ORAL ARGUMENT NOT YET SCHEDULED

No. 24-3042

IN THE

United States Court of Appeals for the Second Circuit

K.W., ON BEHALF OF HIMSELF AND HIS INFANT CHILD, K.A.,

Plaintiff-Appellant,

v.

THE CITY OF NEW YORK, AMAR MOODY, THE CHILDREN'S AID SOCIETY, AND BRIAN GOMEZ,

Defendant-Appellees.

On Appeal from the United States District Court
for the Southern District of New York, No. 1:22-cv-08889
Before Naomi Reice Buchwald.

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS, CIVIL RIGHTS CORPS, NEIGHBORHOOD DEFENDER SERVICES, MOVEMENT FOR FAMILY POWER, CENTER FOR FAMILY REPRESENTATION, RISE

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**Application for admission pending*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* certify that none of the *amici* has a parent corporation or publicly held corporation that owns ten percent or more of its stock or membership interests.

Dated: April 9, 2025

By: */s/ Baher Azmy*
BAHER AZMY

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INTEREST OF *AMICI CURIAE*[1]

Amici, the Center for Constitutional Rights, Civil Rights Corps, Neighborhood Defender Service, Movement for Family Power, Center for Family Representation, and Rise are civil rights organizations and organizations representing families impacted by the Administration for Children's Services (ACS) and that witness and experience the significant role that racism plays in ACS's operation. The child welfare system, which advocates have aptly termed "the family policing system," or the "family regulation system," devalues Black families with the threat of removing and separating children from their families. *Amici* agree with Appellants that meaningful Fourth Amendment and procedural due process protections should apply to cases such as K.W.'s because such constitutional safeguards are important to securing Black families' privacy and maintaining the paramount value of family integrity, as guaranteed by the Fourteenth Amendment.

Amici write to highlight for the Court how racism has come to pervade family policing systems (within ACS and across the country), beginning from its roots in the antebellum separation of enslaved families to its present manifestation in the targeted surveillance and regulation of predominantly Black families. *Amici* thus

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[1] No counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus or her counsel contributed money that was intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

seek to underscore that the Fourth Amendment standard Appellant advocates for would serve as a bulwark against the racial discrimination that has long driven child protective services. A fuller description of *amici*'s identity and interests are included in Appendix A to this brief.

SUMMARY OF ARGUMENT

On March 8, 2017, the Administration for Child Services ("ACS") removed K.A, then six days old, from the custody of his father, K.W., the appellant in this case, who at no point was accused, let alone convicted of, abusing or neglecting K.A. KA. was forcibly removed pursuant to New York's emergency removal procedures, which permits ACS to enter a home and remove children from their families absent a court order or a warrant. Later the same day, the family court entered an order remanding K.A. to the care and custody of ACS, where he would remain in foster care for the next three and a half years. During that time, ACS put K.W. through an agonizing and Kafkaesque maze to regain custody of his child.

K.W. and K.A. are both Black and their experience is far from an anomaly in New York's Black community. Black children, who comprise just 14 percent of the City's population, make up a staggering 54 percent of emergency removals – the purportedly exceptional extrajudicial process used in this case. Meanwhile, white children, who make up 37 percent of the New York population, are the subjects of only 4 percent of emergency removals. Black children are removed from their

families at twice the rate of white children and are 1.5 times more likely to be removed from their parents than Latinx children, even though Black and Latinx families face similar rates of investigation. Studies have shown that these disparities cannot be explained by higher Black poverty rates or rates of child maltreatment.

Considered in its historical perspective, this reality should not come as a surprise. The forced separation of Black families is a through-line in American history, beginning with the Transatlantic slave trade, continuing through Reconstruction, and reinventing itself through the modern family regulation system developed in the 20th century. K.W.'s ordeal, and the broader trends it reflects, make plain that New York's family regulation system stems from this historical legacy.

In New York, the importance of a robust Fourth Amendment standard that applies to the removal of a child without parental consent or judicial authorization, as well as procedural due process protections that pertain to such emergency removals, would limit the disproportionate removal of Black children from their families. Understanding the racialized legacy of family policing and the resulting racial inequities endemic to today's child welfare systems is important to appreciating how a robust Fourth Amendment and procedural due process standard could help safeguard against experiences like K.W.'s and lessen the unwarranted and discriminatory removal of Black children from their parents.

ARGUMENT

I. THE RACIALIZED HISTORY OF FAMILY REGULATION

It is no accident that ACS—like other child welfare agencies across the country—disproportionately targets Black families. The "legalized breakup" of Black families has its roots in American slavery, which was fully operationalized upon the regularized, forced separation of Black families through the horrors of the Transatlantic slave trade and the auction block.[2] After emancipation, Southern states used the Black Codes to re-enslave Black children in the name of child welfare. Finally, in the 20th century, the government welfare efforts that initially excluded Black families across the country, morphed into the surveillance and policing that disproportionately targets Black families today. Recognizing the role of race in these antecedents is necessary to understanding the race discrimination endemic to contemporary family policing and the need for constitutional checks on ACS's conduct.

