline for children when they are being seriously harmed or at imminent risk of harm, the child protective response and investigation by its nature can be intrusive and traumatic for families. We have a collective duty to make sure government intervention is sought and used only when there is true concern for the safety of a child or imminent risk of a child and that it is not used inappropriately or disproportionately, resulting in further marginalization and trauma for families of color.").

[35] *See* Testimony to the New York City Council General Welfare Committee: Hearing on Fiscal Year 2024 Preliminary Budget before NYC City Council Gen. Welfare Committee, *supra* note 33 at 2-3.

Moreover, a coalition of community based activists and advocates has put forth legislation that, if passed, would end anonymous reporting—93% of anonymous reports are unfounded after an ACS investigation[36]—and require every caller to provide their name and contact information when making a report to the SCR, which would be kept confidential.[37] Instead of supporting this common-sense proposal, ACS has lobbied for amendments to the bill that, if passed, would render the bill meaningless.

In an alleged effort to narrow the pathways that thrust families into the family policing system and offer an alleged non-investigatory track for families that come into contact with ACS, ACS has increasingly marketed its Collaborative Assessment, Response, Engagement and Support (CARES) program. ACS claims CARES is a voluntary, "non-investigative child protection response" where caseworkers "assess the safety of the children and then partner with the family to identify needs, empower the family to make decisions that address the needs of their children, and connect families to appropriate services."[38] Contrary to ACS's claims, CARES is no less coercive than traditional investigations, is far more intrusive in the lives of families, is therefore not a shift away from ACS's core policing function and cannot be seen as an answer to ACS's racist practices.

First, CARES is greatly expanding the reach of ACS in the lives of NYC families. In 2022, over 6,900 calls to the SCR were diverted to the CARES program.[39] ACS utilizes CARES in cases "where there is no immediate or impending danger to children and where there are no allegations of serious child abuse."[40] In our experience, these are typically low-risk reports that would be "unfounded" following an investigation. Second, through our representation of parents during ACS investigations, as well as discussions with parent advocates and other impacted parents, we know that, just like "traditional" ACS investigations, with CARES comes invasive surveillance and the use of coercion to compel compliance. Third, though ACS describes CARES as voluntary, and though ACS has not made public its protocol when a parent refuses CARES intervention, our understanding is that parents are often informed that refusing CARES will result in their case being put on the formal investigation track. In some cases, the worker comes with the police to coerce the parent's cooperation with the program. If at the start of every CARES case, parents are presented with a difficult choice – cooperate with CARES or face a "traditional" family policing investigation that could result in the removal of your children, family court involvement, and an indicated case that could impact your current or future employment – then CARES cannot be called "voluntary." Fourth, CARES cases are even more invasive than investigations, collecting detailed and extensive information about the family, providing parents with "homework," and repeatedly

[36] Family Policy Project, *Hotline Calls*, available at https://familypolicynyc.org/data-brief/hotline-calls/.
[37] *See* Anti-Harassment in Reporting, Assembly Bill 2469, Senate Bill 902, https://www.nysenate.gov/legislation/bills/2023/A2479.
[38] *See supra* note 33 at 3.
[39] *Id.*
[40] NYC Children: Administration for Children's Services, *The Collaborative Assessment, Response, Engagement & Support (CARES) Approach*, available at https://www.nyc.gov/site/acs/child-welfare/cares.page.

visiting the home for what may be longer than a typical 60-90 day ACS investigation. All of ACS' interactions with a family are recorded as part of standard case practice, and will be used against a family in the event that a petition is eventually filed in family court. Finally, CARES functions as a shadow system without due process protections or judicial oversight, and where parents have no access to legal counsel.

The incongruity between ACS's purported anti-racist commitments and its actual practice on the ground becomes glaringly conspicuous when one looks at ACS's response to efforts to provide parents basic information during the initial point of contact between ACS and the family under investigation. ACS has attempted to thwart recent community-led legislative efforts to inject more fairness and transparency in the investigation process by publicly claiming to support the proposed legislation, but then quietly lobbying to gut legislation that would require ACS to inform parents and caretakers of basic information about their existing rights during a family policing investigation, including their right to decline to participate in an investigation and their right to decline to provide information to ACS that could be used against them in court.[41] Despite ACS's arguments to the contrary, family policing investigations are not "social work" interactions. Time and again, parents impacted by ACS have made this clear, and have also made clear that ACS—an agency that has the power to remove children and separate families—is neither benign nor benevolent, rather it is coercive, manipulative, frightening, and traumatizing.[42]

Among other things, investigations include far-reaching inquiries into parents' mental health, medical, sexual, and partnership histories, forced disclosure of deeply private health information, and home searches that include opening cabinets, drawers, closets, and beyond, almost universally without a warrant or other court order. For Black low-income families in New York City, this expansive and largely unchecked government intervention all occurs without ever being told their existing rights, guaranteed to them by both New York and federal law, and without any access to advice about how that information could be used against them in court.[43] Indeed, ACS's ability to obtain vast amounts of information from parents without ever seeking judicial review depends entirely on the parents not knowing their rights. Worse yet, the parents who do know and exercise

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[41] Eli Hager, *NYC Child Welfare Agency Says it Supports "Miranda Warning" Bill for Parents. But It's Quitely Lobbying to Weaken It*, ProPublica (June 5, 2023 5:00 a.m.), https://www.propublica.org/article/new-york-families-child-welfare-miranda-warning.

[42] *See New York's Family Policing System Fails to Inform Families of their Rights,* Law & Disorder Podcast, May 30, 2023, https://kpfa.org/player/?audio=401870 (at 38:40); *see also* Why a Child Welfare 'Miranda Rights' Law Is Essential; A Q&A with Advocate and Organizer Joyce McMillan, Center for NYC Affairs June 2, 2021), http://www.centernyc.org/urban-matters-2/2021/6/2/why-a-child-welfare-miranda-rights-law-is-essential-a-qampa-with-advocate-and-organizer-joyce-mcmillan; *and see* Megan Conn, Pressure Builds to Reduce Racial Disproportionality in New York's Child Welfare System, The Imprint (Jan. 19, 2021 5:30 p.m.), https://imprintnews.org/child-welfare-2/new-york-calls-grow-address-racism-child-welfare/51073; *Do we Need to Abolish Child Protective Services*, Mother Jones (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/.

[43] Families who cannot afford to retain attorneys to represent them in family policing cases routinely are not connected to counsel until an Article 10 case comes to family court.

their right to not engage with ACS are punished. We have seen countless instances in which a parent's exercise of their right to deny ACS entry into their home results in ACS threatening to call the police, and on many occasions, ACS does in fact return to the home with armed police. This is all done without seeking a court order authorizing entry into the home.[44] Even more, the parents' decision to exercise their rights is often held against them throughout their ACS and family court case. They are subject to harsher surveillance, are not trusted to follow orders, and reunification and settlement are denied or delayed based on the parents' decision to exercise their rights.

ACS's racism is also revealed upon critical examination of the allegations that ACS uses as a basis to surveil, control, and separate Black families. Black parents face the loss of their children for reasons of poverty or because they are experiencing a condition created and/or exacerbated by multigenerational poverty and structural inequality, such as a lack of stable and adequate housing or income, lack of access to medical or child care, a substance use disorder, or a mental health condition. Rather than addressing the social deficits, economic inequality, and structural racism that plagues families targeted by the family policing system, the system leans on racist narratives about Black parenthood and familial bonds, and responds with child removal, family separation and behavior modification services.

What is more, Black parents are not given the benefit of the doubt and are rarely believed by the caseworkers, their supervisors, social service providers and court-system prosecutors that purportedly represent the interests of the family but who actually treat these cases more like criminal prosecutions. Mandatory reporting laws add to the problem as others who might be inclined to find productive and humane solutions for struggling families are instead turned into the *de facto* eyes and ears of the system, at risk of losing their own livelihood if they fail to comply.[45]

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[44] Under Section 1034 of the Family Court Act, family policing agencies can seek court orders to help them facilitate an investigation and assess children even before they have filed a case in court. The Family Court Act specifically allows family policing workers to obtain orders to gain access to a home or remove a child, orders of protection, or other forms of intervention prior to filing a petition in court.

