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 Before
The New York Senate Standing Committee on Judiciary & New York State Senate Standing Committee on Children & Families

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I. Introduction

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. The model provides comprehensive, interdisciplinary representation to parents through teams of attorneys, social workers and parent advocates. It has been recognized as the most effective model of representation of its kind.[1] Through our collaborative teams working with and empowering

[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.

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]

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." This language accurately reflects the system's prioritization of and roots in surveillance, punishment, and control rather than in 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 vast network of mandated reporters; and the family court.

Just as our modern police systems descend from slave patrols,[4] the family policing system—the family court included— 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 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 and structural inequality that keeps marginalized families—Black, Indigenous, Latine, poor—on the margins.[6]

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[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 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 across the United States work in indentured servitude. Family connections in these impacted communities were considered inferior and therefore breaking those connections was considered to their, and more importantly, to society's benefit.

[6] The modern day family policing system is rooted in, and indeed is a perpetuation of this history, but it did not become the well-funded machine that it is today 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

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. Though framed as a neutral arbiter, the family court is deeply implicated in perpetuating these disparities and inequalities.

Our testimony describes the particular harms the family court causes as the most powerful actor, and indeed final arbiter, within the family policing system. The legislature has bestowed on the family court the enormous power to tear children from their homes, keep families separated, and to even permanently sever legal ties between parents and their children. The operations and structure of the family court, from arraignment to the closure of a case, and the priorities behind the operations and structure, run roughshod over the due process rights of children and families. To begin to ameliorate the harm caused, New York must do more than course correct. New York must listen to the calls of the lived experts who have survived the family policing system and embrace solutions that divest New York from family surveillance, control, and punishment, and invest directly in families and the communities from which they come.

We recommend New York State:

- Eliminate mandated reporting;
- Repeal ASFA and end the prioritization of adoption over family integrity;
- Pass legislation that will narrow the pathways to the family policing system and ensure that New York courts protect and provide full Constitutional due process rights to families;

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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.

- Reject legislation that undermines the fundamental due process rights of New York families, most especially low-income, Black, Latine, and socially marginalized families;
- Invest in keeping families together by supporting family defense; and
- Provide legal representation to parents during a family policing investigation.

II. The Structure And Practices Of Family Court and the Laws Family Court Judges Apply Harm Families and Contribute to the Destruction of Black Communities.

The family court does not support struggling families, nor was it meant to. Despite the right to familial integrity—a fundamental constitutional right—being at stake, the family court resoundingly fails to ensure that the parents before it 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." Three years later, following a pandemic that disproportionately impacted these same communities, this has not changed. Black and Latine families continue to be separated for too long, or even sometimes permanently, as the family courts fail to administer justice. This is by design. 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 a continuum of state power, rather than a neutral arbiter of fairness and justice.

A. The set-up of initial appearances in Article 10 proceedings in the Family Court undermines due process, respect and justice for families.

Family court's failure to administer justice is inherent in the court's arraignment system for family policing cases, which we call "intake." Intake is the critical first appearance where the court is asked to determine whether a child will be removed from their parents care, whether there are relatives available to care for the child, what visitation will be afforded the parent, and what services are necessary. And yet, this first court appearance is rushed and truncated. Often, ACS has already removed a child from their home extrajudicially and often has waited days to file the Article 10 petition in court. Despite the gravity of what is decided at intake, parents are given just moments to speak with their defense counsel and little ability to meaningfully challenge family separation or prepare a defense against a system that has been embedded in their lives for days, weeks, or even months before the parent is brought to court. Allowing intake to operate in this manner dehumanizes parents and families, shows little regard for their family bonds, and treats parents as if they are ancillary to their own children's lives and wellbeing.

The rushed nature of intake is due in part to the fact that, while contact information for parents is provided at intake—though it is often provided late—it is typically shared without the

accompanying Article 10 petition, which contains the full substance of the allegations against the parent. It is not uncommon for parents and their defense counsel to receive Article 10 petitions minutes before court, and in some cases, even *after* the proceedings have commenced. Without having knowledge of the allegations before speaking with a parent, defense attorneys' are limited in their ability to have a meaningful conversation with parents about the allegations and the fundamental rights at stake, and are similarly limited in their ability to counsel parents prior to appearing before the court about the options available to prevent family separation. And even though the law explicitly requires *the family court* to advise the parent of their right to challenge family separation where their child has been removed from their care, family court judges resoundingly fail to do so.[11] Worse yet, at times, we are provided incorrect contact information for parents, and on some occasions, no contact information at all, despite the government having the information in its possession. Not only does this result in parents missing that critical intake day, but it also means that proceedings begin and important decisions are made about parents' children without parents even being present, much less represented in the proceedings. Indeed, parents are deemed fortunate if they have an hour to speak to their new attorneys prior to a first appearance. More commonly, however, parents are faced with lawyers—who at this point are complete strangers to them—frantically attempting to get as much information from them as possible in order to advise the parent on their rights and the best path forward to prevent family separation.

Because of the creation of manufactured time pressure 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. Worse yet, there is no legal obligation for ACS or prosecutors in family policing cases to provide exculpatory or exonerating evidence to the court at intake. 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. Compared with the time ACS has to build their case against the parent, the extremely limited time parents and their attorneys have is abjectly unfair and does not constitute due process in any real way.