[2] Dorothy Roberts, *Torn Apart* 102 (2022).

A. Antebellum Separation of Enslaved Families

> *I have borne thirteen children, and seen most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't I a woman?*
>
> - Sojourner Truth[3]

The profound devaluation of Black families' integrity is as old as the country itself; and our modern insistence on ensuring constitutional protection of family units derive from abolitionist efforts to end the separation of enslaved families, and is codified in the Reconstruction Amendments. Forced family separation was essential to the maintenance of chattel slavery in the United States from 1619 until 1865. The practice itself began with the kidnap and separation of parents and children in Africa for transport across the Atlantic Ocean. Once in the United States, an enslaved person's life was marked by the "ever-present possibility of irremediable physical separation,"[4] through the horrors of the auction block and through the rape and forced procreation inflicted on enslaved women, to facilitate the subsequent sale of enslaved children.[5] Josiah Henson described the panic endured by enslaved families at the auction block: "the knowledge that all ties of the

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[3] Sojourner Truth, Address at the Women's Rights Convention, Old Stone Church (1851), available at https://www.nps.gov/articles/sojourner-truth.htm.

[4] Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* 99 (1997).

[5] Dorothy Roberts, *Torn Apart* 90 (2022) ("For four hundred years, most Black children in America belonged to enslavers who had absolute discretion to sell or give them away[.]").

past are to be sundered; the frantic terror at the idea of being sent 'down south;' the almost certainty that one member of a family will be torn from another; the anxious scanning of purchasers' faces; the agony at parting, often forever, with husband wife, child."[6]

In Maryland and Virginia alone, about one third of enslaved children experienced family separation when they were sold away from their parents, sold with their mother away from their father, or when their parents were sold away from them.[7] Even when enslaved families remained together, "Black parents were denied authority over their children" under slavery laws that "installed the white patriarch at the head of an extended plantation family[.]"[8] This "abrogation of the parental bond" through separation or subjugation "was a hallmark of the civil death that United States slavery imposed."[9]

For antebellum abolitionists and the authors of the Thirteenth and Fourteenth Amendments, family separation was "the greatest perceived sin of American

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[6] *Id.* at 89

[7] Heather Andrea Williams, *How Slavery Affected African American Families*, National Humanities Center, https://nationalhumanitiescenter.org/tserve/freedom/1609-1865/essays/aafamilies.htm (last visited April 9, 2025)

[8] Roberts, *supra,* at 94.

[9] *Id.* at 94, citing Davis, *supra*.

slavery."[10] In fighting this sin, abolitionists fortified the idea that family unity and parental autonomy are central human entitlements. Reconstruction lawmakers "shared a passionate commitment to the stability of family life as a badge of freedom"[11] and Congressmen were explicit that the Thirteenth and Fourteenth Amendments would ensure the constitutional right to family integrity for all.[12] The Due Process Clause right "to establish a home and bring up children"[13] is a legacy of the abolitionist intention to preserve the sanctity of the family unit. As renowned

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[10] James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 37 (1988); *see also* Harriet Beecher Stowe, *Uncle Tom's Cabin* 112 (1852), ("The most dreadful part of slavery, to my mind, is its outrages on the feelings and affections – the separating of families, for example."); *see also Declaration of the Anti-Slavery, Convention, Assembled at Philadelphia* (1883), available at https://www.loc.gov/resource/llst.052/?sp=6&st=image (last visited April 9, 2025), (advocating for emancipation in part because of indignity that families "were ruthlessly torn asunder – the tender babe from the arms of its frantic mother").

[11] Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 87 (1988)

[12] *Cong. Globe,* 38th Cong., 1st Sess. 1324. (1864) (remarks of Massachusetts Sen. Wilson: "When this amendment to the Constitution be consummated, the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child will be protected by the guardian spirit of that law"); *Cong. Globe,* 38th Cong., 2d Sess. 193 (1865), (remarks of Iowa Rep. Kasson, explaining the Thirteenth Amendment would protect "the right of the father to his child – the parental relation"); *Cong. Globe,* 38th Cong. 1st Sess. 2990 (1864) (remarks of Illinois Rep. Ingersoll, that Thirteenth Amendment would ensure the inalienable right of the Black man "to the endearments and enjoyment of family ties' and no white man has any right to rob him or infringe upon any of these blessings"); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition[.]").

