

**Fighting
Institutional
Racism at the
Front End of
Child Welfare
Systems:**

**A CALL
TO ACTION**

TO END THE UNJUST,
UNNECESSARY, AND
DISPROPORTIONATE
REMOVAL OF BLACK
CHILDREN FROM
THEIR FAMILIES



May 15, 2021

In this report Children's Rights puts forth a sweeping plan of action to stop unnecessary government involvement in the lives of Black families, dramatically reduce the number of children entering state foster care and prevent the devastating harms that foster care systems impose on Black children and families.

Central to this Call to Action is a series of high-impact legal, legislative, and policy recommendations concentrated on ending the unjust surveillance, investigation, and family separation practices carried out at the front end of the child welfare system. We hope that child advocates everywhere will join us in this critical campaign to end the unnecessary removal of Black children from their families.

You will also find a brief history of the institutional racism that has pervaded the child welfare system since the very beginning, and learn about the profound trauma family separation inflicts on Black children and their families.

For Children's Rights, writing about the history of Black experiences in the child welfare system has led us to critically reflect on our own history in child-focused civil rights litigation. We recognize that in the past our overarching belief that no child should grow up in the foster care system blinded us to the ways in which our legal cases, and the reforms they delivered, did not always support the preservation of Black families.

We must continue to name institutional racism as a root cause of the overrepresentation of Black children in the child welfare system and we must act with urgency to end the forced disintegration of Black families. To do less dishonors the suffering Black children and their parents have endured and denies the lived reality of so many Black families that the system continues to oppress.

Sincerely,



A handwritten signature in black ink, appearing to read 'Sandy Santana'.

Sandy Santana
Executive Director
Children's Rights

TABLE OF CONTENTS

Introduction	3
Institutional Racism and the History of the Black Experience with the American Child Welfare System	6
Major Legislation That Has Defined the Experiences of Black Families	8
Institutional Racism in Interconnected Systems	11
The Experiences of Black Children and Families at the Front End of the Child Welfare System	12
National Disproportionality Data	12
Disproportionality in Reporting, Investigation, and Removal	13
The Science Behind the Trauma of Family Separation	15
Recommended Strategies to Disrupt Institutional Racism in Child Welfare	17
Strategy One: Ensuring the Right to Counsel Immediately Upon Investigation and During Dependency Proceedings	18
Strategy Two: Urging Courts to Recognize the Fundamental Right to Family Integrity and Association	21
Strategy Three: Challenging Discrimination Under an Equal Protection Legal Theory	24
Strategy Four: Challenging Discrimination Under Title VI of the Civil Rights Act	26
Strategy Five: Changing “Reasonable” Efforts to Avoid Removal to “Active” Efforts	27
Strategy Six: Delinking Community-Based Services for Families from Title IV	28
Strategy Seven: Reimagining Federal Abuse and Neglect Definitions	30
Strategy Eight: Identifying Changes to Mandated Reporting Statutes that Reduce the Surveillance of Black Families	31
Strategy Nine: Holding Systems Accountable to Center the Known Trauma of Family Separation at the Front End and Throughout the Child Welfare System	33
Call to Action	34

A CALL TO ACTION

TO END THE UNJUST, UNNECESSARY, AND DISPROPORTIONATE REMOVAL OF BLACK CHILDREN FROM THEIR FAMILIES

Introduction

For some, the child welfare system appears aptly named—a system of policies and supportive services meant to ensure the safety and well-being of children and families. Yet for many among the millions who actually experience it, the child welfare system is an entrenched set of government structures designed to reinforce the racist history of oppression and separation of Black* families in the United States. That must change. A look at the system’s front end—the series of decision points between an initial report of suspected child abuse or neglect (sometimes collectively referred to as alleged “child maltreatment”), through screening and investigation, culminating in the decision to remove a child from their home—reveals a system in which our state and federal governments perpetuate the oppression of Black children and families.** This Call to Action demands a national discussion to

- (1) unequivocally name institutional racism as a force at work at the front end of the American child welfare system;
- (2) identify strategies to disrupt and end the unjust involvement and removal of Black children from their families through that system; and
- (3) implement those strategies.

The child welfare system is an entrenched set of government structures designed to reinforce the racist history of oppression and separation of Black families in the United States. That must change.

Arguably, the “family regulation system” is a more fitting name for this set of government structures. This term was coined in 2020 in an Honors Thesis by Emma Peyton Williams, currently a Research and Content Development Consultant at the Center for the Study of Social Policy, and since used by child welfare system abolitionists, including Movement for Family Power and race equity scholar Professor Dorothy Roberts. It has been defined as a system “designed to regulate and punish black and other marginalized people.”¹ This Call to Action uses the term “child welfare,” the familiar term that includes all of the concepts discussed throughout this paper, and recognizes its use to describe a system that unjustly regulates marginalized families.

* This Call to Action uses the term Black to include Black or African American people, defined as “a person having origins in any of the Black racial groups of Africa.” *Child Maltreatment 2019*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (2021), at 115, <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf>.

** Importantly, other marginalized groups exposed and entangled with America’s child welfare system have unfair and oppressive experiences. While this Call to Action focuses on the impact of institutional racism and the separation of Black families, and many of the recommendations will help others beyond Black families, children and families with other identities warrant specific resources and recommendations for change that best address their unique experiences. See Patricia Turner Hogan & Sau-Fong Siu, *Minority Children*

and the Child Welfare System: An Historical Perspective, 33 SOC. WORK 493 (1988); Alice M. Hines et al., *Factors Related to the Disproportionate Involvement of Children of Color in the Child Welfare System: A Review and Emerging Themes*, 26 CHILD. & YOUTH SERVS. REV. 507 (2004); Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, CTR. FOR THE STUDY OF SOC. POL’Y (2018), at 15-19, <https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf>.

Many Black parents have publicly shared their stories of oppression, trauma, and unwarranted interference in their lives by child welfare agencies, including removal of their children despite little to no evidence of harm.² These stories are not isolated anecdotes; they are the reality for many Black families destroyed by the child welfare system. And, “just as many Americans believe crime has a Black face, a perception exists that the face of abuse and neglect is also dark, leading to disproportionate targeting of African American and other ethnic minority families in the child welfare system.”³ In 2019, 18.2% of removals of Black children from their homes were due to alleged physical or sexual abuse,⁴ while 63.1% of removals of Black children were due to “neglect.”⁵ In fact, for all children in foster care in

2019, the majority had a removal reason of neglect, rather than physical or sexual abuse.⁶ An analysis of all children in foster care in federal fiscal year 2019 showed that 21.3% of children removed for neglect were Black children, although Black children make up 14% of the general population.⁷ In a recent information memo, the U.S. Department of Health and Human Services (“HHS”), Administration for Children and Families (“ACF”) explained that removals that would typically fall into the “neglect” category, including inadequate housing and failure to provide adequate nutrition, are due to issues related to poverty.⁸ ACF characterized these poverty-related removals as ones that could have been prevented.⁹ In other words, the disturbingly large number of poverty-related family separations that Black families experience are simply unnecessary.

On April 30, 2021, President Biden issued “A Proclamation on National Foster Care Month, 2021,” in which he named the issues of racism, disproportionality, and unnecessary removals associated with the child welfare system:

[W]e also recognize the histories of injustice in our Nation’s foster care system. Throughout our history and persisting today, too many communities of color, especially Black and Native American communities, have been treated unequally and often unfairly by the child welfare system. Black and Native American children are far more likely than white children to be removed from their homes, even when the circumstances surrounding the removal are similar. Once removed, Black and Native American children stay in care longer and are less likely to either reunite with their birth parents or be adopted. Too many children are removed from loving homes because poverty is often conflated with neglect, and the enduring effects of systemic racism and economic barriers mean that families of color are disproportionately affected by this as well.¹⁰

The need to fight institutional racism at the front end of child welfare systems could not be more urgent or timely.

Part II of this Call to Action sets forth a brief history of the institutional racism that has pervaded the child welfare system and interconnecting government systems that define the experiences of Black children and families within those systems. Part III examines the outcomes for Black children and families at the front end of the child welfare system, including the profound trauma of family separation.



The history of the child welfare system and the institutional racism and trauma that continue to shape the experiences of Black children and families today is so tragic that there is a movement to completely abolish the system.¹¹ While we look forward to a time where the system we see today, which destroys Black families, is unrecognizable, Part IV of this Call to Action puts forward nine recommendations with great potential to move us toward ending the unjust, unnecessary, and devastating removal of Black children from their families.

Radical change at the front end of the child welfare system is not only a moral and civil rights imperative, it is also necessary to fight continued racial disparities in the harms and negative outcomes experienced by Black youth who have been removed and are in the foster care system.