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.

[11] Section 1033-b(1)(d) of the Family Court Act specifically provides, "[i]n any case where a child has been removed, the court shall advise the respondent of the right to a hearing, pursuant to section ten hundred twenty-eight of this act, for the return of the child and that such hearing may be requested at any time during the proceeding," and makes clear that "[t]he recitation of such rights shall not be waived."

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.[12]

Ultimately, the need to triage and the cattle call nature of family court intake is not a mere byproduct of an overburdened system, but is by design and born out of lack of respect for the families that come before the court and disregard for their family bonds. While there are the rare emergencies that may truly limit the court's ability to abide by due process mandates, in most cases, the family court system's very structure causes parents dignity, humanity, and due process to be undermined at this critical juncture when the court is considering whether to separate their family. The prioritization of expediency and over reliance on information from ACS means that families are wrongfully separated. It also means that families perceive the court as unfair and biased. This bias is confirmed by the many judges who routinely meet the exercise of due process rights by parents or applications for visitation or services with impatience and disdain.

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. Challenging family separation is undoubtedly the most important part of a family policing case. The law makes clear that children should not be needlessly separated from their parents. The U.S. and New York State Constitutions give parents the right to prompt hearings when their children are forcibly removed from their custody by ACS.[13] To that end, New York State law requires emergency hearings challenging family separation to be prioritized, pursuant to Family Court Act §§ 1027 and 1028. 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."[14] Likewise, a hearing under Family Court Act § 1027 must commence no later than the next day after the filing of the Article 10 petition, and the

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[12] *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).

[13] *Duchesne v. Sugarman*, 566 F.2d 817, 828 (2d Cir. 1977); *In re F.W.*, 183 A.D.3d 276, 281 (1st Sept. 2020).

[14] N.Y. Family Court Act § 1028.

hearing must continue on successive court dates thereafter.[15] 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.

Despite these clear constitutional and statutory commands, 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.[16] According to data provided by ACS in response to a request for information, more than 25 percent of such extended hearings resulted in the return of a child.[17]

Moreover, the family court could, but often fails to act as a check on ACS practices that undermine the meaningfulness of §§ 1027 and 1028 hearings.[18] Such practices include, but are not limited to:

- ACS's failure to provide discovery that is readily available immediately after a parent requests a §§ 1027 or 1028 hearing; and
- ACS's failure to facilitate conversations between children and their attorneys;

All practices which impeded the ability of defense counsel and the attorneys for the children to prepare and appropriately counsel families for their hearing without added delay.

The family court also erects obstacles that cause delay and undermine parents' and children's fundamental constitutional rights.

- Refusing to commence hearings where a parent has given their attorney permission to proceed in the client's absence, which the law allows for[19];

[15] N.Y. Family Court Act § 1027.
[16] 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
[17] On file with the undersigned and available upon request. Between 2014 and 2019, 24% to 29% of the approximately 18,000 Family Court Act § 1028 hearings conducted resulted in court orders that the children return home to a parent. This data underreports the number of children who are returned home after post-deprivation hearings, because it does not capture hearings held pursuant to § 1027.
[18] *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1985)); *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972) (holding that because "the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations . . . it is axiomatic that the hearing must provide a real test" and that "due process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at established the validity, or at least the probable validity, of the underlying claim").
[19] CPLR § 311(a); FCA § 165(a).

- Rejecting oral applications for §§ 1027 and 1028 hearings and instead requiring parents and/or children requesting hearings to submit an affidavit to commence the hearing[20];
- Commencing §§ 1027 and 1028 hearings in a perfunctory manner that undermines the meaningfulness of the hearing. For example, in our experience some jurists have ACS enter the Oral Report Transmission (ORT) into evidence or hear only a couple minutes of testimony before adjourning the hearing; and
- Failing to permit witnesses unable to appear in person to testify virtually for §§ 1027 and 1028 hearings

The result of these practices is thousands of children, disproportionately, Black, Latine, and low-income, being unnecessarily separated from their parents for weeks and even months.

Tellingly, what the family court instead prioritizes positions it as a continuum of state power, rather than its check. Driven by court-created "standards and goals," case resolution and achieving "permanency" for children is prioritized above all else. 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 they 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.

[20] The Family Court Act does not require FCA §§ 1027 and 1028 hearings to be requested in writing (as opposed to other provisions in the statute that do require attorneys to make applications in writing). *Compare* FCA §§ 1027, 1028 (no requirement that application for hearing be made in writing) *with* FCA § 1062 (requirement that a motion be made that is "accompanied by a sworn affidavit stating the grounds for the motion"). An affidavit is a form of evidence. Because ACS has the burden of proof at FCA §§ 1027 and 1028 hearings – *Matter of Kevin W.*, 194 A.D.3d 663, 664 (1st Dept. 2021) (holding "that ACS did not meet this burden" at the 1027 hearing); *Matter of Shevonne C.*, 292 A.D.2d 452 (2d Dept. 2002) (holding that in a § 1028 hearing "petitioner did not meet its burden of establishing that the infant child should remain in its custody") – ACS must present its evidence first and establish a *prima facie* case before parents or children are required to present any evidence. *See also* FCA § 1062 (requiring that motion "be accompanied by a sworn affidavit").