[13] *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (cleaned up).

legal scholar Dorothy Roberts writes, "just as the child welfare system can trace its disruption of Black families to slavery, contemporary notions of family liberty can trace their roots to Black people's resistance against this form of state violence."[14]

While Southern states were forcibly separating enslaved families, Northern states were establishing some of the first institutions to address the issue of "poor and ragged children."[15] In an attempt to protect children from the dangers of adult almshouses and prisons, orphanages were established for impoverished and neglected children, and youth institutions, called "Houses of Refuge," for children labeled delinquent.[16] Both institutions initially excluded Black children from their efforts.[17] Once these institutions began admitting Black children they became segregated and Black children experienced far worse outcomes than their white peers. Black children admitted to the New York House of Refuge, for example, endured longer sentences, harsher treatment, and disproportionately higher death rates compared to white children.[18] This supposedly well-intentioned (mis)treatment

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[14] Roberts, *supra* at 96.
[15] James Bell, *Repairing the Breach: A Brief History of Youth of Color in the Justice System*, W. Haywood Burns Institute, 5 (2011), https://courts.ca.gov/sites/default/files/courts/default/2024-12/btb24-4h-1.pdf.
[16] *Id.* at 7; *see also* Roberts, *supra* at 110-13.
[17] Bell, *supra* at 5; *see also* Roberts, *supra* at 112-13.
[18] Bell, *supra* at 5.

of Black children was an early iteration of the "state violence inflicted in the name of child protection."[19]

B. Continued Separation in the Reconstruction Era

> *Please don't let Mr Suit take me back for I have a mother and father (named Sylva and Abraham Holmes) who would care for me if they knew where I was.*
>
> - Carter X. Holmes, age 12. [20]

During the Reconstruction Era, states increasingly began framing the removal of children from their homes in terms of the "welfare" language we are more familiar with today. In the South, Jim Crow laws leveraged ideas of "welfare" to continue the practice of forced separation of Black children from their families. Under apprenticeship provisions of antebellum laws, which allowed the hiring of Black youth who were deemed orphaned, white planters essentially "re-enslaved" thousands of children within days of emancipation.[21] The Black Codes, enacted in Southern states in 1865 and 1866, empowered courts to order the forced separation of Black families whenever the court deemed such separation in the child's best interest—which is the governing standard in most family court proceedings today.[22]

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[19] Roberts, *supra* at 23-24.
[20] *Maryland Black Apprentice to the Freedmen's Bureau Superintendent at Washington, D.C.*, Reconstruction 360, https://www.reconstruction360.org/the-black-codes/documents/ (last visited April 9, 2025).
[21] Roberts, *supra* at 97, 99.
[22] *Id.* at 97.

Under these laws, Black children were "bound out" to work for plantations over their parents objections if courts "found the parents to be unfit, unmarried, or unemployed"[23] This "court-ordered displacement of free Black children into strangers' homes" is "the historical bridge that connects state disruption of Black families under the antebellum slavery system with state disruption of Black families under the twentieth-century foster care system."[24]

In the North, the nascent welfare charities of the early 1800s excluded Black children. As European immigrants arrived to urban centers hit by economic recession, charities were established for the purpose of "rescuing" white children from the poverty and perceived neglect of their parents.[25] One approach to "saving" white children was to place them in private foster homes, which were thought to provide "wholesome" environments, though the children often labored for their foster families in exchange for their keep.[26] Black children by in large were excluded from this approach to "child saving," and were instead disproportionately labeled delinquents and relegated to the nascent juvenile justice system.[27]

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[23] *Id.* at 97 (internal citation omitted).
[24] *Id.*
[25] *Id.* at 110-12.
[26] *Id.* at 110-112.
[27] *Id.*; *see also* Bell, *supra,* at 10 ("From the juvenile court's inception, Black youth were overrepresented in caseloads" and "substantially underserved by the community-based agencies and services contracted to assist youthful offenders.").

C. The 20th Century and the Birth of the Contemporary Family Regulation System

> *We were 'state children,' court wards; [the judge] had the full say-so over us. . . . Nothing but legal, modern slavery—however kindly intentioned.*
>
> - Malcolm X[28]

The 20th Century saw a transition from societal reliance on private charities to state administration of child welfare endeavors. These state programs, although initially intended as a means to *keep* families together, morphed into an apparatus of state control as soon as Black families began receiving welfare at higher rates.