These nine recommendations include:

- 1** ensuring that parents and children have the right to timely and quality representation by counsel in child welfare proceedings;
- 2** urging courts to recognize the fundamental right to family integrity and association;
- 3** challenging child welfare system action that discriminates on the basis of race under an equal protection legal theory;
- 4** challenging discrimination in federally funded child welfare systems under Title VI of the Civil Rights Act, including under “disparate impact” theories in complaints to the Office of Civil Rights (“OCR”);
- 5** requiring child welfare agencies to clearly demonstrate that they have made “active”—rather than merely “reasonable”—efforts to preserve and sustain families and avoid removal;
- 6** developing critical community-based services to support and preserve families, increase economic opportunity and ameliorate poverty, outside the coercive threat of removal by the child welfare system;
- 7** clarifying vague abuse and neglect definitions that begin the trajectory for involvement in the system and ultimately, removing the general category of neglect from the purview of child welfare agencies;
- 8** identifying changes to mandated reporting statutes that reduce the child welfare surveillance state, such as replacing anonymous reporting with confidential reporting, decentralizing hotline centers, and repealing universal mandated reporting statutes; and
- 9** ensuring that federal and state systems and policies center the known trauma of removal and family separation at every single decision point in the child welfare system, including the front end, and throughout the experience of all children who have been removed and placed into the foster care system.

Finally, in Part V, we conclude by encouraging our readers to join Children’s Rights in implementing these recommendations and working to reduce the number of Black families that are surveilled, regulated, separated, and destroyed by the child welfare system. Radical change at the front end of the child welfare system is not only a moral and civil rights imperative, it is also necessary to fight continued racial disparities in the harms and negative outcomes experienced by Black youth who have been removed and are in the foster care system.¹² Indeed, if our *government foster care systems* were thoroughly investigated through the same lens as parents or especially Black parents, the systems themselves would routinely be substantiated for abuse and neglect.¹³

Importantly, this Call to Action seeks to name institutional racism at the front end of the American child welfare system and offer strategies to disrupt it. The history, current structure, and reality of child welfare surveillance, investigation, and removal demand that we *name* institutional racism as a root cause of the forced separation of Black families and their overrepresentation in the child welfare system.¹⁴ To do less dishonors the suffering Black children and families have endured and denies the reality for so many Black families that the system continues to oppress. Furthermore, offering their own “curb-cut effect,”¹⁵ strategies to dismantle institutional racism at the front end of the child welfare system will likely reach beyond Black families to other families unnecessarily subjected to a fundamentally unfair and oppressive system.

Institutional Racism and the History of the Black Experience with the American Child Welfare System

Scholars discussing the experiences of Black children in America’s child welfare system described institutional racism decades ago as:

the systematic oppression, subjugation and control of one racial group by another dominant or more powerful racial group, made possible by the manner in which the society is structured. In this society, racism emanates from white institutions, white cultural values, and white people. The victims of racism in this society are Black people and other oppressed racial and ethnic minorities.¹⁶

In simpler terms, institutional racism has been defined as “differential access to the goods, services, and opportunities of society by race.”¹⁷ Having systematically excluded Black children and families for nearly a century and, more recently, subjected them to undue surveillance and control, the child welfare system in America has a history of institutional racism.¹⁸

The evolution of the federalized child welfare system coincided with a series of landmark legislative and policy developments that have continued to perpetuate the system’s entrenched racism while strengthening its surveillance and regulatory capacities.

Segregation excluded Black families from the child welfare system until the mid-twentieth century.¹⁹ Black children who were orphaned and freed from the institution of slavery in the North between the late eighteenth and early nineteenth centuries were typically placed in almshouses or bonded into indentured servitude.²⁰ Slavery continued to institutionalize the forced separation of Black families during this period, traumatizing enslaved children and their parents.²¹ In the 1820s, Black orphanages²² and “colored orphan asylums” emerged, overcrowded and woefully inferior to the orphanages established to rescue white immigrant children during the same period.²³ As organized child protection systems began to evolve, white children were moved out of the indentured servitude system and orphanages.²⁴ Black children, however, remained primarily dependent on orphanages, mutual aid societies, and informal kinship supports for their child welfare needs for another century.²⁵

Although they excluded Black children, even early iterations of organized child protection systems shed light on the entrenched racism that continues to plague the system today. Beginning in the 1850s, the “Orphan Train” movement removed poor, immigrant children from Eastern cities and sent them to farm families in the West.²⁶ Many of these children were not actually orphans, but were targeted as in need of protection because their parents were poor.²⁷ As child protection efforts expanded in the 1870s, the Societies for Prevention of Cruelty to Children (“SPCC”) continued to intervene in the lives of families based on conditions of poverty.²⁸ SPCCs “adopted expansive definitions of cruelty that sanctioned extensive policing of working-class families aimed at imposing middle-class family norms on those households.”²⁹ In doing so, these societies reinforced the class and cultural hierarchies that emerged during the Orphan Train era.³⁰

Throughout the latter half of the nineteenth century, American Indian boarding schools continued to reinforce class and cultural hierarchies as white, so-called “reformers” forcibly removed American Indian children from their families.³¹ These reformers justified removal by characterizing it “as an act of benevolence aimed at ‘rescuing the children and youth from barbarism or savagery,’” and advancing “a racialized discourse that deemed indigenous peoples to be lower on the scale of humanity than white Anglo-Saxon, middle-class Protestants.”³² These narratives legitimized unnecessary interventions and removals even before the formal establishment of the child welfare system.

As organized child protection systems began to evolve, white children were moved out of the indentured servitude system and orphanages. Black children, however, remained primarily dependent on orphanages, mutual aid societies, and informal kinship supports for their child welfare needs for another century.

After the federal Children’s Bureau (“the CB” or “the Bureau”) was created in 1912, the child welfare system gradually replaced the prior formal exclusion of Black families with less formal discrimination.³³ Notably, over 60% of child welfare agencies in Northern states were still reserved for white children in 1923.³⁴ By the 1940s, agencies steadily began to include Black children as services shifted from the private to public sector.³⁵ Child welfare scholars noted, however, that the system had experienced “little meaningful change” because “adequate services remained unavailable to the black child.”³⁶ As these services became available, the child welfare system increasingly subjected Black families to the unwarranted policing that had historically been used to separate marginalized families.³⁷

The evolution of the federalized child welfare system coincided with a series of landmark legislative and policy developments that have continued to perpetuate the system’s entrenched racism while strengthening its surveillance and regulatory capacities.

Major Legislation That Has Defined the Experiences of Black Families

Mandatory Reporting Laws

In 1963, the Children's Bureau proposed model legislation to guide states in developing legal requirements for reporting child maltreatment.³⁸ The Bureau issued its proposal in response to the wave of national interest in child abuse following the publication of Henry Kempe's *The Battered-Child Syndrome*.³⁹ The model legislation made reporting suspected maltreatment mandatory for physicians, but the CB noted that the intent was not to prevent or discourage voluntary reporting by others.⁴⁰ It embraced the view that abused children are most frequently brought to the attention of medical professionals, who are uniquely suited "to form reasonable, preliminary judgments" as to how physical injuries have occurred.⁴¹ The Bureau's proposed legislation also included provisions to grant reporters immunity from liability and to make violating the mandatory reporting requirement a misdemeanor.⁴² By 1967, all states had enacted child abuse reporting laws, with all but three modeling their legislation closely after the CB's proposal.⁴³ Throughout the latter half of the century, the number of suspected maltreatment reports increased dramatically from 60,000 in 1974 to one million in 1980 and two million in 1990.⁴⁴ Today, mandatory reporters are deeply involved in the disproportionate representation of Black families in the child welfare system.

The Child Abuse Prevention and Treatment Act of 1974

In 1974, Congress enacted the Child Abuse Prevention and Treatment Act ("CAPTA") to increase federal leadership in the administration of the child welfare system.⁴⁵ Among other things, CAPTA provided funding and guidance to states to support the prevention, assessment, investigation, prosecution, and treatment of child abuse and neglect.⁴⁶ It conditioned this federal funding on states instituting mandatory reporting laws for child abuse and neglect.⁴⁷ Before CAPTA was passed, the federal government did not require states to include neglect in their reporting laws.⁴⁸ The expansion of mandatory reporting requirements to include neglect contributed to, and has continued to result in, increased surveillance and control of Black families.⁴⁹ CAPTA also sanctioned the expansion of the network of professionals mandated to report abuse and neglect.⁵⁰ This has strengthened the child welfare surveillance state by broadening the class of intermediaries, including doctors, teachers, police officers, social service providers, and other professionals, who are tasked with monitoring the families they engage with, overwhelmingly impacting Black families.⁵¹

The Adoption Assistance and Child Welfare Act of 1980

Congress passed the Adoption Assistance and Child Welfare Act of 1980 (“AACWA”) in an attempt to reduce the high rates of children entering and languishing in foster care.⁵² AACWA instituted a requirement that state agencies must make “reasonable efforts” to prevent or eliminate the need for removal and to make it possible for children to return home once they enter foster care.⁵³ The “reasonable efforts” provision has remained largely illusory as a protection from unjustified removal, especially for Black families.⁵⁴ Before Congress passed AACWA, the Senate Committee on Finance issued a report in which it acknowledged concerns that the provision could “become a mere *pro forma* exercise in paper shuffling to obtain Federal funding.”⁵⁵ While the Committee dismissed these concerns, widespread misuse of the “reasonable efforts” provision in this manner became evident within a decade and has persisted to date.⁵⁶