Anchored in the destructive Adoption and Safe Families Act (ASFA),[21] the emphasis on "permanency" for children—which often means adoption or guardianship to a non-parent—is another structural design that undermines family integrity. Again, "permanency" is driven by concerns regarding expediency rather than family integrity, fairness, or justice. 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.[22]

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."[23] Despite this clear mandate, 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.

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[21] 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." *See also* 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*, 24 (June 2020), https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf (ASFA "provided significant open-ended financial incentives to fast-track children who had been removed from their parent's care to permanent adoption" and "dramatically shifted the stated orientation of the foster system from family reunification to permanency—as fast as possible.").

[22] 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/

[23] N.Y. Soc. Serv. Law § 384-b.

C. Family court rubber stamps ACS' positions and fails to hold the agency accountable when their actions directly undermine due process and family reunification.

While so many of the harms caused by the family policing system's unyielding targeting of Black, Latine, and low-income communities occur prior to a case being filed in family court and are made by the family policing agency alone with unfettered discretion – including decisions to indicate a report, file a family court case, or whether to separate a family – the harm does not cease once families reach family court. Indeed, the harm is reproduced and compounded. Although each and every Article 10 case implicates parents' and children's fundamental constitutional right to familial integrity, Family Court Legal Service (FCLS), the attorneys representing ACS, routinely prosecute these cases in a manner that causes unnecessary delay and, more importantly, undermines the procedural and substantive due process rights of families, from the start of a case to its conclusion.

Despite countless studies showing that material disadvantage is one of the largest drivers of what the family policing system calls "neglect," ACS is at best reluctant to and at worst hostile toward providing families with material resources. Whether it's requests for funds for groceries, metrocards to allow parents to travel to and from foster agency visits, furniture necessary to enable children to return home, specialized therapeutic services for families with particularized needs, hotel rooms to facilitate overnight visits for parents that lack stable housing, or beyond, our attorneys and advocates are met with opposition and obstruction from family policing agencies. And in our experience, the family court routinely fails to use its authority to overrule harmful and illogical positions by ACS and foster agencies, and fails even to hold ACS accountable to making the reasonable efforts toward family reunification that the law requires. Worse yet, it is not uncommon for the family court to question and pathologize parents for needing such supports, implying that if, perhaps, parents organized themselves better they would not need ACS "assistance."

Too often, family court judges rubber stamp decisions made by family policing agents and fail to hold attorneys representing the family policing system accountable when their actions directly undermine due process and family reunification. In New York City, FCLS undermines parents' due process rights and unnecessarily and unconstitutionally prolong family separations by routinely failing to uphold its responsibilities as the prosecuting agency.

In practice, FCLS attorneys wait weeks, months or sometimes even years to seek necessary discovery. Likewise, when FCLS attorneys do obtain discovery, they regularly wait weeks and months to turn it over to our attorneys, sometimes even waiting until the eve of trial. This is true even for discovery that is in the possession of ACS caseworkers, including progress notes. Beyond delays in turning over critical discovery, FCLS regularly requests repeated adjournments when their witnesses do not appear to testify, sometimes because they simply

failed to subpoena the witness. It is also common practice for FCLS attorneys to come to court appearances (including court appearances specifically scheduled to discuss resolution and or family reunification) without the information necessary to move cases toward reunification, including information about the status of service participation and visitation. Worse yet, it is not uncommon for FCLS to report that ACS caseworkers have either failed to make or follow up with referrals for the services in ACS's own service plan for the family, despite being ordered by the Court to do so. Although the law enables the family court to compel ACS to uphold its responsibilities, more often than not, the family court gives ACS great leeway to "self-correct" at the expense of families.

Adjournments are regularly granted to family policing attorneys who have failed to obtain discovery, discuss settlement, or subpoena a witness for trial, or when their caseworker simply does not appear, causing unnecessary delays and preventing family reunification for parents who may have had to take off work and lose wages to appear in court. At the same time, there is little tolerance or allowance for parents when they have a last minute emergency or ask for an adjournment based on work or another commitment. Double standards like these are pervasive and an example of the racism experienced by families who must appear in New York's family courts.

When parents and their attorneys arrive prepared for court with reports and letters from the parent's service providers in an effort to move cases along, the family policing agency regularly claims that they will not agree to any expansion until they have personally spoken to the provider. Parents and their attorneys are regularly viewed with mistrust by both the family policing agency and the family courts, who often award the agencies additional time to speak with the parent's service providers. By law, family policing agencies are required to make reasonable efforts towards reunification, but they routinely fail to follow up with the service providers they require parents to attend, and the family court fails to hold the agencies accountable.