[45] The mandates—required by the Child Abuse Prevention and Treatment Act (CAPTA) in order for states to receive federal funding—set forth under Social Services Law § 413 are broad, mandating that "persons and officials" including, but not limited to, doctors, nurses, mental health practitioners, educators, social workers, social service workers, and shelter workers make a report to the SCR when they, in their professional capacity, "have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Helping professionals serve as the family policing system's eyes, ears and whistle blowers account for two-thirds of reports to the system, compared with 18% of reports that come from non-professionals including relatives, friends, and neighbors, and 17% that come from other or anonymous sources. See Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97(4) Social Forces 1785, 1787 (June 2019), https://scholar.harvard.edu/kfong/publications/concealment-and-constraint-child-protective-services-fears-and-poor-mothers; see also Family Policy Project, Where to Find Data on Investigations in New York, https://familypolicynyc.org/2022/10/14/investigations-data/, last accessed Aug. 15, 2023 (noting that in 2019, 25.08% of reports were called in by education professionals, 13.73% by legal professionals, and 9.85% by medical professionals).

It is well documented that mandatory reporting is deeply infected with racial and class bias.[46] This is particularly striking in cases alleging abuse based on unexplained injuries and medical conditions.[47] We have represented countless clients who present to the pediatric emergency rooms with concerns about their child's health and well-being, only to be met with suspicion and investigation, rather than care and support. Similarly, we have represented numerous parents who know with near certainty that *something* is wrong with their child's health and seek specialist after specialist to get answers. Ultimately when an issue is uncovered, the parent is blamed and prosecuted. Finally, we see cases where Black parents are investigated and prosecuted for things that white parents do all the time without concern of family policing, much less family separation. From having dirty homes, to engaging in recreational substance use, to determining that therapy and psychiatric services are not necessary to treat a mental health condition at a particular time, Black parents are pathologized, regarded as a threat to their children, regulated, controlled, and punished. Central to this dynamic is anti-Black racism.

b. **Racism shapes how and why the family policing agency prosecutes certain cases and undermines family reunification for certain families.**

Unsurprisingly, ACS's pervasive racism does not cease once cases are filed against family in family court. Indeed, the harm is reproduced and compounded. The data makes clear what we know from our experience as parent defenders: Black parents and families fare worse at every point of the system.[48] This is by design, not happenstance. Day in and out, ACS's practice and engagement with families reflects the anti-Black racism deeply embedded in the institution, and a complete disregard for the families purportedly in their care. The examples are myriad, but we focus on some of the most striking.

ACS routinely fails to expand visitation without being ordered to do so by courts and rarely affirmatively advocates for family reunification.

- Even in cases where ACS acknowledges that there are no safety concerns with respect to the parent's visitation with their child, ACS often refuses to expand visitation (whether by failing to exercise the discretion granted to them by the court, refusing to expand a court

[46]Children's Rights, *Fighting Institutional Racism at the Front End of the Child Welfare System: A Call to action* (May 2023) 14, https://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf.

[47] The impact of anti-Black racism and implicit bias has devastating consequences for Black families long before family policing agents become involved. Studies show that health care providers report Black children to the family policing system as alleged victims of child abuse at higher rates than white children, despite presenting with the same medical conditions as white children. *See* Carole Jenny et al., *Analysis of Missed Cases of Abusive Head Trauma*, 282 JAMA 621, 623 (1999); Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1606 tbl. 2 (2002). *See also* Stephanie Clifford, *Two Families, Two Fates: When the Misdiagnosis is Child Abuse*, https://www.themarshallproject.org/2020/08/20/two-families-two-fates-when-the-misdiagnosis-is-child-abuse.

[48] Family Policy Project, *Racial Disparities*, *supra* note 22.

visitation order on consent, or by fighting parents' efforts to expand visits), much less advocates for family reunification.

- ACS's own visitation policy indicates that "[v]isits need not be supervised when there are no safety concerns requiring supervision and the child is comfortable being alone with the parent."[49] Nothing in ACS's policy makes expansion of visitation contingent on the parent engaging in their ACS service plan. Yet, ACS's decisions on whether to expand visitation often turns on compliance with service plans—e.g. requiring completion of a parenting classes, requiring a longer "track record" of counseling sessions or substance abuse program sessions, or in cases alleging intimate partner violence, requiring the non-custodial parent to complete batterers accountability programs and/or anger management programs even when there are no safety concerns during supervised visits between the parent and child.
- For parents mandated to have agency-supervised visits with their children, they are most often limited to once or twice weekly, two hour ACS or agency supervised visits. ACS and foster agencies have very limited, if any, weekend hours, so these visits rarely take place over the weekend, thus severely limiting parents whose work schedules conflict with weekday visits. Moreover, ACS often refuses to supervise visits in the community, thus limiting families' parenting time to a small, impersonal visitation room.

ACS fails to provide timely service referrals and make services accessible to parents.

- Despite using service plan compliance as one of the primary determinants of whether a parent can reunite with their child and the legal requirement that ACS "take diligent steps to provide immediate services,"[50] ACS regularly fails to provide timely and meaningful service referrals. It is not uncommon for parents to go *months* in cases without receiving the referrals for the services ACS is requiring, or to be handed a phone number with no further explanation on how to access a required service. And when parents are put on long waitlists, ACS makes no effort to provide alternative services.
- In cases where families require specialized services (either due to their family's needs or due to the parents' work schedule) requiring out-of-pocket payment, or when families are simply unable to afford the cost of services, do not have health insurance, or require interpretation services, ACS often refuses to pay for those services without a court order, and further, their lawyers make a point to register an objection when the Court orders ACS to pay. The refusal to pay for out-of-pocket services without being ordered to do so by the family court inevitably results in delayed family reunification and increased trauma from prolonged family separation. Even when ordered to pay, they often do not without the threat of a contempt proceeding. Likewise, ACS routinely refuses to pay for or delays

[49] *See* Administration for Children's Services, *Determining the Least Restrictive Level of Supervision Needed During Visits for Families with Children in Foster Care* (Policy and Procedure #2013/02, Feb. 28, 2013), https://www.nyc.gov/assets/acs/policies/init/2013/C.pdf.
[50] 18 NYCRR-NY 421.4.

providing material goods that would support the family. For example, we have seen families wait days for grocery support and weeks or months for furniture needed to enable overnight visitation and family reunification. Unsurprisingly, despite deep financial and housing instability being a consistent factor for the vast majority of the families ACS targets, cash stipends are never ACS's recommended "service" or support, and almost always seen as an irrelevant or unreasonable request despite reliable research that shows that unconditional cash grants improve family well-being.[51]

- To the extent that parents are engaged in recommended services, ACS caseworkers make minimal efforts to contact service providers for reports to inform their own position regarding visitation or reunification or to keep the court informed. ACS caseworkers often appear for court, unable to provide updates as to a parents' service engagement and refuse to expand visitation, agree to reunification, or offer a favorable settlement without that same update. Vexingly, where the parent provides a letter from their service providers as to engagement, ACS will take the position that they will not expand visitation or agree to family reunification until they have spoken with the provider directly, making plain that they believe the parents to be so untrustworthy that they could be submitting a forged document to court!

ACS pathologizes parents and their families and undermines parents' autonomy.

- ACS regularly frames structural deficits as personal failings in need of surveillance. For example, we have had cases where a parent is in need of childcare or other caretaking support in order to manage the demands of their work schedule and the childrens' activities and school schedule, yet ACS's proposed "service" for parents is a mental health and or cognitive evaluation. In cases where a parent may acknowledge that they use cannabis as a stress reliever or to help calm their anxiety, ACS will suggest that the parent has a substance use disorder and mental health issue.[52] Additionally, ACS often takes the position that if a parent has *ever* had a mental health diagnosis, they must be in treatment in perpetuity and that they are a danger to their children if they are not. In countless cases where a parent had a previous mental health diagnosis (even one that is many years old and where the parent has evinced no current mental health concerns over the course of the investigation and or case), ACS will request that a parent submit to a mental health evaluation.

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[51] *See Stimulus Checks Substantially Reduced Hardship, Study Shows,* New York Times (June 2, 2021), https://www.nytimes.com/2021/06/02/us/politics/stimulus-checks-economic-hardship.html?partner=slack&smid=sl-share; *Everywhere Basic Income Has Been Tried, in One Map*, Vox (Oct. 20, 2020), https://www.vox.com/future-perfect/2020/2/19/21112570/universal-basic-income-ubi-map; The Bridge Project, Why Cash?, https://bridgeproject.org/why-cash/.