The Multiethnic Placement Act of 1994⁵⁷

In 1994, Congress enacted the Multiethnic Placement Act (“MEPA”) to address the overrepresentation of Black children in out-of-home care who were awaiting adoption.⁵⁸ MEPA prohibited child welfare agencies receiving federal funding from delaying or denying individuals the opportunity to adopt or foster children “solely” on the basis of race, color, or national origin,⁵⁹ or making discriminatory placement decisions on the basis of these factors.⁶⁰ Before 1994, racial and ethnic matching policies were standard adoption practice throughout the country.⁶¹ MEPA not only outlawed these policies, but it also required agencies to develop plans providing for the “diligent recruitment” of racially and ethnically diverse pools of prospective foster and adoptive families.⁶² OCR has not enforced this pool provision assertively.⁶³ More importantly, despite MEPA’s expressed intent, Black children continue to remain in foster care longer than white children.⁶⁴

The Adoption and Safe Families Act of 1997

The Adoption and Safe Families Act (“ASFA”) of 1997 ushered in an era of heightened regulation of families, especially Black families.⁶⁵ Congress passed ASFA as part of a broader overhaul of federal welfare policies.⁶⁶ In stark contrast to AACWA, ASFA has prioritized family separation.⁶⁷ It includes provisions to terminate parental rights if a child remains in foster care for 15 of the most recent 22 months and to initiate efforts to place a child for adoption or with a legal guardian concurrently with reunification efforts.⁶⁸ As Professor Roberts has observed, “[p]erhaps the major reason for preferring extinction of parental ties in foster care is society’s centuries-old depreciation of the relationship between poor parents and their children, especially those who are black.”⁶⁹ As it relates to family separation, ASFA has created a more punitive system that devalues Black families. It has also worsened outcomes for Black children in care, who face a higher likelihood of drifting between placements and aging out of foster care because they are less likely to be adopted than their white peers.⁷⁰

Recently, advocates have spoken out about the role of ASFA in separating Black families and the disproportionate impact the legislation has on Black families. For example, Kathleen Creamer and Christine Gottlieb, family defense attorneys in Philadelphia and New York City, respectively, are urging for the repeal of ASFA. In the alternative, these advocates have proposed specific recommendations to improve the statute, including provisions that would prioritize family relationships over termination, and shift funding incentives away from adoption to fully support other permanency outcomes, such as reunification of families and subsidized guardianship.⁷¹

“Perhaps the major reason for preferring extinction of parental ties in foster care is society’s centuries-old depreciation of the relationship between poor parents and their children, especially those who are black.”

— Professor Dorothy Roberts

The Family First Prevention Services Act of 2018

The most recent major federal legislation, the Family First Prevention Services Act (“FFPSA” or “Family First”) of 2018, aims to shift fiscal incentives and the focus of the child welfare system back to early prevention of maltreatment and removal.⁷² It permits states with an approved Title IV-E plan to receive uncapped federal reimbursements for in-home preventative services.⁷³ Prior to Family First, in order for states to seek Title IV-E reimbursements for their child welfare programs, children had to be removed from their homes and meet the income eligibility requirements under Aid to Families with Dependent Children (“AFDC”).⁷⁴ Although FFPSA focuses on the front-end system, it will not lead to a radical shift in the existing structure that unnecessarily subjects Black families to surveillance and control through state-sponsored monitoring and inherently coercive services.⁷⁵ As Movement for Family Power has suggested, even if the objective of the legislation is realized, it is unlikely that the child welfare system will ever be received as a net force for good by the communities it purports to serve.⁷⁶

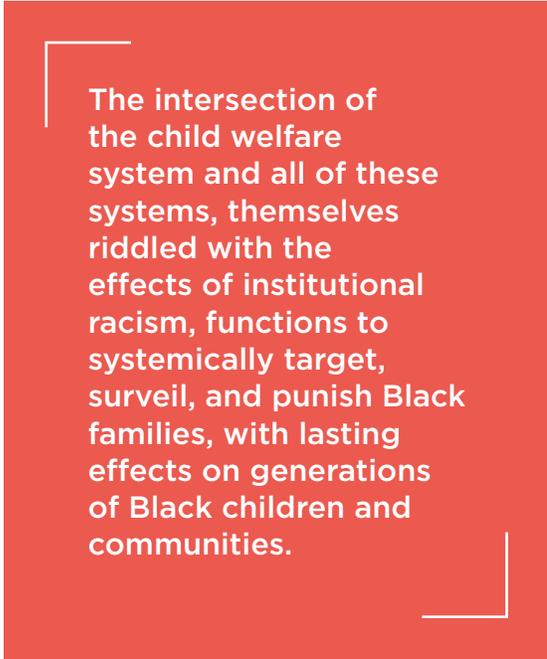
Institutional Racism in Interconnected Systems

The child welfare system is inextricably connected with other government systems rooted in racist histories and plagued by institutional racism. For example, parental involvement with the criminal legal system, which has a long history of disproportionately stopping, investigating, and arresting Black men and women, often sparks child welfare investigations that become the basis for separating Black families.⁷⁷ The “war on drugs” that began in the 1980s highlighted this connection between the criminal legal system and the child welfare system.⁷⁸ During that period, the population of incarcerated Black women increased 828%.⁷⁹ This period also saw an increase in overall family separation.⁸⁰

The punitive approaches adopted during the war on drugs drove these high incarceration and family separation rates. CAPTA, for example, allowed states to weaponize prenatal drug exposure concerns against Black women.⁸¹ This resulted in increased prosecution of Black mothers, who comprised roughly 60% of women prosecuted for using drugs during pregnancy by 1990.⁸² A surge in the use of mandatory sentencing minimums similarly contributed to the incarceration of Black mothers and resulting family separations.⁸³ With mandatory sentencing, judges are unable to use their discretion to consider the negative consequences of incarceration on families, including the severe trauma of family separation.⁸⁴ In contrast to these punitive approaches deployed against Black families, the response to the more recent opioid epidemic, which has affected white communities at a much higher rate, has focused on rehabilitation and recovery.⁸⁵ The high rate of incarceration of Black parents and the resulting family separations impose profound trauma on children and parents alike, and systemically disadvantage Black children by depriving them of the economic, social, and emotional support that would normally come from their parents.⁸⁶

In addition to the criminal legal system, the child welfare system intersects with other systems that surveil Black children and families, including the public benefits, public housing, public education, and public health care systems.⁸⁷ Social service providers, teachers, doctors, and other professionals who work within these systems are an integral part of the child welfare surveillance state due to laws requiring them to report suspected maltreatment.⁸⁸ The intersection of the child welfare system and all of these systems,

themselves riddled with the effects of institutional racism, functions to systemically target, surveil, and punish Black families, with lasting effects on generations of Black children and communities.⁸⁹



The intersection of the child welfare system and all of these systems, themselves riddled with the effects of institutional racism, functions to systemically target, surveil, and punish Black families, with lasting effects on generations of Black children and communities.

The Experiences of Black Children and Families at the Front End of the Child Welfare System

National Disproportionality Data

At major stages of decision-making at the front end of the child welfare system, Black children and their families are worse off than other racial groups. While this section highlights the disproportionality data that is available, it is critical to understand that stories of those with lived experience provide the best evidence of the oppression of Black children and families at the front end of the child welfare system. These devastating accounts reveal a system that separated a Black child from his family at the age of two, and subjected his mother to a five-year custody battle involving repeated mental health evaluations and false allegations;⁹⁰ forced a Black mother to participate in a three-month outpatient program after she admitted using marijuana to help alleviate nausea during her complicated pregnancy, despite her twin sons testing negative when the hospital administered a non-consensual drug test;⁹¹ and permanently removed a Black child from his mother's care, using her request for housing support as the basis for intervention.⁹² These stories must continue to be told so steps can be taken to change this reality.

According to the most recent federal data, nationally Black children represent 14% of the general population of children and 22% of children in foster care.⁹³ In 2019, Black children were disproportionately represented in

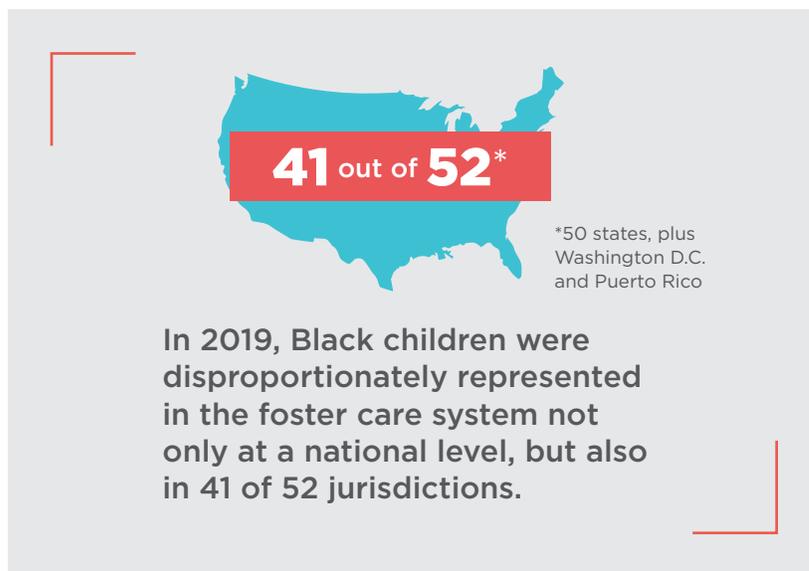
the foster care system not only at a national level, but also in 41 of 52 jurisdictions.⁹⁴ Federal and independent studies and surveys do not definitively identify the cause of the disproportionality, although racial bias emerges as a factor in several smaller studies.⁹⁵ Some emerging data shows that the COVID-19 pandemic has exacerbated disproportionality in system involvement and outcomes for Black children and families.⁹⁶