For the first half of the 20th century, child welfare services expanded and transitioned from private, charitable endeavors to state-funded programs that, like their charitable predecessors, excluded Black children and families.[29] The first state-level efforts, known as Mother's Pensions, were enacted to provide government aid to "deserving" husbandless mothers—white, widowed, or unmarried women with children.[30] This aid was intended to prevent the dissolution of fatherless (white)

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[28] Malcolm X and Alex Haley, *The Autobiography of Malcolm X* 12-13, 21 (1985).
[29] Emilie Stoltzfus, *Child Welfare Programs: A Timeline,* Congressional Research Service (June 3, 2021), https://www.congress.gov/crs-product/IF11843 (Note that the original Social Security Act authorized grants to states for Child Welfare Services beginning in 1935).
[30] Roberts, *supra* at 115 (citing a 1931 national survey showing that 96 percent of recipients of state welfare were White, while only 3 percent were Black).

families through child removal, and to provide support to women so they could stay home with their children instead of working outside the house.[31]

Black women were barred from accessing this aid. In some instances, administrators failed to establish state-based programs in areas with large Black populations or distributed benefits according to standards that were designed to disqualify Black mothers.[32] Black exclusion continued with the federal Aid to Dependent Children (ADC) program, which passed as part of the New Deal, and provided federal assistance for "deserving", *i.e.*, white, women during the Great Depression. Black women were excluded from the ADC program through "discretionary eligibility standards," for the explicit purpose of keeping them in the workforce and laboring for white families, rather than at home caring for their own children.[33] As a result of this systemic exclusion, "Black people relied primarily on

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[31] John E. Hansan, *Widows Pensions: An Introduction,* VCU Libraries Social Welfare History Project (January 20, 2011) https://socialwelfare.library.vcu.edu/programs/widows-pensions-an-introduction/, (President Theodore Roosevelt stated in a special message to Congress, "Surely poverty alone should not disrupt the home. . . . The widowed or deserted mother, if a good woman, willing to work and to do her best, should ordinarily be helped in such fashion as will enable her to bring up her children herself in their natural home. Children from unfit homes, and children who have no homes, who must be cared for by charitable agencies, should, so far as practicable, be cared for in families.").

[32] Roberts, *supra,* at 115.

[33] *Id.* at 115.

extended family networks and community resources" to care for children whose parents were unable to throughout the first half of the 20th century.[34]

1. From Exclusion to Surveillance and Separation

By the 1960s, the Great Migration and Black freedom struggle opened state welfare systems to Black families. Those Black families who migrated North gained access to existing welfare systems, while the Civil Rights Movement, National Welfare Rights Organization (NWRO) and attendant legislation made it more difficult for Southern states to deny Black families welfare services.[35] But this was a "Pyrrhic victory": as more Black families began receiving benefits, states began surveilling Black families or removing Black children from the rolls.[36]

In response to the increasing numbers of Black families accessing government welfare, many states, particularly in the South, changed eligibility and "suitability" requirements to exclude and surveil Black women and children and punish Black communities for their civil rights gains.[37] States passed eligibility requirements re-defining common law marriages as "illicit relationships" and denying benefits under "man in the house rules" to unwed mothers suspected of living or having a sexual

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[34] *Id.* at 114.
[35] *Id.* at 115-16; *see also* Alan Detlaff, *Confronting the Racist Legacy of the American Child Welfare System: The Case for Abolition* 57 (2023).
[36] Roberts, *supra,* at 115.
[37] *Id.* at 116.

relationship with a man.[38] Children born out to unmarried parents were denied benefits and purged from the welfare rolls. As a result of such laws, in Louisiana for example, over 98 percent of the roughly 22,500 children removed from the state's welfare rolls in the early 1960s were Black.[39]

These new eligibility requirements gave social service workers increased power to raid and surveil Black families to look for evidence of men in the home and to remove Black children.[40] Black women deemed ineligible to receive benefits were pressured by case workers to "voluntarily" give up their children to relatives or face being charged with neglect.[41]

While the initial purpose of government welfare had been to prevent the separation of white children from their families, as more Black families filled the rosters, policy began to shift toward separating families receiving welfare. The federal "Flemming Rule," announced in 1961, accelerated the trend toward family separation.[42] Under that Rule, states could not deny federal funds to families due to "unsuitability."[43] Rather, states were required to either provide services to make the

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[38] *Id.* at 116-17.
[39] Laura Briggs, *Taking Children: A History of American Terror 38* (2020), at 38; Detlaff, *supra,* at 59.
[40] Roberts, *supra,* at 116.
[41] Roberts, *supra,* at 117, noting that a 1960 Florida study found that state welfare workers challenged the suitability of 13,000 families, of which only 9 percent were white even though white families made up 39 percent of the total caseload.
[42] Dettlaff, *supra,* at 61
[43] *Id.* at 61.

home suitable, or remove children from "unsuitable" homes, even though "unsuitability" did not require evidence of harm to a child.[44] The Flemming Rule in turn incentivized removal by providing federal reimbursement to assist in the costs of foster care.[45]

The result was devastating to Black families and marked the beginning of a policy shift toward family separation. By 1961, 25 percent of children in foster care were Black, even though Black children comprised only 10 percent of the general population. Of Black children in foster care, 81 percent were there solely because their mother was unmarried or they were living in homes deemed unsuitable.[46]