[52] Contrast *Mother's Little Helper Is Back, and Daddy's Partaking Too*, New York Times (Oct. 3, 2020), https://www.nytimes.com/2020/10/03/style/am-i-drinking-too-much.html (noting that, in response to the stressors of the COVID-19 pandemic, "The increase of substance use among parents is 'just kind of understandable.'").

- ACS will make arbitrary decisions disqualifying family and community members who put themselves forth as resources for the child. Many of these decisions are rooted in the family and community members' limited access to material resources and/or their prior history being policed by ACS and/or the NYPD.
- ACS makes perfunctory (and often eleventh-hour) requests for parental consent for children's needs including the administration of psychotropic medication and children traveling out of state with their foster parents. Often the discussions about these requests are not meaningful, much less informed. And when the parent declines to consent, instead of looking at their own practices, ACS more often than not, weaponizes this lack of consent as proof of further bad judgment by a parent, ignores the parents lack of consent, or seeks a judicial override of the judgment of the parent.
- Finally, even the way in which ACS documents its casework is marked by anti-Black racism. In ACS case notes, caseworkers will often write extensive notes about how happy the child is in his or her foster placement and all that the foster parent is providing for the child. Yet, when it comes to the parent, most especially Black parents, the written observations rarely extend beyond "no safety concerns" or "compliance" with services. This suggests that while ACS can be extremely strengths-based with foster parents, it does not afford that same lens to parents.

In totality, from the moment that ACS receives a case through its prosecution, ACS's practices and its approach to Black families and their communities is steeped in anti-Black racism that ultimately causes tremendous and long-lasting harm to Black children, Black families, and Black communities.

II. The Family Courts Fail to Provide a Check on the Family Policing System and Instead Perpetuate Anti-Black Racism and Further Harm Black Families

If someone walked into any New York City family court pre-pandemic, or entered any Microsoft Teams court appearances since the courts moved largely online, most observers would be struck by the number of Black families and the obvious absence of white litigants. Over 90% of the parents we represent are Black, Latine, and people of global majority,[53] with about 60% identifying as Black. Racism and bias play into the decision-making at every stage of the family policing system - from who is reported, investigated, filed against, temporarily separated, found unfit, and ultimately which families are permanently separated through the termination of parental rights. We have been witness to how racism and bias shape the experiences of Black families in New York's family courts for nearly two decades and can come only to one conclusion: the family

[53] Rosemary Campbell-Stevens, *Global Majority; Decolonizing the language and Reframing the Conversation about Race*, available at https://www.leedsbeckett.ac.uk/-/media/files/schools/school-of-education/final-leeds-beckett-1102-global-majority.pdf. We choose to use the term "global majority" to reflect the neutral reality that "people who are Black, Asian, Brown, dual-heritage, indigenous to the global south, and or have been racialised as 'ethnic minorities' ... currently represent approximately eighty per cent (80%) of the world's population making them the global majority."

courts are constructed and managed in a way to perpetuate the same anti-Black racism and bias that appears in every other stage of the family policing system.

The structure and practices of family court and the laws family court judges apply harm families and act as a force of destruction to Black communities. Too often family courts rubber stamp the decisions of the family policing agencies, and fail to function as the intended check on the system. Instead of protecting the right to familial integrity, a fundamental Constitutional right, the family court resoundingly fails to ensure that the parents and families appearing receive even the most basic protections and due process that the law requires. As the 2020 Report from the Special Adviser of Equal Justice in the New York State Courts found, New York's family courts provide "a second-class system of justice for people of color in New York State."[54] Three years later, following a pandemic that disproportionately impacted these same communities, this has not changed. From its failure to follow governing laws and ensure due process, to its prioritization of expediency over fairness, humanity, and just outcomes, the family court functions as an arm of state power, rather than a neutral arbiter of fairness and justice.

The culture of racism is pervasive to all those who appear in family court. As the Franklin H. Williams Commission of the New York State Courts highlighted, a common complaint about the New York City family court was its "dehumanizing" culture and treatment of litigants *and* counsel, that ranged from disrespectful and discourteous to outright discriminatory.[55] Our experience representing parents in family court confirms this. Our clients and staff are routinely faced with implicit and explicit racism, classism, sexism, heterosexism, xenophobia, and ableism from judges and court staff alike.

On a regular basis our clients face the following harms and disregard for their humanity and dignity in family court:

1. Being called by generic labels like "mom," "birth mom," "dad," and "paramour," instead of by their actual names, and the use of other dehumanizing language;
2. Having cases scheduled and called with no regard whatsoever of the parent's schedule, obligations, or the arduous demands of court ordered services;
3. Experiencing the other players in the system insensitively laughing, joking, rolling their eyes, and making light of the proceedings in total disregard for the profound impact the proceeding is having on them and their family; and
4. Being subjected to the reliance on tropes and narratives deeply rooted in this country's history of anti-Black racism, classism, and other forms of structural oppression.

[54] Jeh Johnson, *Report from the Special Adviser on Equal Justice in New York State Courts* (Oct. 1, 2020), available at https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.
[55] The Franklin H. Williams Commission of the New York State Courts, *Report on New York City Family Courts* (2019), https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final%20Report.pdf

a. Family court procedures and practices perpetuate racism and deny Black families due process, respect, and justice.

From the moment of a parent's first contact with the family court, the system dehumanizes parents and families and deprives them of the opportunity to be fully heard. While family investigations go on for days, weeks, or even months prior to the filing of allegations in family court, parents are typically unable to meet their defense counsel until the day the petition is filed (sometimes even on the second or third appearance) and often only moments before a family is called before the court for the first time, a proceeding called "intake." This happens in part because attorneys are provided clients' names and phone numbers hours or even minutes before a case is heard giving us little time to contact and counsel our potential client prior to appearing before the court. At times, attorneys are provided no contact information for their potential clients at all, or incorrect contact information. Although it is in ACS' possession, forcing the parent to meet their defense attorney for the first time after the proceeding has already begun.

Parents and their defense counsel only receive the full substance of the allegations when defense counsel is provided with petitions minutes before a case is scheduled to be heard for the first time, and sometimes even after the case has begun to proceed before the court. As such, lawyers are unable to fully discuss the allegations, legal challenges, and fundamental rights at stake with parents. Parents are deemed fortunate if they have an hour to speak to their new attorneys—who in that moment are complete strangers to them—prior to a first appearance. More commonly, lawyers are frantically attempting to get as much information from a parent as possible and assess whether to ask for a hearing opposing the separation of a family with only minutes to prepare for a hearing.

There is no legal obligation for ACS or prosecutors in family policing cases to provide exculpatory or exonerating evidence. This results in presentations to the court that are extremely one-sided, resembling a diatribe making a case against a parent without the balance that could give the court an accurate picture of the family. With the time the agency has to build their case against the parent and the extremely limited time we, as attorneys, have, this is abjectly unfair and does not constitute due process in any real way.

Moreover, the parent is often so deeply traumatized by the announcement that their child is being removed or has been removed that they cannot sit with an attorney and meaningfully go over the events that have taken place over weeks or months. Yet, the court proceedings will go forward anyway with an attorney who is often ill-prepared to interpose a real defense at the most critical juncture of the case.

The unnecessary and inexplicable, and in our view intentional, delay in providing information is so normalized in the courts, that we are greeted with astonishment when we propose that we receive the information earlier. In fact, when we proposed to get lists of clients coming to the court simply for the purpose of doing conflict checks on cases and to be ready for who was appearing

that day, the court used the confidentiality rules to prevent even that. While there may be some validity to their concern about confidentiality, it is more likely that they will go to any length to prevent our offices from having any information with which to prepare our cases and assure that parents receive a fair hearing in court.