The National Incidence Studies (“NIS”) of Child Abuse and Neglect are used to estimate the occurrence of child maltreatment in the United States. There have been four NIS studies, the most recent of which (NIS-4) is 15 years old and utilizes data from 2006. The NIS-2 and NIS-3 found no significant differences in the rates of maltreatment for Black children and children of other races.⁹⁷ However, the

NIS-4, for the first time, found that rates of maltreatment for Black children were significantly higher than those for children of other races.⁹⁸ Some researchers have identified shortcomings of the NIS-4, including concerns with missing socioeconomic status data, which obscured possible race differences across ranges of household incomes.⁹⁹ More recent studies focusing on statewide data have shown the opposite—that race is a significant predictor of racial disparities in the child welfare system.¹⁰⁰ Other non-quantitative

It is critical to understand that stories of those with lived experience provide the best evidence of the oppression of Black children and families at the front end of the child welfare system.

tative findings and evidence make clear that racism is an important factor.¹⁰¹ The exercise of even attempting to pinpoint “racism” as **the** scientific cause of Black families’ disproportionate involvement is inherently fraught, as it assumes racism to be measurable and quantifiable—itsself a complex and unsettled question.¹⁰² These findings, combined with qualitative information, namely the lived experiences of Black families involved with the child welfare system and the history of racism within it, provide strong evidence of institutional racism as a root cause of the unnecessary separation of Black families.



Disproportionality in Reporting, Investigation, and Removal

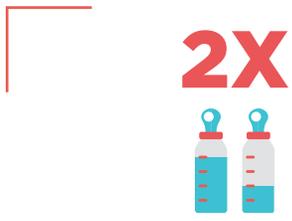
Involvement with the child welfare system, including the traumatic surveillance, investigation, and potential separation of Black families, is often initially set in motion through mandatory reporting. Over time, states have broadened the number of mandated reporters and the circumstances that qualify as suspected child maltreatment. Research focused on dissecting the varied child maltreatment definitions across states, especially what constitutes *neglect*, identified the following as “neglect” according to some state statutes in 2019: (1) lack of medical, dental, surgical, child care, behavioral and

other services; (2) failure to provide for basic needs, including food, nutrition, clothing, education, and shelter; (3) failure to supervise a child; and (4) parental needs, including mental illness, developmental disorders and domestic violence.¹⁰³ These categories of alleged “neglect” often trigger unnecessary investigation and family separation.

Mandated reporters in both the education and medical fields are more likely to report Black families than white families.¹⁰⁴ One study found that Black children are more likely to be reported for suspected child abuse or neglect than white children by educational personnel, at the national, state, and county levels.¹⁰⁵ Other research noted that the disproportionate reports of Black families by educational personnel were reports of neglect that were often confused with poverty—reports that children were hungry, unkempt, tardy, or absent from school.¹⁰⁶ According to social workers in another study, teachers reported children who arrived at school dirty, not because they were being abused or neglected, but because their families did not have a washer or dryer or funds to use the laundromat regularly.¹⁰⁷

Medical personnel are also more likely to report Black children than white children for similar injuries.¹⁰⁸ Various points of contact with medical providers demonstrate the difference in experiences between Black families and white families. Despite standardized screening tools to assess maternal drug use, medical professionals are twice as likely

Black children are more likely to be reported for suspected child abuse or neglect than white children by educational personnel.



2X

Despite standardized screening tools to assess maternal drug use, medical professionals are twice as likely to screen Black infants than white infants.

to screen Black infants than white infants.¹⁰⁹ When pregnant women of color refuse medical procedures, there is a greater risk that medical professionals will threaten to call child protective services (“CPS”).¹¹⁰ Not only are women of color and low-income women disproportionately impacted by postpartum depression, this population of women are also more likely to be reported to CPS than the general population.¹¹¹

Following receipt of a report of child abuse or neglect, the child welfare agency must determine whether a report should be screened in and accepted for investigation or screened out and closed. All states have procedures for this screening process and most utilize a safety assessment.¹¹² Typically, screening in a report requires that the alleged maltreatment, on its face, would rise to meet the statutory definition of child abuse or neglect in that state.¹¹³ Some states utilize a differential response system designed to intervene and offer services to families after reports are screened in but in lieu of investigation and possible removal. Differential response is reserved for those reports that suggest a low risk of harm.¹¹⁴ When a determination is made that a report, on its face, demonstrates a moderate or high risk of harm, CPS investigates the family for child abuse or neglect.¹¹⁵ At the investigation stage, at least one study found that Black families are almost twice as likely to be investigated for child abuse or neglect, compared to white families.¹¹⁶

An investigation concludes with a finding of whether child abuse or neglect occurred.¹¹⁷ Research focused specifically on substantiated reports of child abuse or neglect found that in 2011, 12.5% of U.S. children experienced a substantiated report of child abuse or neglect. However, 20.9% of Black children, compared to 10.7% of white children, experienced substantiated reports.¹¹⁸ Studies in Minnesota showed that reports of abuse or neglect involving Black families were more than six times as likely to be substantiated as reports involving white families.¹¹⁹

Finally, the front end concludes at the decision to remove Black children from their families, homes, schools, and communities. Once again, Black children are more likely to be separated from their families and placed into foster care than white children.¹²⁰ A 2020 study found that Black children were 15% more likely to be assigned to an out-of-home placement following a CPS investigation.¹²¹ An earlier study analyzing risk scores and removal showed that cases resulting in removal of Black children had lower risk scores than those resulting in removal of white children.¹²² The disproportionate removal of Black children from their homes continues to result in the overrepresentation of these youth in foster care and imposes severe trauma on Black families.



Black families are almost twice as likely to be investigated for child abuse or neglect, compared to white families.

The Science Behind the Trauma of Family Separation

The child welfare system imposes trauma on families when it forcibly separates them—trauma that is proven to result in significant harm that can last a lifetime. According to the American Association of Pediatrics, family separation can lead to “irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children.”¹²³ Children who are forcibly separated from their families experience emotional and psychological harm stemming from disruption of attachments, trauma from the very act of removal, and grief and loss.¹²⁴ Parents and children may also experience trauma as a result of their experiences with individual or institutional racism in the child welfare system. Given the risk of ongoing significant harm to children who are separated from their families, evidence that the harms of forced separation and entry into foster care could outweigh any harm associated with neglect should be assessed at all points along the child welfare continuum.¹²⁵

“A considerable body of theoretical and empirical literature indicates that children generally benefit from maintaining important family attachments in their lives, even if those attachments are faulty or if the family members have significant deficits.”¹²⁶ Children separated from the only parents they know will suffer “strong and painful emotional reactions.”¹²⁷ In the short term, children can experience intense anxiety, depression, and disruptive behaviors.¹²⁸ Long-term consequences of involuntary family separation can include poor developmental health and adult involvement with the criminal legal system.¹²⁹ Numerous studies illustrate the negative impact of “adverse childhood experiences” or ACEs on brain development.¹³⁰ The overwhelming conclusion is that childhood trauma, regardless of severity or type, results in lasting effects on a child’s mental and physical health.¹³¹

Published standards and policy guidance underscore the trauma of family separation, including from

the Child Welfare League of America (“CWLA”), a coalition of hundreds of private and public agencies that advance policies and best practices for children, youth, and families. CWLA’s Standards of Excellence for Services to Strengthen and Preserve Families states, “[p]ractitioners and child advocates recog-

nized that separating children from their families is traumatic for children, that they often experience lasting negative effects, and that children need a safe and stable family.”¹³² Similarly, The Council on Accreditation (“COA”), an international, independent, nonprofit organization that accredits human and social service providers, has also acknowledged the negative effects separation has on children.¹³³

The act of removing a child from their home, family, and community is itself traumatic. While some may consider it a single moment

in time, for children, the trauma of being ripped away from their parents is an experience that they relive over and over again.¹³⁴ The intense grief that children experience after they are forcibly separated from their parents can result in “guilt, post-traumatic stress disorder, isolation, substance abuse, anxiety, low self-esteem, and despair”¹³⁵

Importantly, trauma extends beyond actual separation at the front end of the child welfare system. Research suggests that children are likely to experience trauma as a response to government surveillance and investigations because they are frightening intrusions in their everyday lives.¹³⁶ Moreover, stories of lived experience animate multiple forms of trauma that occur in the surveillance and investigation processes.