What this all adds up to is months or even years of unnecessary delay and prolonged family separation, as well as an increased burden on the court system as cases are repeatedly rescheduled to wait for what should be routine updates from the family policing agency. Our clients have also experienced egregious and lengthy family separations even in cases where ACS ultimately cannot support its allegations with evidence at trial. Even for the families that reunify in an early stage of the proceedings, living under the protracted surveillance, scrutiny, and control of the family policing system and family court is not without consequence or harm. Too often, we have seen parents put their lives and their families' lives on hold—quitting jobs, pausing pursuits of higher education, canceling family vacations—in order to comply with the demands of the family policing system and family court. While few things approach the level of trauma and harm left in the wake of government-enforced family separation, persistent, unconstrained government monitoring and surveillance–amplified by the threat of family

separation– throughout ACS's self-made court delays causes high levels of stress, anxiety, and fear for all members of the family.

Fundamentally, the family court system was not built to support struggling families. The solution cannot be to grow it by adding more judges and resources, but rather the government must invest in solutions that narrow the pathways to the family policing system. In an adversarial legal process, which requires families to affirmatively assert due process rights in order to be heard, an important way to meaningfully address the abuses described above is to increase the resources available to parents and their advocates from the moment that an ACS investigation begins through the reunification of their families. The most effective investments would be to provide parents with crucial information regarding their rights and ability to access counsel before cases come to court and to fully fund parent defender offices so that they can meet state caseload standards for adequate parental representation and provide timely defense to families.

III. The Family Courts Perpetuate Racism and Classism that Harms Families

If someone walked into any New York City family court 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, 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, prosecuted, 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 families in New York's family courts for nearly two decades and can come only to one conclusion: the family courts are constructed and managed in a way to perpetuate the same racism and bias that appears in every other stage of the family policing system. The culture of racism is pervasive to all those who appear in family court as it manifests in how litigations and our staff are treated in and outside of the courtroom, in the assumptions made about the families before the court, and in how the subjective language of the law is interpreted and applied with long lasting impact.

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. 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. The direct testimony of so many lived experts during this hearing illuminated these experiences.

On a regular basis our clients face the following harms and disregard for their humanity and dignity in family court: being called by generic labels like "mom," "birth mom," "dad," and "paramour," instead of by their actual names; the use of other dehumanizing language; cases being scheduled and called with no regard whatsoever of the parent's schedule, obligations, or

the arduous demands of court ordered services; 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 being subjected to the reliance on tropes and narratives deeply rooted in this country's history of racism, classism, and other forms of structural oppression.

From their first appearance in court, families are not looked at holistically, and are met with suspicion and contempt. For example, expressions of emotion by a 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. This perception is consistent with racist perceptions and tropes about poor families and families of color – that these parents love their children less, are not also singularly concerned with the wellbeing of their children, or are inherently dangerous to their children – 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" parents 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 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.

IV. The Broad and Subjective Language of the Law Applied in the 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 parent or caregiver's failure to "exercise a minimum degree of care." While the Court of Appeals defined "imminent," as "near or impending," 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 and the life experiences and biases of each individual jurist. 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. 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." The Court must also consider whether any orders could be put in place to mitigate the risk of harm to the child. 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. 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.

V. Recommendations: Putting Community First -- A Comprehensive Approach to Reshaping the Legal Landscape of Family Court

In order to shift the New York family court toward a court grounded in justice, fairness, and respect for the rights and integrity of the families it serves, the entire family policing system, family court included, must undergo transformative change. The harm and trauma resulting from the racism, bias, and lack of humanity that families are met with in the family court runs deep and spans generations. The court's practice and policies have too often been a source of division, pain and suffering, particularly for Black, Latine and Indigenous families who bear the brunt of disparities in the system. This is a reality that can no longer be ignored.

Foremost, New York must shrink the expansive reach of its family policing system, and vastly reduce the number of families that are targeted, surveilled, controlled and separated by the family policing system. Doing this depends on New York investing resources to systematically address the largest drivers of families into the family policing system—poverty and racism—and directly invest in programs and resources that have been demonstrated to provide real and lasting support to families. While divesting from New York's current system of family policing and redirecting funds from family policing directly into the communities targeted by the family policing system is the ultimate goal, there are numerous legislative and policy changes that will reduce the harm caused by the current system in the short term. To do this, we recommend the following:

A. Eliminate mandated reporting.

In 2022, 72.5% of reports to the State Central Register (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 refer 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 force frontline workers into a policing role that harms families, our state's resources would be better used by directly supporting families and professionals, and avoiding a need for reporting and investigation. As advocates and attorneys who have worked with thousands of families facing investigation and family separation due to mandated reporting, we know that the vast majority of reports and subsequent filings involve allegations of neglect, not abuse, and that often at the root of this alleged neglect is lack of access to basic needs.[24] In fact, research has shown that even a one dollar increase in the minimum wage results in a nearly ten percent decrease in reports of neglect.[25]

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 because of this reduction in reporting, 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.[26] Data from this period reveals that during this lockdown period, there was no rise in child abuse and no subsequent increase in reports.[27] The former Commissioner of the Administration of Children's Services himself testified that by all normal measures of child well-being, this unplanned reduction in mandated reporting and increase in support to families

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[24] NYS Unified Ct. Sys. Div. of Tech. & Court Research, Family Court Caseload Activity, https://app.powerbigov.us/view?r=eyJrIjoiMTExOWU2ZWEtNWMyNi00MGU1LTllMmYtODY4OTU5MDA4YjJmIiwidCI6IjM0NTZmZTkyLWNiZDEtNDA2ZC1iNWEzLTUzNjRiZWMwYTgzMyJ9 (last visited Oct. 4, 2008) (for 2023 YTD, noting 17,990 neglect cases filed and 1,410 abuse cases filed).