Because of the unnecessary creation of urgency during intake, parents have little time to meaningfully engage with counsel, discuss their family, their history, their goals, and the allegations holistically, seek substantive legal advice, and arrive at an informed and carefully rendered decision on how to proceed. Instead, families are reduced to the alleged events of one or two days, and do not have the opportunity to discuss other factors that should be considered when the court determines whether to separate a child from their parent. While we do our best to empathize with our clients and give space for parents to express their emotions, too often, we must urge our clients to set aside their priorities, fear, grief, and trauma and focus on the specific facts we think would be important to the court at that moment. While there are the rare emergencies requiring an immediate court filing, in most cases, the family court system's very structure necessitates this triaging that denies parents dignity, humanity, and due process at this critical juncture when the court is considering whether to separate their family. Families of means will regularly retain an attorney as soon as ACS approaches them, but people without means are regularly in the horrifying position of having tried to do everything they were asked to do, even if it was overreaching. They are then dropped into a court proceeding with an attorney with little time to prepare for a court appearance that often determines whether a family will remain together or be separated. There are so many missed opportunities in this process from beginning to end for an attorney to intervene in a way that would prevent the unnecessary entanglement with ACS in the first place and/or assure that families that need to address an issue are able to do so within their families and communities. Failing that, at minimum, the parents and children could be afforded a measure of dignity and humanity if they had a voice in the process through an attorney or social worker advocating on their behalf.

Presented with such limited, often one-sided, information during initial appearances, bias plays a significant role in how judges evaluate the cases before them, particularly at the early stages. Time and time again, we have seen cases with similar facts have vastly differing results, with the only measurable distinction between the families being the color of the parent's skin. For example, when allegations of neglect relate to a one time incident of excessive corporal punishment, white and Asian children are more likely to remain at home with their families, while Black families are consistently separated, with the court relying on racist tropes that the parent is "angry" and unable to control their actions. The data also supports our observations in court, showing that although the percentage of reports leading to Article 10 filings for Black parents and Latine parents are

similar, the reports made against Black parents are 50% more likely to result in removal than those made against Latine families.[56]

From their first appearance in court, Black families are not looked at holistically, and are met with suspicion and contempt. For example, expressions of emotion by a Black parent whose children are being torn away are often viewed by both the court and caseworkers as evidence of a larger mental health or anger issue, consistent with racist perceptions and tropes about Black people—rather than recognizing an emotional response to family separation as fundamentally human.

A parent's conformity to the idealized values prized by white middle-class society will also result in faster reunification by the court, a more favorable settlement from family policing attorneys, and less time under the surveillance of the courts and family policing agencies. The refusal to conform, however, will result in more punitive measures by both the family policing agency and the courts, and a greater likelihood of a termination of parental rights. A parent who is deferential to the agency and the court – who is "polite," easy to work with, and who expresses "insight" in terms that they admit full wrongdoing – is more likely to have a swift and favorable resolution. In contrast, a parent who expresses emotions about the separation of their families, who questions unreasonable directives from the agency and court, and who raises concerns about the care their child receives in the foster system, will often be viewed as "angry," "difficult," "non-compliant," and "lacking insight," which will delay reunification and progress in family court. "Difficult" clients are pathologized to have mental health and anger management issues, and will be required to complete additional services until they can demonstrate their conformity to what is considered "appropriate" behavior. The court's enforcement of unrealistic social mores and expectations on Black families who appear in family court fundamentally denies them justice and the right to self-determination, devalues their own value systems and right to family integrity.

b. Family courts prioritize proceedings that separate families while permitting intolerable delay and disregarding laws meant to reunite families.

The family courts are plagued by unacceptable delays, which reveal a disregard for the families the court claims to serve. Prosecuting attorneys attend court conferences intended to discuss settlement and visitation completely unprepared, without settlement offers or positions on expanding visits or other plans for achieving reunification. Cases with extremely weak allegations often unnecessarily take months or years to resolve, and then only after attorneys for parents force the agency's hand by filing motions to compel discovery or to dismiss. The ACS attorney will then

[56] *Where to Find Data on Investigations in NYC*, Family Policy Project, available at https://familypolicynyc.org/2022/10/14/investigations-data/ (last accessed August 1, 2023); *see also Demographics of Children and Parents at Steps in the Child Welfare System, FY 2022*, Administration for Children's Services, available at https://www1.nyc.gov/assets/acs/pdf/data-analysis/2022/demographics-children-fy-2022.pdf (last accessed August 1, 2023) (Following an indicated report, 11.4% of Black families, 6.8% of Latine families, and 4.5% of Asian/Pacific Islander families have a removal ordered at the initial appearance).

often withdraw their petitions or offer a very short adjournment in contemplation of dismissal,[57] ultimately subjecting families to months or years of unnecessary surveillance and family policing involvement.

Prosecuting attorneys regularly fail to provide discovery until the eve or day of trial, making it difficult, if not impossible, for defense counsel to advise parents about the potential risks and consequences of settlement, or to be prepared to move forward with trial. Parents regularly take off work to appear in court for a fact-finding hearing, only to find out that the ACS attorney failed to subpoena a witness or essential records, or is simply unprepared to move forward. Adjournments are liberally granted by the court in these circumstances, despite the ACS attorney's lack of diligence. The resulting delays subject families to needless separation, unnecessary surveillance and stress, and demonstrate an utter disrespect for families.

While these delays are intolerable and grounded in a racist disregard for the time and well-being of Black and Latine families, the family court's efforts to address them also often display the same racist disregard. For example, while adjournments are repeatedly granted to ACS, a parent's request for an adjournment, no matter the basis, is routinely denied. A parent's absence will lead to an immediate default, which carries with it negative legal consequences, while the court will grant multiple adjournments when the ACS worker is repeatedly absent, even when their participation is essential. This same disparate treatment is applied when parents try to appear virtually for a proceeding compared to workers or other lawyers.

Moreover, the court's prioritization of "permanency," including termination of parental rights, and the implementation of "standards and goals" over proceedings aimed at reunification and ensuring the agency is working towards reunification, demonstrates the court's real priorities. This indifference to keeping families together was seen perhaps most starkly when the courts shut down at the start of the COVID-19 pandemic. While family court struggled to bring a robust virtual court system online, virtual court space for family separation applications were nearly immediately and seamlessly made available to the family policing agency. While the courts continued to hear emergency applications for removals throughout the early pandemic, it refused to permit emergency applications for reunification. Even as the courts increased their virtual capabilities, a significant time period passed and an enormous amount of advocacy was needed before parents were permitted by the court to make emergency applications for the reunification of their families pursuant to Family Court Act §§ 1027 and 1028, and to actually have their hearings scheduled and heard in a timely manner. Likewise, the courts prioritized completing permanency hearings to move toward adoption over fact-finding and dispositional hearings, which, unlike permanency

[57] An adjournment in contemplation of dismissal is an adjournment of the Article 10 proceedings, pursuant to Family Court Act § 1039, "with a view to ultimate dismissal of the petition in furtherance of justice. Fam. Ct. Act § 1039.

hearings, enabled cases to progress through family court towards resolution and reduce the time families had to live under the surveillance of the family policing system.

The court-created "standards and goals"[58] in New York City family courts also undercut New York State laws meant to protect families from government overreach. Though not mandated by law, New York City family court judges are held to "standards and goals" regarding the time periods in which they conduct a fact-finding proceeding, disposition hearing, or termination of parental rights trial. These standards and goals were created without any input from the public and are not available to the public. As such, the values and priorities that went into the creation of the standards and goals are unknown, as is information bearing on how the standards and goals are applied and assessed. Goals about timing, rather than fairness and substance, result in judges being more concerned with expediency than reaching the best outcome for the mostly Black families in their courtroom. The pressure to move cases along undermines New York State laws that require prioritization of reunification proceedings and that function as a check on the state's power to remove children from their families.