For example, one Black mother shared that two child welfare caseworkers knocked on her door in the middle of the night stating they were removing her children due to her substance use.¹³⁷ They asked this mother to wake her children in the middle of the night and began a “body check,” looking for bruises.¹³⁸ This involved having the children lift their shirts, pull down their pants and spin in circles to be observed by total strangers.¹³⁹ The mother shared

The child welfare system imposes trauma on families when it forcibly separates them—trauma that is proven to result in significant harm that can last a lifetime.

that although her children were not removed, they were afraid.¹⁴⁰

Another parent, a teacher herself, recalled instances in which the school her sons attended reported her over disagreement about the types of services one son should receive.¹⁴¹ In one of those instances, the school called in a report because the mother sent one of her children to school with a bad haircut that he had given himself—the mother was told this act could constitute emotional abuse.¹⁴² Another mother reflected on growing up in the projects and fearing child protective services her entire life.¹⁴³ In her neighborhood, they referred to CPS as the “Parent Police.”¹⁴⁴ This mother explained that her fear continues because she has been investigated for lies—a false report was made when she slipped on ice while pushing her baby in a stroller and fell, accidentally tipping the stroller (even though the baby did not fall out).¹⁴⁵ The reporter alleged that she threw her baby’s stroller over.¹⁴⁶

As reflected in the above accounts, children are not the only family members traumatized by forceful separation. Parents also experience severe trauma when their children are removed from their homes or there is a threat of removal. This trauma can harm their identities as mothers, resulting in, for example, grief; loss; and mental health and substance abuse disorders.¹⁴⁷ Black parents experience an additional layer of trauma from the “policing” they are subjected to by an inherently racist system. Studies have demonstrated “that people of Color are stressed by individual, institutional, and cultural encounters with racism,” impacting psychological and physical health.¹⁴⁸ Dr. Shawn Utsey, Professor of Psychology at Virginia Commonwealth University, noted a “plethora of evidence linking racism to an assortment of indicators of psychological and physical distress”¹⁴⁹ One study found a relationship between frequent encounters with racism and higher blood pressure among African Americans; others found that chronic encounters with racism resulted in lower levels of self-esteem for African Americans; and another found a positive relationship between experiences with racism and perceptions of life stress.¹⁵⁰

The trauma imposed on children and their parents, especially Black families, must be assessed and continually reassessed throughout all decision points in the child welfare system. Advocates and all professionals in key roles must make decisions informed and balanced by this trauma. Far too often, the trauma of separation—or continued separation—outweighs any actions that run contrary to keeping families together.

The act of removing a child from their home, family, and community is itself traumatic. While some may consider it a single moment in time, for children, the trauma of being ripped away from their parents is an experience that they relive over and over again. The intense grief that children experience after they are forcibly separated from their parents can result in “guilt, post-traumatic stress disorder, isolation, substance abuse, anxiety, low self-esteem, and despair”

Recommended Strategies to Disrupt Institutional Racism in Child Welfare

Naming the institutional racism at the front end of the American child welfare system is critically important, but we must also identify disruption strategies and spur action to implement them. This section proposes nine strategies to disrupt the unnecessary and traumatic forced separation of Black children from their families.

1

Right to Counsel: From the moment an investigation commences, parents must have a right to, and meaningful access to, counsel. This representation should be consistent throughout the dependency proceeding in the case.

2

Right to Family Integrity & Association: Parents and children facing separation—and their advocates—should assert First and Fourteenth Amendment rights to intimate association and family integrity in the face of unwarranted government intrusion.

3

Equal Protection: Advocates should leverage the Equal Protection Clause, which prohibits selective enforcement of the law, to challenge policies and practices that may be facially neutral but have a strong discriminatory effect on Black families.

4

Challenge Discrimination Under Title VI: Advocates should challenge discrimination at the front end of the child welfare system under Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in programs and activities receiving federal financial assistance, such as state child welfare systems.

5

Shifting to “Active” Efforts: Federal law should replace the vague and grossly inadequate “reasonable” efforts legal standard with an “active” efforts requirement to heighten the effort child welfare agencies must make to prevent removal.

6

Delinking Services from Title IV: Policymakers should delink community-based services for families from Title IV of the Social Security Act and the child welfare system.

7

Narrowing Definitions of Maltreatment: Federal law should require states to adopt definitions of child abuse and neglect that avoid conflating the consequences of poverty with child maltreatment.

8

Amending Reporting Statutes: Federal law should require states to move away from universal, centralized, and anonymous reporting, toward non-universal, confidential, and decentralized reporting of suspected child maltreatment.

9

Centering Trauma: Federal and state legislation, policies, and practices must hold systems accountable for the trauma, loss, and long-term developmental impacts associated with disrupting a child’s attachment to her family.

1 STRATEGY ONE

Ensuring the Right to Counsel Immediately Upon Investigation and During Dependency Proceedings

Right to Counsel for Parents

Establishing an absolute right to counsel for parents who are the subject of investigations initiated by child welfare agencies could significantly reduce and protect against the unnecessary involvement of Black families in the child welfare system.¹⁵¹ Representation for parents at the first moment an investigation commences—upon acceptance of a report—would also ensure that Black parents' voices are heard during an investigation, an important step in shifting power from agencies to families. Importantly, once parents receive counsel, they should remain represented throughout the dependency proceedings in the case.

The Need for State and Federal Law Recognition

States vary widely as to whether parents may even bring counsel to an investigative meeting initiated by a child welfare agency. For example, in 2011, in Hawaii an attorney could attend a child protective meeting, while in New York an attorney was not permitted to attend.¹⁵² As of 2019, lawyers were still not permitted at New York "child safety conferences," although New York allowed Parent Advocates, who are often employed by legal

offices, to attend.¹⁵³ In Mississippi, as of 2017, a parent could go through the entirety of dependency proceedings—let alone an investigative interview—and have their rights to their child permanently terminated, without ever receiving assistance of counsel.¹⁵⁴ These differences reflect an overall patchwork of laws governing parents' entitlement to counsel throughout the legal proceedings—well after an initial investigation has concluded. Ensuring protection of parents in investigations would entail statutory changes guaranteeing the right to counsel at the earliest point possible—including at an investigative meeting. The New York City Progressive Caucus, for example, has introduced legislation to provide counsel to parents at the first point of contact during a child welfare investigation.¹⁵⁵

In the absence of state uniformity, advocates have also urged uniformity through federal action.¹⁵⁶ The federal Administration on Children, Youth and Families ("ACYF"), an office of ACF, has recently called for states to provide parents (and children) with "high quality" counsel "at or before the initial court appearance in all cases," finding the lack of effective counsel for parents a significant impediment to functioning child welfare systems.¹⁵⁷ Since 2019, ACYF has allowed states to claim federal funds to help pay for attorneys representing parents, as well as certain children, but whether that is interpreted to include investigations remains to be seen.¹⁵⁸ Both state and federal law should recognize the importance of early representation in preventing unnecessary removals, and fund that representation accordingly.

Both state and federal law should recognize the importance of early representation in preventing unnecessary removals, and fund that representation accordingly.

Federal Constitutional Law

To the extent states do not require appointment of counsel early as a matter of statute, courts should recognize that counsel at the investigation stage is critical to protecting parents' liberty interests. The balancing test announced in the Supreme Court's decision in *Mathews v. Eldridge* governs

analysis of a parent's right to counsel as a matter of due process.¹⁵⁹ Under that test, courts consider: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.¹⁶⁰

In *Lassiter v. Department of Social Services*, the Supreme Court applied these factors but rejected a categorical right to counsel for parents in termination of parental right ("TPR") proceedings. In deciding the question had to be answered case-by-case, the Court emphasized "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."¹⁶¹ The dissenters argued that precedent did not in fact consider the threat of incarceration the touchstone for the right to counsel, and repeatedly underscored the fundamental importance of "the interest of a parent in the companionship, care, custody, and management of his or her children."¹⁶² Justice Blackmun pointed out in dissent that the "case-by-case approach" entailed "serious dangers for the interests at stake and the general administration of justice," as it would be difficult, if not impossible, for reviewing courts to determine how counsel might have changed the outcome of a particular case after the fact.¹⁶³ Nonetheless, courts have since applied *Lassiter* to determine whether a parent has the right to appointed counsel in the context of dependency proceedings.¹⁶⁴

One possible tool to assist advocates seeking to establish an early right to counsel for parents is therefore to underscore how that right would help protect the parent's *physical liberty interests* during an investigation, and how existing processes do not sufficiently protect those interests, under the first two *Mathews* prongs.¹⁶⁵ Advocates should continue to demonstrate that removal of one's child is a life-changing physical deprivation. The *Lassiter* Court acknowledged that "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one,"¹⁶⁶ but the Court's decision suggests it did not view severance of the legal parent-child relationship as a physical liberty deprivation. But even temporary removal of one's

child implicates the ability of a parent to be with, provide for, and physically nurture their child—all of which transcend legal status. Further, advocates should highlight that statements made during an investigation may expose a parent to potential criminal liability, creating an additional risk to a parent's physical liberty.¹⁶⁷

Investigative interviews conducted by a child welfare agency offer inadequate protection to guard against these risks.¹⁶⁸ For example:

- Lack of a *Miranda*-like warning means parents unknowingly may make statements exposing them to criminal liability.¹⁶⁹
- Parents may not be aware of their ability to end an investigative meeting, believing that continuing to participate is in the best interests of their family.
- Unlike formal proceedings where a parent may be on notice that the state is a legal adversary, parents may not be aware that declining services offered may have legal consequences.
- State and agency policies requiring a caseworker to refer a parent to law enforcement upon statements made during the investigation exacerbate the risk of criminal liability.
- Child welfare agencies rely heavily on the discretion of individual caseworkers during investigations.
- Investigative meetings typically lack a transcript or impartial overseer, procedural safeguards used in other proceedings, such as the TPR proceedings at issue in *Lassiter*.
- Parents who make statements at an investigative meeting may have their name put on a State Central Registry as a child abuser, which can have consequences for the parent's employment.¹⁷⁰ Seven states plus the District of Columbia require only the lowest standard—"some credible evidence"—for this to occur.¹⁷¹
- A court has no way of making even a discretionary appointment of counsel prior to the investigative phase. Later appointment, if after removal, may be too late.¹⁷²

Finally, early appointment of counsel for parents subject to investigation is in the interest of state and local agencies under the third prong of Mathews. Agencies have an interest in avoiding erroneous removals, both because any removal, even temporary, is extremely traumatic for children and families, and because removal and placement of a child costs the agency significant funds. Advocates should demonstrate that the funds expended by a state during removal and placement, especially for those removals later reversed, far exceed those needed for having counsel available during investigations.