2. Expanding the Tools of Surveillance and Separation

As welfare increasingly went toward Black recipients, and as welfare policy shifted from assistance toward surveillance and separation, two consecutive policy trends converged to create the system we have today. First, policies that equated poverty with neglect, and those that mandated reporting of suspicions of neglect, meant that Black families were funneled into the family regulation system simply for being poor. Second, funding for in-home services, childcare, cash assistance, and money and vouchers for food and housing shrank, while funding for foster care and adoption grew exponentially. The convergence of these two policies created "a

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[44] *Id.* at 61.
[45] *Id.* at 61.
[46] *Id.* at 62

'stop-and-frisk' type referral system that feeds hundreds of thousands of Black families into the parasitic public/private foster industrial complex[.]"[47]

Beginning in the 1960s, federal and state regulations expanded the definition of child maltreatment to include neglect, and expanded the required reporting of suspected maltreatment. First, mandatory reporting laws—which require certain individuals to report suspected cases of abuse or neglect—proliferated.[48] In 1963, only four states had mandatory reporting laws; by 1967 all fifty states required some sort of mandatory reporting.[49] Then, in 1974 Congress enacted the Child Abuse Prevention and Treatment Act ("CAPTA"). CAPTA requires neglect—generally defined as a parent's failure to provide for a child's basic needs and therefore closely overlapping with poverty—to be included in the definition of maltreatment subject to mandatory reporting.[50] CAPTA also mandated that certain professionals be

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[47] Angela Olivia Burton and Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 Columbia J. Race and Law 639, 644 (2021).

[48] Dettlaff, *supra,* at 69

[49] *Id.* at 65

[50] *Report and Recommendations of the Committee on Families and the Law Racial Justice and Child Welfare*, New York State Bar Association, 9-10 (April 2022), https://nysba.org/wp-content/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf (explaining that in 1974, the year CAPTA was enacted, there were 60,000 reports of child maltreatment); whereas, see *Child Maltreatment Report*, Administration of Child and Family Services, ii, x (2023), https://acf.gov/sites/default/files/documents/cb/cm2023.pdf (explaining that in 2023, 3 million children nationally were the subject of a Child Protective Services investigation or alternative response, and 64 percent of those cases were for neglect).

designated as mandatory reporters.[51] Today, in many states, mandatory reporters include not only doctors and teachers, but also social services providers, including homeless shelter workers, therapists, drug treatment counselors, and domestic service providers.[52] Because Black families experience poverty at higher rates than other racial groups, CAPTA's expansion of maltreatment to include neglect "ensures that Black families will be disproportionately subjected to mandatory reporting."[53]

As the infrastructure for family surveillance and separation expanded, funding for direct services to poor families shrank amidst the racist "welfare queen" hysteria of the 1990s.[54] At the same time, federal funding for foster care and adoption grew exponentially.[55] In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, which ended the guarantee of federal cash assistance to families.[56] One year later, the Adoption and Safe Families Act ("ASFA") was signed into law.[57] ASFA incentivized adoption over reunification through a series of mandates, federal subsidies, and bonuses to states that prioritized

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[51] NYSBA Committee on Families Report, *supra* at 9-10.
[52] *Id.* at 9.
[53] *Id.* at 10.
[54] Dorothy Roberts and Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, The Appeal (Mar. 26, 2018), *available at* www.theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/.
[55] *Id.*
[56] Roberts, *supra,* at 120.
[57] *Id.* at 121.

adoption and termination of parental rights (TPR) over reunification of families.[58] ASFA requires states to move toward TPR—what advocates call the family death penalty— after a child has been in foster care for 15 of the last 22 months, which dramatically accelerated the timeline for terminating parental rights.[59]

In addition, ASFA incentivizes adoption over reunification by providing federal cash bonuses to states that increase the number of adoptions,[60] without providing comparable federal funding to states that increase the number of family reunifications.[61] The coinciding of the decline of welfare funding with the passage of ASFA "marked the first time in US history that the federal government mandated that states protect children from parental neglect but failed to guarantee a minimum economic safety net for impoverished families."[62] By 2000, 36 percent of children

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[58] *Id.*

[59] Adoption and Safe Families Act, 42 U.S.C. § 675(5)(E) ("[I]n 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[.]")

[60] *The President's Fiscal Year 2025 Budget Request,* Child Welfare League of America, CWLA.org (March 2024), https://www.cwla.org/wp-content/uploads/2024/03/CWLA-Summary-of-Presidents-FY-2025-Childrens-Budget.pdf (explaining the AFSA incentive fund whereby "[i]f states increase the number of children adopted from foster care over a previous year's high mark, they are awarded an incentive from this appropriation").