For example, when a court temporarily separates children from their families in Article 10 cases, parents may request the return of their children under §§ 1027 and 1028 of the Family Court Act. Because of the universally understood harm that is caused by family separation, there are strict timelines under which these hearings must commence according to the statute; once a parent requests a § 1028 hearing, the law requires that "such hearing shall be held within three court days" and may not be adjourned "except upon good cause shown."[59] Likewise, a hearing under Family Court Act § 1027 must commence the next day after the filing of the Article 10 petition, and the hearing must continue on successive court dates thereafter.[60] The purpose of these provisions is to ensure that determinations to take the extreme step of separating a family are reviewed expeditiously and made with a complete record. Yet the family court routinely fails to prioritize these hearings over other matters, often scheduling them for such short increments of time that no substantive evidence can be entered, and scheduling them weeks into the future or with weeks-long gaps between dates, leaving families needlessly separated. Deprioritizing emergency hearings violates the law, denies justice for families, and needlessly prolongs separation and court involvement.[61]

The family court's prioritization of case resolution and achieving "permanency" for children—which often means adoption or guardianship to a non-parent—is yet another structural design that undermines family integrity. It is driven by concerns regarding expediency rather than family

[58] *See State of our Judiciary, 2019 (*Feb. 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Report.pdf (Last accessed Aug. 15, 2023).
[59] N.Y. Family Court Act § 1028.
[60] N.Y. Family Court Act § 1027.
[61] See Lucas A. Gerber et al., *Effects of An Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 Children & Youth Serv.'s Rev. 42 (2019), https://www.sciencedirect.com/science/article/pii/S019074091930088X

integrity, fairness, or justice and is anchored in the federal Adoption and Safe Families Act (ASFA).[62] Central to the notion of "permanency" as utilized by the court and the family policing system is a so-called "permanent living arrangement," irrespective of whether that arrangement includes the children's families of origin who love them and want to care for them. While it may be *expedient* to do so, the reflexive prioritization of "permanency" and presumption that, after the arbitrary ASFA clock has run, the child's bond with their parents and extended family of origin is no longer worthy of nurturing and preserving, is harmful to children, families, and the communities from which they come. The focus on so-called "permanency" ignores the material deprivations and anti-Black racism that drives families into the system to begin with and belies the reality that 66,000 adoptions failed and led to foster system placement between 2008 and 2020.[63]

The family court's practice of prioritizing termination of parental rights over reunification proceedings is also contrary to the legislative intent enumerated in Social Services Law § 384-b(1), where ASFA is incorporated in New York's statutory framework. The New York State legislature recognized that "it is generally desirable for the child to remain with or be returned to the birth parent because the child's need for a normal family life will usually be best met in the home of its birth parent" and that "the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home."[64] The termination of parental rights should be a last resort and only used after every effort has been made to reunify the family. The prioritization of achieving "permanency" leads family courts to allocate more time to termination of parental rights proceedings and less time to reunification proceedings or other proceedings aimed to hold agencies accountable to their obligation to support a family towards reunification.

c. Broad and subjective language in the laws applied in family courts allows implicit bias and racism to significantly impact decision making.

The laws governing family court proceedings are vague and overly broad, particularly in their application. New York statutes require judges to make subjective decisions, which allow implicit bias and racism to play a significant role in outcomes for families. The Family Court Act allows a finding of neglect when a child is at "imminent danger of becoming impaired" as a result of their

[62] In 1997, ASFA was signed into law. Under ASFA, states are financially incentivized to place children in adoptive homes, and are mandated to move to terminate a parent's rights if a child has remained in the foster system for 15 out of 22 months. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997). Specifically, absent certain exceptions, ASFA mandates, "in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the Child's parents . . . and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption). In other words, ASFA financially incentivizes states to limit to a mere 15 months the time period in which families whose children have been removed to the foster system can receive "reunification services and activities."

[63] Marisa Kwiatkowski and Aleszu Bajak, *Far from the fairy tale: Broken adoptions shatter promises to 66,000 kids in the US*, USA Today (June 6, 2022), https://www.usatoday.com/in-depth/news/investigations/2022/05/19/failed-adoptions-america-foster-care-troubles/9258846002/

[64] N.Y. Soc. Serv. Law § 384-b.

parent or caregiver's failure to "exercise a minimum degree of care."[65] While the Court of Appeals defined "imminent," as "near or impending,"[66] whether impairment is "imminent" and a parent failed to "exercise a minimum degree of care" continues to be analyzed differently depending on the race of the family before the Court. Similarly, decisions about which families should remain together or be reunified is highly dependent on the race of the parent. While Black children are separated from their parents at an initial hearing in 14.8% of indicated investigations against Black parents, white children are separated at a much lower 8.9% of indicated investigations against white parents.[67] The Court must determine if family separation is "necessary to avoid imminent risk to the child's life or health," and must consider whether family integrity "would be contrary to the best interests of the child."[68] The Court must also consider whether any orders could be put in place to mitigate the risk of harm to the child.[69] Although it is not required by the statute, the family courts often consider what they call a parent's "insight" in making determinations regarding family separation and reunification, another standard that invites implicit bias into legal determinations.[70] All of these determinations are highly subjective and allow for implicit bias and racism to shape judges' decision making. Compounding the harm, often, Black parents are treated across the board with greater skepticism and distrust. Courts question the intentions of Black parents, their love and commitment to their children, as well as their willingness and ability to follow court orders while white parents are generally given the benefit of the doubt and trusted to overwhelmingly have good intentions and stronger protective capacity.

III. The New York Advisory Committee Process at Times Mirrored the Racism and Harms of the Family Policing System.

We thank the New York Advisory Committee for their commitment to investigating racism in New York's family policing system, but must also raise troubling dynamics we observed throughout the Advisory Committee's investigation process that mirror ways the family policing system operates and the harm that results therefrom.

On several occasions throughout the proceedings, the Advisory Committee Chair emphasized the need for "civility."[71] This call for "civility" first came when Black and system-impacted speakers

[65] N.Y. Family Court Act § 1012(f).
[66] *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 369, 820 N.E.2d 840, 845 (2004).
[67] *Demographics of Children and Parents at Steps in the Child Welfare System, FY 2022*, Administration for Children's Services, available at https://www1.nyc.gov/assets/acs/pdf/data-analysis/2022/demographics-children-fy-2022.pdf (last accessed August 5, 2023).
[68] N.Y. Family Court Act § 1028; N.Y. Family Court Act § 1027.
[69] *Id.*
[70] *See In re. Gavin S.*, 52 Misc.3d 1221(A), 43 N.Y.S.3d 767 (Kings County Fam. Ct. 2016); *Matter of Caleb S.*, 78 Misc.3d 1215(A), 185 N.Y.S.3d 493 (Bronx County Fam. Ct. 2020); *Matter of D.J.*, 69 Misc.3d 1208(A), 131 N.Y.S.3d 853 (Bronx County Fam. Ct. 2020).
[71] Several Committee business meetings and public briefings opened with a general announcement about the expectations of participants behavior and an explanation of the Committee's rules for the public comment section and the use of the chat function. It had been noted that if the Committee determined that comments were

called out non-Black and non-impacted participants and panelists when they employed the very same well-worn racist narratives and tropes of the family policing system to bolster their positions that, in fact, the family policing system is not racist. Historically, the notion of "civility" has been used as a tool to silence legitimate critique of oppressive systems.[72] Though perhaps unintentional, the Advisory Committee's emphasis on the need for civility in response to legitimate critique of both the Committee's investigatory process and pathologizing views espoused by certain panelists suggested that calling out racism was an unacceptable form of participation in the proceedings.

Like the family policing system, the Advisory Committee exercised its authority throughout these hearings in a way that fundamentally contradicted its missions and obligations. The prioritization of civility over hearing the voices of impacted people undermined the Committee's stated purpose—to investigate racism and its impacts in the family policing system. It is impossible for an investigative process to address racial disproportionality and disparities in the family policing system, discern the mechanisms driving the disproportionality and disparities, and understand the impacts on families, particularly Black families, without permitting Black and impacted participants to fully participate. We firmly object to the manner in which the Committee explicitly chilled the legitimate speech of impacted people while it tacitly protected and elevated racist and harmful speech of so-called "experts."

Finally, throughout the proceedings, the Committee has perpetuated and reinforced the racist false dichotomy that "children's rights" and "children's safety" stand in opposition to the rights and interests of parents. This false child-safety/parents-rights dichotomy is premised on one of the oldest ideas in American history—that Black parents acting on their own accord are unsafe and white people in power know how to best manage Black relationships. In this context, this idea manifests as the belief that impacted Black parents speak subjectively and only in their own interests, while academics and researchers, who are overwhelmingly neither Black nor rooted in Black and/or impacted communities, speak objectively and for the best interests of Black children, therefore any call by impacted parents to divest from the current family policing system and to reimagine a system designed, run, and managed by the Black community is necessarily at odds with the safety of Black children. The child-safety/parents-rights binary is a key trope used by the family policing system to delegitimize Black family bonds, and to justify family separation and family policing intervention. Most telling, this dichotomy, this foundational belief of this system, is purposely blind to the actual reality of the safety of the children it claims to protect. Black children experience discrimination, bigotry, violence, structural inequality and anti-Black racism by virtue of the color of their skin. The family policing system perpetuates this rather than working toward actually protecting Black children. Furthermore, this dichotomy and reinforcement of the

inappropriate, disrespectful, disruptive, and/or veered from the civil rights questions at issue and focused on "important but unrelated topics," the Committee staff reserved the right to conclude the meeting.