State Constitutional Law

Advocates may have the opportunity to establish a right to counsel for parents involved in an investigation in states that have embraced a more expansive right to counsel for parents than that identified by the U.S. Supreme Court. Several state courts have declined to follow *Lassiter* on state law grounds.¹⁷³ For example, the Supreme Court of Hawaii has held that indigent parents are guaranteed the right to court-appointed counsel in TPR proceedings under the Hawaii Constitution—largely applying the *Lassiter* dissents.¹⁷⁴ That court more recently significantly strengthened the right, holding that counsel must be appointed for parents as soon as the state files a case seeking even family supervision, let alone foster care custody, and the failure to do so violated due process guarantees under the Hawaii Constitution.¹⁷⁵ Others have at least identified the right to consult an attorney during an investigation, without explicitly holding that the attorney must be provided by the state for indigent parents.¹⁷⁶ Of course, for an indigent parent, having the opportunity to consult a lawyer is only meaningful if that lawyer is appointed.

Right to Counsel for Children

All parties involved in the system—including the children the system purports to protect—should have legal representation to further reduce unnecessary removals.¹⁷⁷ As advocates like Shanta Trivedi have pointed out, “[I]awyers for both parents and children would be able to advance arguments regarding all harms that a court should consider and provide information regarding the efforts the state made prior to removal.”¹⁷⁸ These arguments would encourage courts to consider both the emotional and psychological harms that children experience upon removal—including how these harms are disproportionately and differently experienced by Black children.¹⁷⁹ They would also encourage courts to grapple with the harms of foster care itself, such as frequent moves among unstable settings, placements in restrictive congregate environments, lack of access to mental health care, and harmful outcomes upon exiting or “aging out” of the system.¹⁸⁰ Counsel for children and parents alike can effectively urge courts to constantly balance concerns for child safety with the trauma of family separation and the harms imposed by the out-of-home foster care system itself.

Despite the benefits of early appointment of counsel for children, many states do not afford a fulsome right to counsel for children throughout all dependency proceedings. Children, especially those who may face institutionalization upon removal—and therefore significant restrictions of their physical liberty—have strong arguments for their right to counsel in the context of early proceedings leading to removal decisions. Children should therefore have equal access to high-quality legal representation early in dependency proceedings.

Counsel for children and parents alike can effectively urge courts to constantly balance concerns for child safety with the trauma of family separation and the harms imposed by the out-of-home foster care system itself.

2 STRATEGY TWO

Urging Courts to Recognize the Fundamental Right to Family Integrity and Association

The right to security in one's family is constitutionally protected by the First Amendment right to intimate association and the Fourteenth Amendment right to family integrity. Parents, children, and their advocates should assert these constitutional rights in the face of unwarranted and invasive surveillance and investigation practices at the front end of the child welfare system. Both the associational rights guaranteed by the First Amendment and the right to family integrity protected by the Fourteenth Amendment should operate to protect familial relationships from unwarranted government intrusion by child welfare agencies.

Though courts consistently recognize and protect these rights, the child welfare system continues to regularly separate children from their families, and these routine family separations disproportionately target and disrupt Black families. Furthermore, many of the family separations and investigations effected by child welfare agencies are unwarranted intrusions—as children are removed from their homes by child welfare workers due to racial biases and circumstances related to poverty, and families routinely investigated on the basis of anonymous reports of neglect or abuse that are later found to be meritless. Parents and children facing separation—and their advocates—should assert their First and Fourteenth Amendment rights in the face of unwarranted government intrusion into family relationships carried out by child welfare agencies.

The First Amendment Right to Intimate Association

Family relationships are protected by the First Amendment right to intimate association.¹⁸¹ While not all private relationships are so protected, the Supreme Court explained in *Roberts v. U.S. Jaycees* that familial relationships exemplify the

Because family relationships are considered the epitome of intimate relationships entitled to constitutional protection, the heart of any claim against a child welfare agency is the level of government interference with that relationship.

criteria of an intimate relationship entitled to First Amendment protection.¹⁸² The Court in *Roberts* also held that the level of constitutional protection afforded to an intimate relationship depends on the nature of the relationship at issue and the extent to which the protected relationship is at stake.¹⁸³

Under *Roberts*, a First Amendment intimate association claim requires an inquiry into the nature of the relationship at issue and the level of government intrusion into that relationship. The appropriate level of scrutiny to apply to the government action depends on this inquiry.¹⁸⁴ Because family relationships are considered the epitome of intimate relationships entitled to constitutional protection, the heart of any claim against a child welfare agency is the level of government interference with that relationship.¹⁸⁵ Courts have developed varying approaches applying *Roberts* to determine the level of constitutional protection for an intimate relationship, based on the level of government interference. For example, the Sixth Circuit applies strict scrutiny where there has been “direct and substantial interference” with the associational right.¹⁸⁶ The

Tenth Circuit requires a showing of intent to interfere with the right to intimate association.¹⁸⁷ The Fifth Circuit applies strict scrutiny to government action that infringes upon the right to intimate association protected by the First Amendment, without any threshold inquiry into the level of intrusion.¹⁸⁸

First Amendment intimate association claims have been brought to challenge actions taken by child welfare workers that prohibit or restrict contact between family members.¹⁸⁹ District courts in these cases have similarly applied various standards when assessing whether the government action violated the parents' First Amendment right to intimate association. In *Doe v. Fayette County Children and Youth Services*, the court addressed a First Amendment intimate association claim challenging a safety plan that prohibited contact between a father and his children prior to his completion of a sex offender treatment program.¹⁹⁰ The court recognized that "where a governmental regulation substantially interferes with close familial relationships, the most exigent level of inquiry—strict scrutiny is applied."¹⁹¹ In this case, the court reasoned that because the relationship at issue was a familial one, and the government intrusion into that relationship through the complete prohibition of contact for an indefinite period of time was substantial, strict scrutiny applied. The court held that the safety plan was not narrowly tailored to address the state's compelling interest in protecting his children and therefore violated the father's First Amendment rights.¹⁹²

Advocates for children have also asserted intimate association claims on behalf of children in the foster care system.¹⁹³ In *Brian A. ex rel. Brooks v. Sundquist*, for example, a plaintiff class consisting of all foster children who were or would be in the custody of the Tennessee Department of Child Services alleged, among other things, that the state's systemic actions and inactions violated their First Amendment right to intimate

The First Amendment right to intimate association may be a powerful tool to challenge government intrusion into family relationships in the name of the well-being of the child.

association.¹⁹⁴ Specifically, the plaintiffs argued that the state violated their First Amendment associational rights when it failed to facilitate appropriate family visits between children and their siblings, or parents, and failed to develop appropriate family reunification plans, unnecessarily keeping children apart from their families for longer than necessary.¹⁹⁵ The court recognized the First Amendment right to intimate association asserted by the plaintiff

class of children, and accepting the facts alleged, denied the defendant's motion to dismiss the First Amendment claim.¹⁹⁶

Because the exact inquiry governing an intimate association claim varies, a First Amendment intimate association claim should be framed based on precedent in the relevant jurisdiction. Advocates should first show that the government intrusion on the parent-child relationship is a substantial enough burden to warrant strict scrutiny.¹⁹⁷ If strict scrutiny applies, advocates should then show that the child welfare agency's actions were not narrowly tailored to address the compelling government interest in protecting the child,¹⁹⁸ or that less restrictive methods would advance the same interest.¹⁹⁹ As discussed above, scientific evidence shows that children can suffer lifelong adverse consequences as a result of trauma stemming from temporary separations from their families, government surveillance, and child welfare investigations.²⁰⁰ Evidence of the known trauma of family separation can help amplify these claims.

The First Amendment right to intimate association may be a powerful tool to challenge government intrusion into family relationships in the name of the well-being of the child. Strengthening this right could be used to disrupt the front end of the child welfare system by challenging intrusive investigation and removal practices that interfere with the parent-child relationship.