[61] *What is the Adoption and Safe Families Act?*, Repeal ASFA, https://www.repealasfa.org/what-is-asfa (last visited April 9, 2025)

[62] Roberts, *supra,* at 122.

in foster care were Black, despite comprising only 15 percent of the child population, a rate more than double their proportion of the population.[63]

II. DRIVEN BY THE DARK ROOTS OF FAMILY POLICING SYSTEMS, ACS CONTINUES TO POLICE, AND SEPARATE, BLACK FAMILIES AT VASTLY DISPROPORTIONATE RATES.

> *[H]e is my son and would be safe. I can take care of him and his family.*
>
> - Appellant, K.W.[64]

Driven in part by this racist history, ACS regulates and separates Black families, like K.W. and K.A., at vastly disproportionate rates. This disparity is starkest with respect to emergency removals, the process used in this case. Black children, who make up only 14.6 percent of New York City's child population,[65] are the subject of 54 percent of ACS emergency removals.[66] White children, who make up 46.7 percent of New York City's child population, are the subject of only 4 percent of ACS emergency removals,[67] making Black children in New York City

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[63] Roberts & Sangoi, *supra*.
[64] Petra Bartosiewicz, *Extraordinary Circumstances: A father's yearslong struggle to regain custody of his son*, The Intelligencer, (Feb. 15, 2022), https://nymag.com/intelligencer/2022/02/nyc-acs-child-custody-foster-care.html.
[65] *The State of New York's Children*, Schuyler Center for Analysis and Advocacy (2025), *available at* https://scaany.org/wp-content/uploads/2025/01/State-of-New-Yorks-Children-Data-Book-2025.pdf, at 1.
[66] *Racism at Every Stage: Data Shows How NYC's Administration for Children's Services Discriminates Against Black and Brown Families*, New York Civil Liberties Union (NYCLU) June 20, 2023, https://www.nyclu.org/report/racism-every-stage-data-shows-how-nycs-administration-childrens-services-discriminates.
[67] *Id.*

thirteen times more likely to be the subject of an emergency removal than their white peers. The massive overrepresentation of Black children in emergency removals is particularly disturbing because emergency removals are both extraordinarily traumatic and imprecise: in 27% of cases, when ACS eventually seeks judicial approval of their extrajudicial emergency removal, judges decline to grant it, and instead return children to their parents.[68]

Emergency removals are the tip of the iceberg. Racial disparities pervade New York City's family regulation system and are amplified at every stage, meaning that ACS is more likely to rely on punitive interventions, like removal, when regulating Black families.[69] According to the most recent data, Black children in New York City are 7.5 times more likely than white children to be the subject of an ACS report[70]—meaning that between 40 to 50 percent of *all* Black families in New

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[68] *Report of the Finance Division on the Fiscal 2021 Preliminary Financial Plan, Fiscal 2021 Preliminary Capital Budget, Fiscal 2021 Preliminary Capital Commitment Plan, and the Fiscal 2020 Preliminary Mayor's Management Report for the Administration for Children's Services,* Child Welfare Information Gateway, 41 (March 23, 2020). https://cwlibrary.childwelfare.gov/discovery/delivery/01CWIG_INST:01CWIG/1218678880007651.

[69] *Examining the New York Child Welfare System and Its Impact on Black Children and Families: A Report of the New York Advisory Committee to the U.S. Commission on Civil Rights*, Civil Rights Commission, 40 (May 2024) ["NYAC Report"] https://www.usccr.gov/files/2024-05/ny-child-welfare-system-sac-report_0.pdf.

[70] *DMR County Comparison 2022*, Office of Children and Family Services, https://ocfs.ny.gov/reports/sppd/dmr/DMR-County-Comparison-2022.pdf (last visited April 9, 2025).

York City will be reported to ACS at some point.[71] Black families are 9 times more likely to be the subject of an indicated ACS report (meaning ACS has determined there is evidence of abuse or neglect).[72] In nearly half of cases where a judge orders removal, the child is Black,[73] and the substantial majority of removals are for poverty-related neglect.[74] Once removed, Black children are also less likely to be reunified with their families.[75]

Poverty alone does not explain these disparities. Black children in affluent New York neighborhoods still face disproportionately high ACS investigation rates.[76] In addition, "[e]xtensive testimony and data reveal that . . . higher rates of