[72] *See* Karen Grigsby Bates, *When Civility is Used as a Cudgel Against People of Color*, NPR (Mar. 12, 2019, 5:04 AM), https://www.npr.org/sections/codeswitch/2019/03/14/700897826/when-civility-is-used-as-a-cudgel-against-people-of-color.

current model of family policing ignores that when children are removed from their family they are placed somewhere else and these foster placements are often unable to meet their needs. We have seen many children harmed in foster placement, including children who have died due to failure to provide proper care or due to violence against the child the state has determined needs protection. Addressing racism in the family policing system does not detract from efforts to protect Black children. On the contrary, failing to address it undermines Black children's safety and the integrity of their families and communities.

As the Committee concludes it investigation and renders its findings and recommendations, we ask that it *begin* its inquiry by acknowledging the current disproportionality and anti-Black racism rife within this system, acknowledge and accept the expertise of those who have lived that experience, and present meaningful recommendations that will move us to real safety for Black families.

IV. Recommendations

1. We must divest from the family policing system and invest in Black families.

The use of state power to investigate, surveil and prosecute families harms Black children. In contrast, providing financial resources to Black families has been shown time and again to be the most effective and least harmful way to prevent what the system refers to as "neglect."[73] In order to effectively help Black children, the money currently spent on the enormous bureaucracy that disproportionately polices Black families should go directly to those families and their communities to meet basic needs and create job and investment opportunities.

While divesting from the current system and redirecting funds from family policing to eradicating family poverty will help ensure Black children are safe, there are numerous legislative and policy changes that would also reduce the harm caused by the current system in the shorter term. The following recommendations are directed toward increasing assistance to Black families while shrinking the family policing system.

[73] *See, e.g.*, Kerri M. Raissian & Lindsey Rose Bullinger, *Money Matters: Does The Minimum Wage Affect Child Maltreatment Rates?*, 72 CHILD. & YOUTH SERVS. REV. 60, 63–66 (2016)*; Nicole L. Kovski et al., Association of State-Level Earned Income Tax Credits With Rates of Reported Child Maltreatment*, 2004–2017, 20 J. CHILD MALTREATMENT 1, 1 (2021); Jessica Pac et al., *The Effects of Child Poverty Reductions on Child Protective Services Involvement*, 97 SOC. SERV. REV. 43 (2023), https://www.journals.uchicago.edu/doi/epdf/10.1086/723219 (study finding that implementation of three of the policy packages from a recent National Academy of Sciences proposal to reduce child poverty, including the introduction of a child allowance and expansions to the earned income tax credit, the Supplemental Nutrition Assistance Program, and the federal minimum wage, have the potential to reduce family policing investigations by 11.3-19.7% yearly).

2. **The Family Court Act should be amended to eliminate, or at least narrow, the definition of "neglect."**

As noted above, the legal definition of neglect in New York State is highly subjective and susceptible to racial and class bias. As is well established, the surveillance and interrogation of families during investigations, and the coercive power of courts has long-lasting harmful consequences for Black families and communities. To mitigate these harms, the power of state intervention authorized by Article 10 should be reserved for cases where there is credible evidence of abuse. At the very least, the provisions that define neglect should be narrowed to include only those cases in which a parent's actions are intentional, not a function of poverty, and have caused actual harm.

The subjective nature of neglect permits racism and bias to contaminate decision-making at every level of the family policing system. The Court of Appeals has stated that findings of neglect should not be casually issued and should not be based on presumptions.[74] However, lower courts frequently interpret the language of the statute, which permits neglect findings based on parental actions that cause "imminent danger of impairment," to encompass any action or omission they view in their subjective opinion as bad parenting. Family courts regularly base neglect findings not on specific, particularized evidence of "near or impending" danger of "serious harm," but on inferences drawn from their subjective assumptions about what is best for children.

In fact, lower courts have found, and Appellate Courts have upheld neglect findings based on the presumption that circumstances such as drug use, mental illness, domestic violence, school absences, or inadequate housing conditions constitute imminent danger, without identifying specific evidence of impending, serious harm as the law requires and without assessing that the state has made sufficient efforts to assist a family prior to intervening. Some of those presumptions – such as equating repeated drug use with neglect – are even written into the statute, embedding in the law unnecessary and harmful shortcuts to family destabilization that do not exist in many other states.

While we support the total elimination of neglect as a cause of action under Article 10 to narrow the front door to the family policing system, at the very least, the definition should be amended to address how unfounded presumptions, racism, and implicit bias influence decision-making by agencies and the judiciary. As a first step, the definition of neglect should include only intentional actions that are not associated with poverty and result in actual harm to a child in order to eliminate the subjectivity, and accompanying race and class bias, that trap too many Black families in the net of the family policing system.

[74] *Nicholson v. Scoppetta*, 3 N.Y.3d 357 (2004); *Matter of Jamie J.*, 30 N.Y.3d 275, 284 (2017).

3. Termination of Parental Rights Should be Eliminated.

The permanent destruction of a child's relationship to their parent is one of the most violent and harmful powers wielded by the state. Even where a parent has struggled, the state-imposed destruction of a child's relationship with their parent represents a tremendous loss to the child. This loss is not simply erased if the child is adopted into a "new" family. Studies have shown that children maintain "significant psychological ties" to their family of origin even after adoption, and grieve their loss even as they bond with their adoptive parents.[75]

Contrary to the legal and cultural framing of adoption as a "new start" that replaces what has been lost, the ambiguous loss caused by termination is not resolved by the child's legal placement into a new family unit. Our experience in working directly with hundreds of families, which is confirmed by research,[76] shows that many children whose relationship with their parent has been legally terminated choose to continue those relationships and even return to those parents when adoptions fail, or as they grow old enough to choose for themselves. And even those who do not return home often retain ongoing connections to and identity with their families and cultures.

Losing their parents works a particularly egregious injury on Black children, whose rights to a legal relationship with their parents are disproportionately terminated. Because the family of origin is a critical "source of identity," termination of this relationship can damage the child's self-esteem and harm their developing sense of identity. Losing their parents, family, and community as positive sources of identity can take a high toll on Black children, on top of the many other harms caused by systemic racism.

Because the permanent severance of a child's relationship with a parent is extremely harmful, and because the adoption of the child into another family does not, in and of itself, remedy that harm, a system that was truly committed to the welfare of Black children would work to avoid such an outcome at all costs.

4. Repeal ASFA and End the Prioritization of Adoption over Family Integrity

As discussed above, the very structure, time frames, and incentives of ASFA and the family policing system result in Black families being separated when they could stay together. The emphasis on permanency, unreasonable timelines, and prioritization of adoption over family

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[75] *See, e.g.*, Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 326- 28 (2008) (reviewing recent studies); Kirsten Widner, *Continuing the Evolution: Why California Should Amend Family Code Section 8616.5 to Allow Visitation in All Postadoption Contact Agreements*, 44 SAN DIEGO L. REV. 355, 367-68 (2007).

[76] *See* Mark Courtney et al., *Executive Summary, Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 21*, 3 (2007)("Midwest Study") (reporting that "[a]lmost all of the young adults in the Midwest Study sample had maintained at least some family ties, and in many cases those ties were quite strong."); Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REB 437, 477 (2012) (finding that biological family remained involved in the lives of children in 75% of surveyed cases).

reunification, results in the systematic destruction of Black families. To reduce the harm of the family policing system, ASFA must be repealed and Black families must be valued and prioritized, and directly given the resources they need to thrive.

So long as the family policing system and its hallmark responses of child removal, family separation, court supervision, therapeutic interventions, and family dissolution remain our society's response to families in need of support, race disparities will remain. Until all branches of government commit to a wholesale new response to the inequalities in our society caused by years of racist exclusion, wealth disparities, and resource hoarding by the privileged few that cause a number of families, disproportionately of color, to struggle, the billions of dollars used to fund the family policing and foster system need to be transferred into the communities they harm.