[25] 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); *see also* 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).

[26] Arons, *supra* note 42.

[27] *Id.*

did not lead to a reduction in safety.[28] In fact, given clear evidence that investigations and family separation are traumatic for children—this reduction of reporting in and of itself may have in fact increased safety for children.

This research, and our collective lived experience during the COVID-19 pandemic, shows that by divesting from systems of mandated reporting and investigation, and investing in tangible support for families, we can simultaneously decrease harm to children caused by these harmful systems, and increase safety. These supports can include direct cash payments; investments in long term, safe, and affordable housing and child care; provision of food, clothing, furniture; investments in community-based mutual aid networks; and educating medical and mental health providers in ways to connect families directly to these resources.

Beyond ending the mandate currently restricting helping professionals, increasing investment in supportive resources, and connecting professionals to these resources, the committees should:

- initiate and support any efforts to remove all penalties and fines for a failure to report a family. The fear of this punishment - incarceration, loss of licensure, and financial penalties - is often a driver of reporting families;
- oppose all efforts to expand categories of mandated reporters;
- support efforts to repeal CAPTA, which incentivizes maintaining this harmful system of mandated reporting and investigation; and
- support efforts to stop New York State from accepting any funding from the federal government received under CAPTA, which would relieve New York State from the obligation of complying with the legislation's reporting requirements.

B. 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 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.

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[28] Michael Fitzgerald, *No Evidence of Pandemic Child Abuse Surge in NYC, But Some See Other Crises for Child Welfare System*, The Imprint (June 15, 2021), 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; *see also* Melissa Friedman & Daniella Rohr, *Reducing Family Separations In New York City: The Covid-19 Experiment And A Call For Change*, 123 Colum. L. Rev. 52 (2023), *available at* https://columbialawreview.org/wp-content/uploads/2023/03/Friedman-Rohr-Reducing_family_separations_in_new_york_city.pdf.

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.

C. Pass legislation that will narrow the pathways to the family policing system and ensure that New York courts protect and provide full Constitutional due process rights to families.

We urge the committees to actively champion and the Senate to pass the following vital legislative changes:

Anti-Harassment in Reporting Act (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. These investigations can be frightening to children and have serious consequences for families. ACS's willingness to accept and investigate these reports, despite their anonymity and lack of reliability, tips the culture of the agency in the direction of prosecution instead of support, creating a burden that drains desperately-needed government resources from families and communities that would benefit more from support than investigation.

This legislation is a necessary step in safeguarding the reporting process of suspected child abuse or maltreatment. Requiring reporters to provide their name and contact information helps prevent the harmful practice of anonymous reporting, which can be weaponized as a form of domestic harassment or to settle personal grievances. By promoting transparency and accountability, we can reduce the misuse of anonymous reporting, ensuring that the reports made to the SCR are based on genuine concerns, not ulterior motives.

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.

Informed Consent in Drug Testing (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 and or verbal drug screening pregnant people, new parents, and their newborns. Ensuring that health care providers obtain specific and informed consent before drug testing or verbally drug screening new parents and newborns is a fundamental safeguard of individual rights and bodily autonomy. New York's current “test and report” practices disproportionately impact Black and Latine communities, exposing families to the unnecessary violence of family separation and deterring pregnant individuals from seeking essential pre- and perinatal health care. This legislation rectifies a critical breach of informed consent and protects the rights and well-being of pregnant people 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. 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. 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.

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 and we urge the committee to support parents' right to informed consent.

Family Miranda 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.

This legislation is a matter of transparency and justice. It requires workers to advise parents and caretakers of their rights at the start of an investigation. It does not create new rights but ensures that parents are aware of the rights already guaranteed by New York State law and the United States Constitution. This simple act of notification empowers families to understand their rights within the complex family court system, fostering a more equitable and just process.

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. 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. 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.

PromPT Stability Act (A3750A/S3066)

The Promoting Pre-Trial (PromPT) Stability Act (S3066/A3750) codifies the First Department's decision in *Crawford* v. *Ally*[29] into law, and ensures that when a New York criminal court issues a temporary order of protection (TOP) against a charged party, the court complies with it's due process obligation to hold a "prompt evidentiary hearing" to determine whether a full TOP is necessary and appropriate during the pendency of the criminal case. The need for PromPT is critical. Every day, New Yorkers are kicked out of their homes or separated from their families because of TOPs. These orders are issued in virtually every case involving a witness, but because the orders are issued shortly after arrest, when judges have little information, they must rely almost entirely on the unverified reports of law enforcement. Worse yet, TOPs typically last until the underlying case resolves, which can take months or even years. This common practice puts New York's most vulnerable community members at risk of homelessness and family separation, while also depriving them of significant liberty and property interests.