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[71] NYAC Report, *supra*, at 44.
[72] *DMR County Comparison 2022*, *supra*, n.72.
[73] *Racism at Every Stage: Data Shows How NYC's Administration for Children's Services Discriminates Against Black and Brown Families*, New York Civil Liberties Union (NYCLU) June 20, 2023, https://www.nyclu.org/report/racism-every-stage-data-shows-how-nycs-administration-childrens-services-discriminates.
[74] NYAC Report, *supra*, at 61 ("[Child protective services] criminalizes poverty through the removal of 70% of Black children from their families for neglect and 7.2% for inadequate housing, which equated to 709 Black children in New York State in 2021. Assemblyman Hevesi concurred that 60% to 70% of the neglect cases are poverty related[.]").
[75] *Id.* at 83.
[76] *Id.* at 71 ("New York City child poverty rates do not correlate with child welfare investigation rates. . . . Black children in the majority White, affluent neighborhoods of Brooklyn Heights or Boerum Hill face extremely high child welfare investigation rates."); *id.* at 7 ("While Latinx and Black youth are 3-4 times more likely to be in poverty or come from a single parent household than white peers, they are 5 to 13 times more likely to be in state "protective" custody than white peers in NYC."); *see also Racial Disparities*, The Family Policy Project, https://shorturl.at/Oe6n3 (last visited April 9, 2025) ("Black children are extraordinarily vulnerable to investigations no matter how rich or poor the neighborhood they live in.").

maltreatment of children by Black parents simply cannot account for Black families' overrepresentation at every stage of the child welfare process."[77] What is more, ACS's own data from the COVID-19 lockdowns, when ACS's reach into families' homes precipitously decreased and courts increased their scrutiny of requests for removals, shows that, "severe child abuse in New York City fell."[78] During COVID, when "only half as many children were taken from their families, children stayed just as safe."[79]

The impacts, falling as they do on Black families disproportionately, are devastating. Social scientists have established that "the moment when a child is taken from [their] parents is a source of lifelong trauma, regardless of how long the separation lasts."[80] One study showed that even separations of only *one week* within a child's first two years of life can "result in distress for a young child who lacks the cognitive abilities to understand the continuity of maternal availability."[81] Half of all children removed are under the age of five, which meets the definition of "complex

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[77] NYAC Report, *supra*, at 7.
[78] Anna Arons, *An Unintended Abolition: Family Regulation During the Covid-19 Crisis*, 11 Columbia J. of Race and L. 18-22 (2022).
[79] *Id.* at 18.
[80] Eli Hager, *The Hidden Trauma of "Short Stays" in Foster Care*, The Marshall Project (Feb. 11, 2020), https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care; *see also infra* Section III.
[81] Kimberly Howard et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 Attachment & Hum. Dev. 5 (2009).

trauma."[82] Because infants have a limited understanding of the reasons for maternal absence and the likelihood of return, even a few hours or days of separation between parent and child can be severely distressing.[83] Removal can be damaging to a child even when their parents are far from perfect,[84] and reunification does not negate the harmful effects of removal.[85]

According to a racial equity audit commissioned by the agency and published in 2020, ACS staff themselves

> describe[] a predatory system that specifically targets Black and Brown parents and applies a different level of scrutiny to them throughout their engagement with ACS. . . . When we asked participants why white families receive preferential treatment, many simply pointed to racism and pervasive anti-Black stereotypes about the abilities of Black and Brown parents to provide for their children.[86]

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[82] NYAC Report*, supra,* 83.
[83] *Id.* at 2
[84] Shanta Trivedi, *The Harm of Child Removal*, 43 New York University Review of Law & Social Change 523, 527 (2019).
[85] Johayra Bouza et al., *The Science is Clear: Separating Families Has Long-Term Damaging Psychological and Health Consequences for Children, Families, and Communities*, Society for Research in Child Development, (June 20, 2018), https://www.srcd.org/briefs-fact-sheets/the-science-is-clear).
[86] antwuan wallace et al., *New York City Administration for Children's Services Racial Equity Participatory Action Research & System Audit: Findings and Opportunities (Draft)*, National Innovation Service, 14-15 (Dec. 2020), https://shorturl.at/4yctV.

The traumatic family policing disproportionately borne by Black families is neither justified by rates of neglect or abuse nor necessary to maintaining children's safety. It is simply a legacy of this country's racist past and symptom of its racist present.

III. THE FOURTH AMENDMENT STANDARD APPELLANT ADVOCATES FOR WOULD HELP PROTECT BLACK FAMILIES' CONSTITUTIONAL RIGHT TO FAMILY INTEGRITY.

Ensuring robust Fourth Amendment protections for parents in the emergency removal process would help "narrow the front door" and "re-inscribe the judicial role" in balancing the interests of parents, children, and the state.[87] As this Court has recognized, judicial authorization makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State." *Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999) ("We do not think that freedom from ever having to obtain a pre-deprivation court order is among [an ACS's worker's special needs]. Caseworkers can effectively protect children without being excused from whenever practicable, obtaining advance judicial approval of searches and seizures.") (cleaned up). Fourth Amendment protections will have the salutary effect of protecting those Black families who are disproportionately targeted by ACS family policing system. Turning the paper promise of the Fourth Amendment into actual rights for the Black families who have

[87] Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 Wash. U. L. R. 1057, 1124, 1126 (2023).

borne the brunt of family policing and forced separations for over 400 years is one step in lessening history's long shadow.