5. Narrow the Reach of the New York State Central Register of Child Abuse and Maltreatment.

In 2022, New York's State Central Register of Child Abuse and Maltreatment accepted 148,087 reports of suspected child abuse or neglect. Of those reports, more than 75% were determined to be unfounded following invasive and traumatic investigations. Thirty-nine percent of investigations in New York City involved Black children, even though Black children comprise less than 22% of the city's child population. In contrast, white children comprise 26% of the child population whereas they are 6% of the children investigated. In 2019, 1 of every 15 Black children experienced a family policing investigation, compared with 1 of 86 white children.[77] Without a doubt, these investigations come at a great cost to Black children and families, who regularly report the immense trauma and stress they experience as a result of investigations.

Furthermore, having an indicated report in the SCR can seriously limit a parent's employment prospects, further destabilizing families often already struggling with poverty.[78] Certain employers who work with children, such as schools, daycare centers, and some medical providers, are required to run an applicant's name through the SCR before hiring them.[79] Indicated reports of neglect remain in the SCR for eight years from the time the report was made.[80] Indicated reports of abuse remain in the SCR until the youngest child named in the report turns 28.[81] As a result, parents may be denied employment years after the allegations were made against them, even if the

[77] *Racial Disparities*, Family Policy Project, https://familypolicynyc.org/data-brief/racial-disparities/ (last accessed July 24, 2023).
[78] *See* Abigail Kramer, *BANNED for 28 Years: How Child Welfare Accusations Keep Women out of the Workforce*, Center for New York City Affairs (Feb. 2019); Rise, *New SCR Legislation Took Effect January 1st: What it Means for Parents*, Rise Magazine (Jan. 18, 2022), available at https://www.risemagazine.org/2022/01/what-new-scr-legislation-means-for-parents/#:~:text=Being%20listed%20on%20the%20SCR,home%20health%20aides%20and%20nurses.
[79] Id.
[80] SSL 412.
[81] Id.

allegations were never heard by a judge, are unrelated to employment, and/or they have ameliorated the alleged concerns that led to an initial report. Additionally, an indicated report may prevent or delay a person from serving as a foster or adoptive parent, limiting their ability to be critical resources for their family and community members.[82]

Below we recommend several reforms that would shrink the harmful system and decrease the number of unnecessary investigations and indicated reports.

6. Support efforts to amend the federal CAPTA legislation and repeal NY Social Services Law section 413 to eliminate mandated reporting.

In 2022, 72.5% of reports to the SCR were made by mandated reporters. Teachers, nurses, case managers, and social workers—those best able and most willing to support the very families they are forced to report—are threatened with loss of their jobs or licenses if they do not implicate families to a harmful and biased system of investigation and family separation largely out of fear. Ending mandated reporting will, in turn, allow New York to invest resources in supporting and building community-led and -based supports. It also would create opportunities to better train and support professionals in their efforts to assist families, encourage those professionals, who are in the best position to do so, to assist families with the support and assistance they really need, and would help create trust between communities that have been marginalized and these professionals.

Rather than further investing in mandates that limit frontline workers, and harm families, our state's resources would be better used by directly supporting families and professionals to completely avoid any need to report a family in the first place. When New York City families experienced a sudden and drastic decrease in their exposure to mandated reporters during the COVID-19 pandemic lockdown, officials feared that reports of child maltreatment would drop and that children would be harmed. Instead, families found support elsewhere, both through imaginative and community-based mutual aid networks and through cash injections from new pandemic government programs. Data from this period reveals that during this lockdown period, there was no rise in child abuse and no subsequent increase in reports. The former Commissioner of the Administration of Children's Services himself testified that by all standard measures of child well-being, this unplanned reduction in mandated reporting and increase in support to families did not lead to a reduction in safety. In fact, given clear evidence that investigations and family separation are traumatic for children—this reduction of reporting arguably increased safety for children.[83]

[82] See supra Note 78.
[83] Michael Fitzgerald, *No evidence of Pandemic Child Abuse Surge in New York City, But Some See Other Crises For Child Welfare System*, The Imprint (June 15, 2021 7:25 p.m.), https://imprintnews.org/top-stories/no-evidence-of-pandemic-child-abuse-surge-in-new-york-city-but-some-see-other-crises-for-child-welfare-system/55991.

7. Recommend Passage of New York's Anti-Harassment in Reporting Bill, A2479/S902.

New York's child abuse and neglect reporting system is flawed. Under current law, anyone may call the SCR and report suspected abuse or neglect anonymously. The state's child maltreatment hotline is flooded with anonymous reports, many of which are intentionally false accusations, and many of the rest are demonstrably unreliable. After the standard of evidence was increased in 2022, New York City found that 93% of anonymous reports were unfounded after an initial investigation, meaning there was insufficient evidence to support that any neglect occurred.[84] These investigations can be frightening to children and have serious consequences for families. And the burden of investigating these unreliable anonymous reports takes resources away from other family policing investigations.

Based on our substantial experience working with parents and families facing investigation by ACS, we know first-hand that false reports of child abuse and neglect, and the resulting investigations, cause varied and long-lasting harms to children and their families. Although there is no data to support this precisely because of the anonymous nature of the reports, our experience tells us that anonymous reports come most often from greedy landlords, jilted lovers, bitter family members, and the like, who will benefit from the fallout of an ACS investigation. Often, it becomes obvious to ACS early in their investigation that the substance of the anonymous reports is false; however, given internal rules and the intrusive, coercive and punitive nature of the investigation, ACS- and court-involvement will often continue for the family. Like every other aspect of the family policing system, false allegations of child abuse or neglect have a disparate impact on families of color.

The Anti-Harassment in Reporting Act corrects this flawed system by ending anonymous reporting and requiring all reporters to identify themselves confidentially, thereby deterring false and malicious reporting while maintaining confidentiality of reporters. Under a confidential reporting system, members of the public would be required to provide identifying information, which would be provided to an investigator but would be kept confidential from the public and the person accused of child maltreatment.

The law would decrease the severe harm that false reports cause families and allow for more reliable investigations and transparency in the reporting process by allowing investigators to question reporters directly, while still providing continued assurance that the reporter's information would be protected.

[84] *Hotline Calls*, Family Policy Project, https://familypolicynyc.org/data-brief/hotline-calls/ (last accessed August 16, 2023).

8. Ensure that Parents and Families are Aware of their Rights and Provided Timely Access to Defense Counsel

The Family Court Act permits family policing agencies to seek court orders to interview or examine children when there is probable cause to believe a child has been harmed or is in danger. Yet ACS rarely seeks those orders.[85] Instead, they intimidate and coerce families into agreeing to intrusive investigations without informing them of their right to refuse. As a result, children—and in particular Black children—are regularly subjected to unnecessarily intrusive and harmful investigations even when there is no credible evidence that they are in danger. Ensuring that every parent and caretaker has access to timely defense, and passing the Family Miranda Rights and Informed Consent Acts are critical to ensuring that the rights of families are protected and curtailing the unnecessary intrusion into the lives of families, especially those Black families that are disproportionately investigated and separated.

9. Support efforts to pass New York's Family Miranda Rights Act, A1980/S901.

The Family Miranda Rights Act requires family policing agents to inform parents and caretakers of their legal rights at the beginning of an investigation. The bill does not create any new rights, but ensures that parents under government investigation know the legal requirements governing the rights of the government to access to their children, homes, medical and mental health information. New York should follow the lead of Texas, which passed similar legislation this year, and Connecticut, to ensure that all families know their rights at the start of a family policing investigation.[86]

The Family Miranda Rights Act requires investigators to provide families with information about existing law and due process protections, orally and in writing, in the parent's primary language. It requires them to inform parents of the allegations against them; of their right to consult an attorney before speaking with an investigator and to have that attorney present during questioning; that they are not required to allow investigators to enter their home or interrogate or examine their children without a court order or an emergency; that they are not required to share their family's medical information with family policing agents or to submit to a mental health evaluation or drug test without a court order; and that anything they say can be used against them in a court or administrative proceeding.

White, affluent families are far more likely than low-income Black families to have ready access to counsel, and to information about their legal rights when faced with an investigation.

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[85] Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One*, ProPublica (October 13, 2022 8:00 a.m.), https://www.propublica.org/article/child-welfare-search-seizure-without-warrants. (ACS obtains court orders to enter homes in only .2% of cases.)