To ensure that the due process rights of charged parties across New York State are respected, the legislature must pass PromPT, codifying the right to a hearing to determine whether a full TOP is necessary and appropriate during the pendency of a criminal proceeding, and clarifying the key details of the hearings in order to establish a uniform application of the decision across the State. The PromPT Act is critically important when full TOPs result in the

[29] 197 A.D.3d 27 (1st Dep't 2021).

separation of parents from their children. PromPT would allow criminal court judges to respond to the unique needs of a particular family, while also allowing a family to work out its differences, and teenagers and young adults to stay in their family's home. While PromPT would apply in all situations involving a TOP, a heightened standard exists when a child is separated from their parent(s). Family Court Act §§ 1027 and 1028 and the Court of Appeals have long made clear that a court may only separate a family after making a finding that there is an "imminent risk to the child's life and health" if they remain with their parents, and after balancing any risk against the harm of family separation.[30] We have worked with dozens of families who have been separated because of these full TOPs and without any legal mechanism by which to reunify—prolonging the trauma and harm of family separation. This legislation would allow those families to come before the court and seek legal recourse.

D. Reject legislation that undermines the fundamental due process rights of New York families, most especially low-income, Black, Latine, and socially marginalized families.

Kyra's Law (S3170A/A3346A)

The legislature must oppose Kyra's Law, which would amend Domestic Relations Law § 240. While born out of unimaginable tragedy, it raises serious due process concerns for parents and their children. The legislation circumvents existing legal systems and strong safeguards that appropriately balance allegations of child maltreatment and family violence, while ensuring due process protections for the family. It also risks making the legal process ripe for misuse by allowing litigants to make false or exaggerated allegations of abuse and violence to expedite orders of sole custody, or to drastically and unfairly limit contact between a child and parent.

We are very concerned that this bill undermines the best interest of the child analysis by elevating and emphasising allegations of domestic violence and child abuse over all other aspects of parenting and the parent-child relationship. The best interest determination enables a holistic assessment that requires the judge to consider myriad factors that weigh on the health and wellbeing of a child, including any alleged family violence. By reducing this meaningful assessment to focus entirely on allegations of domestic violence and child abuse, this bill institutes a myopic focus on alleged family violence, which is only one of many factors that impact child wellbeing, and should therefore not be considered in isolation.

There are also several provisions in this bill that risk further marginalizing parents accused of violence, most especially low-income parents and Black and Latine parents accused of violence. This bill allows a court to limit or restrict a parent's custody or visitation with their child where it has been deemed "necessary to avoid imminent risk to the child's life or health."

[30] *Nicholson* v. *Scoppetta*, 3 N.Y.3d 357 (2004).

The bill is silent on what provisions and supports, if any at all, will be available to support supervised visitation where appropriate.

E. Family defense: invest in keeping families together.

New York has long recognized a parent's right to counsel in Article 10 proceedings. In a pioneering 1972 decision, *Matter of Ella B.*, 30 N.Y.2d 352, the New York Court of Appeals recognized the equal protection and due process right to indigent parents to assigned counsel in child neglect and abuse cases. Three years later, sections 261, 262, and 1120 of the Family Court Act codified a broad parental right to counsel. Additionally, numerous provisions throughout Article 10 of the Family Court Act address implementation of the parental right to counsel in these proceedings.

Despite decades of public hearings and reports describing the crisis in family court representation and the need for an investment in legally mandated representation, New York has still failed to make a sufficient investment in families facing separation under Article 10 of the Family Court Act. These families are facing the removal of their children, often because they are living in deep poverty or facing obstacles to accessing needed supportive services. Family defense attorneys can make the difference by protecting the legal rights of parents and their families while also providing social work assistance to help address service and support needs for the whole family that allow families to remain together rather than relegating children to the foster system.

As early as 2000, New York City's Public Advocate issued a report outlining the crisis in the representation of parents in Article 10 proceedings highlighting the harm to children as well as parents.[31] Later that same year, the Appellate Division First Department's Committee on Representation of the Poor held public hearings and invited experts to examine the quality of government-funded legal representation of the poor and issued a report in 2001 which concluded, among other findings, that low-income parents did not have sufficient legal representation. Although New York City changed its model of parental representation to include interdisciplinary defense practices, there has never been sufficient financial investment to assure all low-income parents receive the robust interdisciplinary legal representation needed to keep their families together. Even with these changes, New York City providers are still operating at less than 50% of the funding needed to meet standards and provide appropriate representation for clients. In other parts of New York State, the situation is even more dire, where some counties are providing only a tiny percentage of what is required.

Nearly two decades later, the 2019 *Interim Report to Chief Judge DiFiore* describes the crisis in New York's parental legal representation and made six initial recommendations, including timely access to counsel, state funding for parental representation, and the need to

[31] Mark Green, *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Welfare Proceedings* (2000).

reduce caseloads among family defense attorneys.[32] In June 2021, the New York State Office of Indigent Legal Services (ILS), responsible for overseeing the quality of parent representation in New York State, released *Caseload Standards for Parents' Attorneys in New York State Family Court Mandated Representation Cases* to determine appropriate maximum caseload standards.[33] Current caseloads across the state are much higher than these recommendations and a vast influx of funding is needed to ensure that these standards are met.