The Fourteenth Amendment

Family integrity has also been recognized as a fundamental liberty interest under the Fourteenth Amendment.²⁰¹ The Supreme Court has identified this liberty interest as underpinning parents' right to retain custody and control over the upbringing of their children, barring a finding of parental unfitness by the courts.²⁰² While this fundamental liberty interest has long been recognized by the courts, the level of scrutiny triggered by a violation of the right to family integrity is not settled. In *Troxel v. Granville*, the Supreme Court decided that a Washington state statute dictating third-party visitation rights unconstitutionally violated a mother's fundamental liberty interest in the care and upbringing of her children.²⁰³ The *Troxel* Court did not, however, clearly articulate the level of scrutiny it applied in rendering its decision.

As a result, lower courts have applied varying levels of scrutiny in cases alleging a violation of the fundamental right to family integrity. Several circuits have applied rational basis scrutiny to alleged violations of this right, reasoning that the right is subject to reasonable regulations, and asking whether the infringement is rationally related to a legitimate government interest.²⁰⁴ The Ninth Circuit has applied both strict scrutiny and rational basis review in cases asserting a family integrity claim, with the level of scrutiny varying based on the nature of the government infringement.²⁰⁵ In *Doe v. Heck*, the Seventh Circuit recognized that some heightened level of scrutiny was warranted and applied the Fourth Amendment's "reasonableness test" used to evaluate whether a search or seizure performed by the government was reasonable.²⁰⁶ The test for reasonableness considers "(1) the nature of the privacy interest upon which the action taken by the State intrudes; (2) the character of the intrusion that is complained of; (3) the nature and immediacy of the governmental concern at issue; and (4) the efficacy of the means employed by the government for meeting this concern."²⁰⁷

In the child welfare context, parents have asserted the right to family integrity in attempts to retain custody over their children.²⁰⁸ In one of those cases, the right has been framed as a parental interest in conflict with the best interest of the child.²⁰⁹ The Supreme Court, however, has recognized that parents and children share a

vital interest in the familial relationship, and their interests in maintaining a family unit should not be viewed as divergent until there has been a finding of parental unfitness.²¹⁰ In *Troxel*, Justice Stevens stated in dissent that while the Court had not yet had the opportunity to explain the nature of the child's interest in "preserving established familial or family-like bonds," it seemed likely that children, like their parents, have an independent interest in preserving their families.²¹¹

Recently, the idea that children have an independent liberty interest in family integrity has gained momentum in the context of the separation of immigrant families at the Southwestern border. Several cases brought by child plaintiffs have successfully asserted that the forcible separation of their families at the border deprived children of their fundamental liberty interest in family integrity.²¹² As with First Amendment claims, the science and other evidence of the trauma of family separation—even when short-lived—can further strengthen these claims.

Advocates should consider the utility of Fourteenth Amendment family integrity claims to disrupt the front end of the child welfare system. These claims could urge courts to recognize that both children and parents have a strong interest in family integrity. This recognition could help reframe the decision-making processes during the investigation, intervention, and removal stages of child welfare inquiries, and give proper weight to the child's interest in remaining with their family.

As with First Amendment claims, the science and other evidence of the trauma of family separation—even when short-lived—can further strengthen these claims.

3

STRATEGY THREE

Challenging Discrimination Under an Equal Protection Legal Theory

The Equal Protection Clause of the Fourteenth Amendment recognizes that citizens are entitled to equal protection of the laws. Among other types of discrimination, the Equal Protection Clause prohibits the selective enforcement of the law, including the decision to conduct heightened surveillance or to open an investigation, based on race.²¹³ A plaintiff may make out such a claim by showing either (1) that a law or policy contains an express racial classification that singles out the person's race for disfavored treatment,²¹⁴ or (2) a facially neutral law or policy was selectively enforced against members of the plaintiff's race in an intentionally discriminatory manner.²¹⁵ Equal protection claims could be a powerful tool to apply law from the policing context to the surveillance experienced by Black families at the front end of the child welfare system.

A number of high profile cases challenging racially discriminatory investigative and surveillance practices in the criminal legal context have resulted in favorable judgments or settlements.

Regardless of the chosen theory, a *purpose* or *intent* to discriminate is an essential element of an Equal Protection Clause violation.²¹⁶ This means that the decision maker must have “selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.”²¹⁷

This requirement, however, does not require that the plaintiff show that race was “the sole, predominant, or determinative factor in a[n] . . . enforcement action” or that the discrimination was based on “ill will, enmity, or hostility.”²¹⁸ Rather, state action violates the Equal Protection Clause so long as “a discriminatory purpose has been a motivating factor” in the challenged action.²¹⁹

In the clearest cases, a showing of discriminatory intent can be made with direct evidence that an enforcement decision was based on a person's race, such as an admission from a state official that race is used as a proxy for heightened criminality. More frequently, however, the plaintiff must rely on circumstantial evidence of intent to prove their case. Statistical evidence showing a glaring pattern of racial disproportionately is one powerful category of circumstantial evidence, and has even in rare cases been “accepted as the sole proof of discriminatory intent under the Constitution” where the disparity is sufficiently “stark.”²²⁰ For instance, in *Washington v. Davis*, the Supreme Court noted that in jury cases, “the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”²²¹

More typically, the plaintiff must come forward with at least some other evidence of discriminatory intent beyond evidence of statistical disproportionality. Examples of other types of circumstantial evidence that a plaintiff may use include “suspicious timing or inappropriate remarks, or comparative evidence of systematically more favorable treatment toward similarly situated [individuals] not sharing the protected characteristic”²²²

A number of high profile cases challenging racially discriminatory investigative and surveillance practices in the criminal legal context have resulted in favorable judgments or settlements. In

one high profile case, *Floyd v. City of New York*, the U.S. District Court for the Southern District of New York found that the New York City Police Department had engaged in a widespread practice of unconstitutional and racially discriminatory “stops and frisk” actions.²²³ There, the plaintiffs showed discriminatory intent through a combination of detailed statistical evidence of disproportionality in the stops as well as evidence that the police targeted young African American and Latino men because of their representation in crime statistics.²²⁴ In another class action case, *Melendres v. Arpaio*, the U.S. District Court for the District of Arizona found after a weeks-long bench trial that Sheriff Joe Arpaio and his agency violated the Equal Protection Clause by engaging in racial profiling and illegal detentions to target Latinos.²²⁵ There, the court relied on evidence including statistical studies, racially charged emails disparaging Latinos, and a failure to evaluate and monitor officers’ conduct for racial profiling.²²⁶

Although fewer and farther between, some analogous cases have been brought in the child welfare system to challenge discriminatory policies and practices, including at the front end of the system. For instance, in *People United for Children, Inc. v. City of New York*, a case that ultimately settled, the plaintiffs alleged that New York City violated the Equal Protection Clause by targeting African American parents and guardians when making decisions to remove children from their parents’ homes.²²⁷ In denying the defendants’ motion to dismiss, the court cited plaintiffs’ disproportionality statistics indicating “that a vast majority of children in foster care in New York City are African American, and that the likelihood of remaining in foster care is much greater for an African American child than for a white child.”²²⁸ The court concluded that “the statistical disparity alleged by plaintiffs” combined with “other allegations in th[e] complaint which also raise[d] an inference of intentional discrimination” were “sufficient to survive” the defendants’ motion to dismiss.²²⁹ Cases such as *People United* show that equal protection litigation can be a potentially powerful tool in challenging policies and practices that may be facially neutral but still unlawfully discriminate against Black families.

In addition, advocates should also consider asserting that a child welfare system’s deliberate indifference to racial disproportionality at the front

end, and the harms that result, rises to the level of intentional discrimination to support an equal protection claim. Under the Supreme Court’s ruling in *City of Canton, Ohio v. Harris*, intent on the part of the government may be inferred when a failure to train agency employees “amounts to deliberate indifference” of the constitutional rights of those individuals the employees interact with.²³⁰ Thus, the Court held that municipalities may be held liable when a “deliberate choice to follow a course of action is made from among various alternatives.”²³¹ Scholars and advocates Edgar Cahn and Cynthia Robbins contend that under this standard, in the context of an equal protection claim challenging racial disproportionality in the juvenile justice system, an argument may be made that “when official decision-makers have had formal notice of alternatives that are less costly and yield significant, sustained effects that have been replicated or have earned designation as promising or exemplary, the failure to use these alternatives would constitute ‘intentional disregard’ of injury to the fundamental constitutional rights for youth of color in the juvenile justice system.”²³²

To analogize the front end of the child welfare system to the arguments raised in the juvenile justice context, advocates could argue that: (1) the front-end system in a particular jurisdiction has documented disproportionate contact with Black children or families; (2) the disparity cannot be explained by race-neutral factors such as substantiated abuse or neglect; (3) contact with the front-end system causes injuries to children and families; and (4) the jurisdiction has been made aware of effective, less costly alternatives to the existing system that would reduce that disproportionality.²³³ To be successful under this theory, advocates should show that officials have been put on notice of both the disproportionate impact of the front-end policies and the effective and less costly alternatives that exist.²³⁴ Once there is formal notice of alternatives that would reduce racial disproportionality, the decision-makers’ failure to implement such alternatives—like the failure to train in *Canton*—may rise to the level of intentional discrimination under a deliberate indifference theory.²³⁵

4

STRATEGY FOUR

Challenging Discrimination Under Title VI of the Civil Rights Act

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination based on race, color, or national origin in programs and activities receiving federal financial assistance, is an additional tool available to combat racial discrimination at the front end of the child welfare system.