[86] *See* Id.; Eli Hager, *Texas, New York Diverge on Requiring Miranda-Style Warnings in Child Welfare Cases*, ProPublica (July 5, 2023 3:00 p.m.), available at https://www.propublica.org/article/texas-new-york-diverge-miranda-warning-bill.

Conversely, Black communities have historically been targeted by law enforcement agencies and are more likely to experience coercion on the part of the family policing system, and less likely to feel comfortable asserting their right to speak to counsel before acceding to the demands of ACS. The harm caused by the imbalance of power between people facing these coercive situations and the law enforcement agents who are investigating them has been recognized for nearly 60 years in the criminal legal context.[87] It is time to give the same basic protections to families being targeted for separation and harm. Passing the Family Miranda Rights Act will help to address systemic inequities by empowering families with knowledge of their rights and eliminating economic and racial disparities in families' access to legal information and counsel that is both timely and comprehensive.

The family police take advantage of racial disparities in access to information and resources to invade Black families' privacy, and disrupt Black children's sense of safety and stability in their homes, without judicial oversight. Instead, they should inform Black parents that they have the right to protect their children from these intrusions when faced with baseless investigations. This Committee should recommend that New York State pass the Family Miranda Rights Act.

10. Ensure the provision of timely access to representation for parents.

Currently, low-income parents being investigated by family policing agencies who cannot afford to hire counsel are not entitled to be assigned an attorney until the state files an abuse or neglect case against them in family court. Before a case is filed in court, however, critical decisions are made that have grave consequences for how cases proceed, including whether the family will be diverted to prevention programs and services, whether the case will be filed in court, and, most significantly, whether children will be separated from their parents and, if so, who will care for them. Without access to counsel during this critically important investigative stage of an Article 10 case, parents are forced to meet with ACS investigators and make critical decisions impacting the integrity of their family, discuss the allegations against them, and navigate the state's intervention in their family without any professional support.

Early access to counsel has been recommended repeatedly. New York's Commission on Parental Legal Representation established in 2018 by Chief Judge Janet DiFiore recommended that parents be granted access to counsel during a child protective investigation.[88]

> "Giving parents representation when it matters – before they appear in court - is consistent with principles of equal protection and due process; can prevent unnecessary and prolonged separation of children from their parents; and can mitigate the disruption and trauma that accompanies State intervention into the family. Timely access to counsel may also help

[87] *See Miranda v. Arizona*, 384 U.S. 436 (1966).
[88] Commission on Parental Legal Representation, Interim Report to Chief Judge Defiore, 16 (February 2019), http://ww2.nycourts.gov/doc/15446

reduce the disproportionate percentage of children of color in New York's foster care system."[89]

In addition, the standards of practice for parents' attorneys adopted by the American Bar Association in 2006 recommend that attorneys actively represent parents during an investigation.[90] In recently-issued eligibility standards, the Office of Indigent Legal Services (ILS), the state agency tasked with overseeing the state's defense function, also recommended that counsel be assigned to parents during the investigation stage of a case. The Office of Court Administration codified these standards as a court rule.[91] However, there is insufficient funding for defender offices to provide pre-filing representation for everyone who needs it. In many counties throughout New York State there are no funds allocated for pre-petition representation.

Our offices have been using an interdisciplinary approach, relying on attorneys, social workers, and parent advocates to intervene early during an ACS investigation. Our teams are available to advise parents about their rights, their choices and the consequences of decisions during an ACS investigation. Through early advocacy and identification of appropriate services and resources, we avoided unnecessary and traumatic family separations and, often, kept family court cases from ever being filed against the families we assisted. By way of example, in 2022, CFR avoided a court filing in 83% of the cases where they represented parents during an ACS investigation. For the cases that were filed in court, early advocacy also has an impact on whether families are separated. For those families represented by BXD, children stayed home or were placed with family rather than in the foster system in 96% of the cases that were ultimately filed.

Representation at the investigation phase of a case is an effective and much needed bulwark against a multitude of avoidable harms to the low-income, predominantly Black and Latine families most often targeted by the family policing system. Not only would timely defense avoid unnecessary court filings, but it would also eliminate the false urgency that is created when a neglect case is filed in court and an attorney is assigned to the parent that same day. Assigning parent defense attorney and social work teams at the start of an investigation would provide the required due process to parents. When a court filing is unavoidable, it would ensure parents have sufficient time to discuss their needs and the allegations with their attorneys prior to the court filing, and that attorneys are prepared to proceed with emergency hearings to oppose the separation of a family with all of the necessary information.

[89] *Id.*
[90] *See* American Bar Association, Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases 10 (2006), available at https://www.americanbar.org/content/dam/aba/administrative/child_law/aba-parent-rep-stds.pdf
[91] Fam. Ct. Rule 205.19.

Supporting the budgets and funding needed to provide timely interdisciplinary defense to parents, whether through office-based providers or assigned counsel, is essential to protecting families' rights and protection during family policing investigations.

11. **Support efforts to pass New York's Informed Consent Act, A109B/S320**.

The Informed Consent Act emphasizes the need for greater prenatal and postpartum support in our medical system and less surveillance by requiring that healthcare providers obtain written and verbal specific informed consent before drug testing pregnant people, new parents, and their newborns.

In our experience, Black pregnant people and their newborns are targeted for non-consensual drug tests by hospitals, and then reported by healthcare providers to family policing system authorities. This is not a practice that is universal or commonly employed for non-Black pregnant people or newborns. The "test and report practice" makes pregnant people fearful of engaging in critical prenatal care, puts new families at risk of traumatic family separation, and does not improve the health and safety of the child, parent, or family. These drug tests are often administered without any medical basis, and a positive result is more likely to initiate an investigation rather than to initiate responsive medical care for the pregnant or parenting person. Instead, newly parenting people are met by a family policing agent at their bedside, where they are interrogated, sometimes mere hours after giving birth, only to be separated from their newborn shortly thereafter.

Receiving information about what is being done to your body or your child's body, the medical reason for the procedure and the consequences—medical or otherwise—that may result, are critical pieces of information that make for well-informed patients and good health care. These are standards that we would expect of any other medical intervention. It is crucial that patients be fully informed of the consequences of prenatal/postpartum drug testing and screening as well as the medical reason for testing and screening, and that they be provided the opportunity to consent to the drug test and/or screen.

Non-consensual drug testing of pregnant people, new parents and their newborns is a violation of individual bodily integrity, undermines maternal-fetal health, and unnecessarily exposes new families to the risk of traumatic family separation. A drug test is not a parenting test; a positive drug test says nothing about a parent's capacity to parent their child or a parent's love for their child. To create a world where the dignity and integrity of all families is valued and supported, we must put an end to punitive and criminalizing responses to drug use.

12. **End the silencing, decentering, and other daily acts of racism in family court and create clear reporting and accountability mechanisms**

Our Black and Latine clients and staff members are subjected to daily racial harm, both explicit and subtle, at the hands of judges and court staff with no recourse. Judges and court staff must be

required to ask how names are pronounced, to welcome the sharing of pronouns, and to clarify what role each individual plays in a proceeding without making assumptions based on race and gender. This should include regularly scheduled surveys and feedback sessions with the supervising judges in the boroughs regarding the micro- and macro-aggressions experienced on a regular and daily basis by Black, Latine and people of the global majority before the court. In addition, there should be a centralized reporting mechanism where those reporting have the option of doing so anonymously, including complaints about judges, including supervising judges, or their inaction in response to legitimate complaints. Those of us regularly appearing in the family court should be able to report on racially harmful incidents without the fear of reprisal against our clients or us. To cite just one example, our current experience is that complaints made about certain actors, court officers in particular, can result in intimidation by both the offending officer and the officer's colleagues toward the person making the complaint, as well as penalization of that person's clients. There is no clarity about what, if any, remedial action can be expected or even when a complaint will be reviewed. Thus, any reporting mechanism should provide information on what a reporting party can expect in terms of who will review the complaint, what additional action or information might be required, and when a response might be forthcoming. Reporting mechanisms are critical to holding judges and other significant actors accountable and can provide valuable information on the type of training court actors may need.

We want to thank the Commission for investigating the impact of racism on Black families who are entangled in the family policing system. We expect that your report will shed further light on the extensive and ongoing harms that have been caused on Black families by the family policing and family court systems. We hope that the Commission will make serious recommendations that will begin to redress these harms.

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