By failing to adequately invest in parent representation, the State is also losing an opportunity to save money while helping families stay together. A 2019 study of the BxD, BDS and CFR found that interdisciplinary teams representing parents at risk of losing their children, made up of attorneys, social workers and parent advocates, reduced time children spent in the foster system by 4 months without any increased risk.[34] The study calculated the cost savings in New York City alone at $40 million per year.[35]

Based on these caseload standards, ILS is requesting that New York State's budget for FY25 include $50 million for attorneys for cases in family court, incrementally expanding over the next three years to a baseline of $150 million, including to $100 million in FY26, and to $150 million in FY27. Our organizations support this request and believe its key that this money be baselined and made available to ILS.

These additional resources would fulfill the recommendations of the Chief Judge's Commission on Parental Representation designed to provide parents quality representation. This model of increasing resources predictably over five years provides the type of stability and commitment that is needed so that offices can hire and retain staff and plan for the future in terms of physical space, supervision and training and build programs that serve clients, such as social work services, which support the families and reduce the costs of foster placements.

Despite decades of research, hearings and reports describing the crisis in Family Court representation and the need for an investment in these services, New York has failed to make a meaningful investment in families facing separation under Article 10 of the Family Court Act. Family defense attorneys can make the difference by assuring the legal rights of parents are protected while also providing social work assistance to parents struggling with alcohol or drug

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[32] Commission on Parental Legal Representation, *Interim Report to Chief Judge Defiore* (February 2019), http://ww2.nycourts.gov/doc/15446.
[33] Office of Indigent Legal Services, *Caseload Standards for Parents' Attorneys in New York State Family Court Mandated Representation Cases* (June 4, 2021), https://www.ils.ny.gov/files/Caseload%20Standards%20Parents%20Attorneys%20NYS%20Family%20Court.pdf.
[34] Lucas A. Gerber, Yuk C. Pang, Timothy Ross, et. al., *Effects of an Interdisciplinary approach to parental representation in child welfare*, Children and Youth Services Review 102, 42-55 (2019); *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.
[35] Gerber, Pang, Ross, et. al., *Effects of an Interdisciplinary approach*, at 53.

use, mental health issues or other problems that can be addressed to keep families together rather than relegating children to the foster system.

F. Provide legal representation to parents during a family policing investigation.

Timely representation of parents during family policing investigations stabilizes families and prevents court involvement and family separation. It has been recognized nationally as an effective form of primary prevention. In 2018, the federal Children's Bureau released guidance that recognized that "[h]igh quality legal representation for parents prior to and after contact with the child welfare system is also a critical component of a robust prevention continuum."[36] The report named the Detroit Center for Family Advocacy, which provided pre-petition representation to parents[37] as an example "of programs that support families through primary prevention."[38] None of the 110 children served over the course of the Center's three-year pilot entered the foster system.[39] Based on its own investigation, and understanding the Children's Bureau's recommendation, the Commission on Parental Legal Representation's 2019 Interim Report to Chief Judge DiFiore, recommended that parents be given access to counsel during a family policing investigation.[40]

> 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 reduce the disproportionate percentage of children of color in New York's foster care system.[41]

The federal Children's Bureau addressed the importance of timely representation again in 2021, when they clarified that revised 2019 policies made Title IV-E funds available for high quality legal representation to parents, including where there is no court involvement.[42] According to the Children's Bureau, "[e]valuations demonstrate that legal advocacy in times of family vulnerability can help stabilize families and reduce the need for more formal child welfare system involvement, including foster care."[43]

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[36] *Reshaping Child Welfare to Focus on Strengthening Families Through Primary Prevention of Child Maltreatment and Unnecessary Parent-Child Separation*, at 5, ACYF-CB-IM-18-05, Children's Bureau, ACF, US DHHS (Nov. 16, 2018), https://www.acf.hhs.gov/sites/default/files/documents/cb/im1805.pdf.
[37] *Id.*, at 19.
[38] *Id.*
[39] *Id.*
[40] Commission on Parental Legal Representation, *Interim Report to Chief Judge Defiore*, 16 (February 2019), http://ww2.nycourts.gov/doc/15446
[41] Id., at 16.
[42] *Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth who are in Foster Care, Candidates for Foster Care and their Parents and to Promote Child and Family Well-being*, ACYF-CB-IM-21-06, Children's Bureau, ACF, US DHHS, 10 (January 14, 2021), https://www.acf.hhs.gov/cb/policy-guidance/im-21-06.
[43] Id., at 11.

In 2021, the New York State Office of Indigent Legal Services recognized the importance of timely defense when it issued *Standards for Determining Financial Eligibility for Assigned Counsel*, which called for the presumptive eligibility for counsel for parents experiencing a family policing investigation.[44] Following the promulgation of those *Standards*, the Office of Court Administration issued a request for public comment on a new Section 205.19 of the Uniform Rules of the Family Court, which would allow counsel to be provided during a family regulation investigation.[45] The Rule was adopted and is in effect as of September 28, 2022.[46]

While the assignment of counsel during an investigation is now permitted under the Uniform Court Rules, in current practice, parents in New York State with family policing involvement who cannot afford to hire counsel are not provided assigned attorneys until the local family policing agency 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 family policing workers, 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 formal support. In contrast, the family policing agencies have access to legal representation throughout their investigation. The result is catastrophic for the families targeted by the family policing system–families that are invariably low-income and predominantly Black and Latine. Too many cases are filed unnecessarily and too many children are unnecessarily traumatically separated from their parents.