CONCLUSION

For the reasons sated above, *amici* respectfully urge the Court to consider the racialized history of family regulation in the United States in considering the appropriate Fourth Amendment standard for claims of unlawful seizure during the forced removal of a child from his home absent judicial authorization.

Dated: April 9, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief has a typeface of 14 points and contains 5,693 words.

Dated: April 9, 2025

By: */s/ Baher Azmy*
BAHER AZMY

CERTIFICATE OF SERVICE

I hereby certify that, on April 9, 2025, I caused the foregoing to be electronically filed with the Clerk of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All counsel in this case are registered CM/ECF users and will be served by the appellate CM/ECF.

Dated: April 9, 2025

By: */s/ Baher Azmy*
BAHER AZMY

APPENDIX A

Amici Statements of Interest

Center for Constitutional Rights

Founded in 1966, the Center for Constitutional Rights ("CCR") is a national, nonprofit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Upholding the equal protection guarantees of the 14th Amendment has been central to much of CCR's decades-long legal work, as has stopping the forced separation of families by the government. CCR has challenged violations of the 14th Amendment by agencies at all levels of government in cases such as *Floyd, et al. v. City of New York, et al.* as well as filed cases such as *Al Otro Lado, Inc., et al. v. Alejandro Mayorkas, et al.* to stop the separation of immigrant parents from their children. Additionally, we have used open records litigation to support nationally known family rights advocates such as Joyce McMillan.

Civil Rights Corps

Civil Rights Corps is a national civil rights non-profit legal organization dedicated to challenging systemic injustice in the American legal system. It works with individuals directly impacted by the legal system, their families and communities, activists, organizers, judges, and government officials to create a legal system that promotes equality and freedom. Since its founding in 2016, the organization has sought to end the criminalization of poverty, and has filed successful lawsuits in federal and state courts around the country challenging systemic practices that are unjust, unconstitutional and that separate families.

Neighborhood Defender Service

Neighborhood Defender Service (NDS) is known nationally and internationally for its innovative, community-based, holistic public defense practice. Since opening its doors in Harlem in 1990, NDS has pioneered the holistic interdisciplinary model of public defense in criminal, civil and family court proceedings.

NDS's Family Defense Practice maintains offices in New York and Bronx Counties, representing parents and caretakers during ACS investigations, at every stage in Article 10 proceedings, including collateral termination of parental rights, custody, visitation, paternity, guardianship, violation, and voluntary placement petitions that arise during the course of that representation and in litigation to challenge administrative records in the State Central Register. NDS has been the primary Article 10 provider for Upper Manhattan since 2014 and conflict provider in the Bronx since 2022. NDS attorneys, social workers, client advocates, litigation assistants, and administrative staff have worked together to provide holistic, interdisciplinary representation to thousands of clients in both Bronx and New York Counties.

Movement for Family Power

Movement for Family Power ("MFP") is a national, abolitionist movement hub and incubator, cultivating and harnessing community power to end family policing and build a world where all families can thrive. Founded in 2018, MFP shifts narratives and supports grassroots organizers and lived experts on the frontlines of dismantling the family policing system through our three-pronged approach--connection, capacity, and care. MFP advocates for family safety and well-being outside of carceral systems and believes that drug tests are not parenting tests. MFP regularly supports amicus curiae briefs and other legal briefings that challenge pervasive and ongoing threats to family integrity.

Center for Family Representation

The Center for Family Representation, Inc. ("CFR") represents indigent parents in child protective and termination of parental rights proceedings in Manhattan, Queens, Bronx and Staten Island Family Courts. CFR assigns every parent an interdisciplinary family defense team comprised of an attorney, a social worker, and a parent advocate (parent advocates are trained professionals who have had direct experience being prosecuted in Family Court, losing their children to the foster system, and successfully reunifying their families). Since its founding in 2002, CFR has provided high quality defense to over 10,000 indigent parents with more than 20,000 children, and has trained more than 10,000 practitioners in 19 states.

Rise

Rise is a parent-led organization of Black and Latinx women and mothers who have been impacted by the harms of the child welfare system. Rise envisions communities that are free from injustice, family policing and separation, and envisions a society that is cultivating new ways of preventing and addressing harm. Rise imagines a radical commitment to ensuring that all families have what they need to live beyond survival and truly thrive. The organization's mission is to empower parents to be leaders and to create communities that invest in families and offer collective care, healing and support. As parents facing the injustices described in this brief, Rise hopes this litigation will serve as a guide to a more equitable court system which supports families, rather than causing more harm.