Since 2019, the family defense organizations have been providing timely representation to parents in New York City. Collectively, we have **prevented a filing in family court more than 80% of the time** and **over 90% of the children involved in investigations where we represented their parents remained with their families and never entered the foster system**. Parents contact our offices directly at a very vulnerable time for their family. We are able to explain their rights and offer support throughout the investigation by ACS. Parents' ability to consult with a social worker, attorney, and parent advocate that understands the system and who will listen and connect them to resources they have specifically identified is essential.

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[44] New York State Office of Indigent Legal Services, *Standards for Determining Financial Eligibility for Assigned Counsel* (February 16, 2021), https://www.ils.ny.gov/files/Eligibility%20Standards%20Final%20021621.pdf.
[45] New York State Office of Court Administration, *Request for Public Comment on Adopting a New Section 205.19 of the Uniform Rules of the Family Court to Develop Uniform Standards of Eligibility for Assigned Counsel The Would Apply in All Family Court Proceedings* (June 3, 2022), https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/Family-court-rule-June-3.pdf.
[46] *Administrative Order of the Chief Judge of the Courts* (September 28, 2022), https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO220.pdf.

The success of timely representation is based on our ability to partner with parents as trusted advocates and identify and address each families' particular needs. Parents facing a family policing investigation report considerable mistrust of investigators[47] because they feel threatened by family separation and family court involvement from the initial knock on the door. Timely defense teams at our organizations, can truly partner with parents to identify the specific concerns the parent has and refer the family to resources and services that would most assist the family and avoid the need for further family policing involvement. Our teams are able to push back against unnecessary and formulaic service referrals from ACS and instead focus on supporting each families' individual and unique needs. Our offices also have attorneys to assist parents with housing, public benefits, immigration, and criminal matters, which are often the cause of family instability that leads to family policing involvement.

Families should not have to enter this traumatic and punishment-oriented system to access supportive resources for their families. While we believe that families should not be targeted by the family policing system—when parents do face an investigation, family separation, and prosecution in family court—robust and timely access to confidential legal and social support reduces the likelihood of family separation and court involvement, and ensures more individualized and impactful service planning.

Our timely representation teams are able to utilize our knowledge and community connections to ensure that the parents we serve are successfully connected to available resources and able to avoid formal and long term family policing involvement. We urge the Senate to think of our programs as a model statewide and to guarantee timely access to representation for parents. Our impactful work in timely representation saves money and more importantly, prevents unnecessary separation of families.

G. Hold the family court accountable to change the practice and culture of family court to respect the rights, dignity, and autonomy of the families it serves.

The powerful testimony given by numerous parents impacted by the family court regarding the racism, discrimination, injustice, and dehumanization they experienced in family court made clear that the court must go beyond reform measures it has implemented in the past, including anti-bias training and improving court signage. We echo these calls and offer the following recommendations to ensure that the family court respects the rights, dignity, and autonomy of the families it serves.

- Center the voices, experiences, and perspectives of parents in proceedings about their children.

[47] Kelly Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, Social Forces, Vol. 97, Issue 4, p. 1785-1810 (June 2019), https://academic.oup.com/sf/article-abstract/97/4/1785/5113162?redirectedFrom=fulltext

- Acknowledge that children in Article 10 proceedings belong to a family unit and do not exist in a vacuum detached from their parents, extended family members, caretakers, and communities.
- Abolish current "standards and goals" for family court judges which results in prioritizing disposing of matters rather than prioritizing the unique needs of each family.
- Require that judges adhere to statutory timelines for emergency hearings that prevent or end family separation, reverse all local court memoranda unlawfully prioritizing court calendars over the rights of families, and establish an emergency hearing part that is also available after 4:30 PM, or other mechanisms to ensure that these hearings are heard in an expedited but meaningful way.
- Ensure equal access to the court by requiring judges to schedule and hear orders to show cause and motions filed by defense attorneys according to the CPLR.
- Require the use of real names and person-first language in the courthouse that is respectful of the lives, humanity, familial relationships, and responsibilities of the people before the court.
- Enhance and expand interpretation services for additional languages beyond Spanish.
- End the daily acts of racism and discrimination by judges and court employees toward Black and Brown staff and people before the court. Steps towards this goal should include regularly scheduled surveys and feedback sessions with the supervising judges in the boroughs regarding the micro- and macro-aggressions experienced by Black and Brown staff and people 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 supervising judges or their inaction in response to legitimate complaints.

The recommendations provided here offer a clear roadmap to transform the family court and the family policing system more broadly, shifting away from the racist, biased, and punitive practices that have plagued the court for so long, and toward practice rooted in equity, family integrity, and justice. We call upon the Committees on Judiciary and Children & Families, and indeed the entire Senate to be the champions of this transformation, to hold the family court accountable for its past and continuing injustices, and to lead the charge for a more just and compassionate system. Let us prioritize the preservation and reunification of families over the perpetuation of harm.

We are grateful to the Senate Committees on Judiciary and Children & Families for hearing our concerns regarding the New York State family court, and taking steps to transform the current system and its harmful outcomes. We welcome the opportunity to work with the committees to move this important work forward.

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