Title VI has been interpreted by the Supreme Court to include an implied private right of action for litigants to enforce the statute's prohibition against intentional discrimination.²³⁶ In addition, however, Title VI authorizes federal agencies to issue regulations prohibiting disparate impact discrimination as well. For example, HHS, which oversees child welfare systems, has implemented regulations prohibiting the use of “criteria or methods of administration which *have the effect* of subjecting individuals to discrimination because of their race, color, or national origin” or “have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect[s] individuals of a particular race” See 45 C.F.R. § 80.3(b)(2); See also 45 C.F.R. § 80.3(b)(3) (emphases added).²³⁷

Applying Title VI to disparate impact cases against recipients of federal funds is more complex. In 2001, the Supreme Court held in *Alexander v. Sandoval* that there was no implied private right of action to enforce federal disparate impact regulations promulgated under Title VI.²³⁸ Instead, the Court held that Title VI's provision allowing federal agencies to issue those regulations only allowed the agencies themselves to take action to enforce the prohibition on disparate impact discrimination, including by cutting funding to the federal program.²³⁹ Thus, private litigants may sue to enforce regulations issued under Title VI's prohibition of intentional discrimination only.²⁴⁰ The proof required for these claims is therefore similar to the proof discussed above for equal protection claims.²⁴¹

Federal agencies must continue to enforce disparate impact regulations. In the child welfare

context, HHS and ACF promulgate regulations and policy governing Title IV-B and IV-E agencies, while the Department of Justice (“DOJ”) is responsible for enforcing Title VI across federal funding agencies.²⁴² HHS and DOJ therefore have a mandate to ensure that state court systems and child welfare agencies comply with Title VI and its implementing regulations. This includes ensuring that child welfare agencies do not manage their reporting systems, conduct investigations, and remove children from their homes in a manner that disproportionately impacts Black children and families. Importantly, individuals who believe they have experienced discrimination in the child welfare system may submit complaints to HHS's OCR, which may refer a case to DOJ for further enforcement.²⁴³

Shortly before the end of the Trump Administration in January 2021, DOJ sent to the Office of Management & Budget for review a draft proposed final rule that, if put into effect, would have barred cases of disparate impact (including investigations) under Title VI across the board, permitting only cases of intentional discrimination.²⁴⁴ The “midnight rule” was issued in draft

Title VI is a critical tool to disrupt institutional racism in the child welfare system, as every state system receives federal funding and is therefore subject to the federal government's non-discrimination rules.

form without the public notice and comment typically required for rule changes, and no text of the proposed rule had been posted to the public.²⁴⁵ On January 20, 2021, the Biden Administration issued a “regulatory freeze” to ensure that the administration had the opportunity to review any new or pending rules, and the draft proposed final rule has not since been published in the Federal Register.²⁴⁶ The Biden Administration has since affirmed its intent to enforce prohibitions on disparate impact discrimination, at least in the housing and environmental contexts.²⁴⁷ Thus, there appears to be a robust opportunity to trigger OCR investigations into front-end child welfare practices that have a clear disproportionate impact on Black families and defeat or substantially impair the family preservation objectives of the federal scheme.

Title VI is a critical tool to disrupt institutional racism in the child welfare system, as every state system receives federal funding and is therefore subject to the federal government’s non-discrimination rules. The Biden Administration should fully enforce the long-standing protections against disparate impact discrimination, including where child welfare systems disproportionately impact Black families at the front end. Meanwhile, advocates should continue to marshal strategies and evidence to establish intentional discrimination under both the Equal Protection Clause and Title VI. Advocates should also consider submitting thoroughly documented complaints of discrimination to OCR for investigation and enforcement.

5

STRATEGY FIVE

Changing “Reasonable” Efforts to Avoid Removal to “Active” Efforts

Another recommendation to reduce the number of Black children unnecessarily removed from their homes is to ensure, both in law and in practice, that child welfare agencies demonstrate that they have “actively” tried to keep families together in order to legally justify removal (and as a condition for states to receive federal funding).²⁴⁸ The child welfare system must appreciate the importance of keeping Black families together in the same way that it values keeping other families together. Currently, under AACWA, a child welfare agency must show that it made “reasonable efforts” to preserve a family before a child is removed and in order to receive federal funds.²⁴⁹ “Reasonable efforts” was left undefined and vague in federal law.²⁵⁰ According to ACF’s Child Welfare Policy Manual, a federal definition of “reasonable efforts” was

considered contrary to the intent to have courts consider whether the agency made reasonable efforts on a case-by-case basis, and a definition was considered too broad to be effective.²⁵¹

The only touchstone courts have to determine whether an agency made reasonable efforts, however, is to consider the child’s health and safety as paramount.²⁵² Additionally, in making a reasonable efforts determination, judges may consider whether a family’s service plan was appropriately tailored, how the agency assessed services to provide the family, and any efforts taken to overcome obstacles to obtaining services.²⁵³

States that have attempted to define the “reasonable efforts” standard have not successfully clarified exactly what an agency must do to comply with the law. The Child Welfare

Information Gateway sets forth the reasonable efforts laws for each state, explaining that “[t]he statutes in most States use a broad definition of what constitutes reasonable efforts. Generally, these efforts consist of accessible, available, and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children.”²⁵⁴ For example, New Hampshire defines reasonable efforts as “services to the family that are accessible, available, and appropriate,” while Ohio requires only “relevant services provided by the child welfare agency to the family of the child.”²⁵⁵

Despite the lack of federal and state clarity in defining reasonable efforts, a “reasonable effort” to preserve a family and prevent the profound trauma of separation and removal is grossly inadequate, especially given the disparities in removal and separation impacting Black families.

Borrowing from the heightened standard required under the Indian Child Welfare Act (“ICWA”), “active efforts” should be required in all states, and would help prevent the alarmingly high number of Black families that are broken up every day by the child welfare system. Respecting the brutal history of forced separation and assimilation of American Indian and Alaska Native children and

families and the tribal sovereignty interests driving ICWA, federal regulations have defined active efforts as “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.”²⁵⁶ Prior to removing a child from their home, the agency must demonstrate that active efforts “have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the . . . family and that these efforts have proved unsuccessful.”²⁵⁷ Undoubtedly, active efforts require far more action by the child welfare agency to prevent removal and must be made universal.²⁵⁸

“[A]ctive efforts” should be required in all states, and would help prevent the alarmingly high number of Black families that are broken up every day by the child welfare system.

6

STRATEGY SIX

Delinking Community-Based Services for Families from Title IV

Services to support and preserve families in their communities are largely unavailable or inaccessible in the United States.²⁵⁹ In fact, those services and funding for services are usually not available unless a family becomes wrapped up in the child welfare system. For Black families, this means that accessing services requires the coercive and traumatic interference and surveillance from the same agency that removes their children at an

alarming and disproportionate rate. By the time families consider “prevention” programs, the trigger for system involvement has already been set in motion.

As discussed above, the 2018 Family First legislation seeks to overhaul federal child welfare financing by giving states the option to use funds previously reserved for maintaining children in foster care for prevention services that include

mental health, substance abuse, and in-home parent skill-based programs. While FFPSA may be a start to increase the provision of some services to some children and families, advocates should consider legislation that would ensure provision of services that address issues of poverty, housing, income supports, child care, and other necessary services for children and families, *apart and delinked from Title IV-E and the child welfare system*. In making a similar recommendation, Emma Williams, author of an Honors thesis focused on reconceptualizing child welfare, explained, “[t]he interwovenness of these systems [family regulation system and policing system] is concerning, especially in light of the fact that individuals who reach

out to social services seeking help may end up referred into punitive [child welfare] interventions. In this way, individuals are criminalized as a result of seeking help.”²⁶⁰

The National Academies of Sciences, Engineering, and Medicine produced a roadmap to reducing child poverty in the United States, and many of its recommendations could help provide families with services and supports without unnecessarily involving the child welfare system. These supports could include: an expansion of the Earned Income Tax Credit (“EITC”) and the Child and Dependent Care Tax Credit (“CDCTC”); an increase in the minimum wage; a child allowance designed to expand the reach of the Child Tax Credit; expansion of the Supplemental Nutrition Assistance Program (“SNAP”) and housing voucher programs; and elimination of the restrictions on certain immigrants obtaining public benefits by the 1996 welfare reforms.²⁶¹

In March 2021, President Biden signed the American Rescue Plan, which provides temporary improvements to the Child Tax Credit, the EITC, and the CDCTC. Improvements include expanding the Child Tax Credit, allowing families to offset

\$3,000 per child (\$3,600 per child under age 6); expanding the CDCTC, by making it fully refundable and increasing the maximum benefit; and expanding the EITC by removing the upper age limit and lowering the lower age limit to 19.²⁶² These changes offer the possibility of providing

more direct cash payments to poor families who need them.²⁶³ Nevertheless, these changes are temporary. We are hopeful that advocates will continue calling for Congress and President Biden to make these improvements permanent. In addition to continuing to develop ways to provide cash assistance to families, the federal government and states must improve access to physical and behavioral health services as

well as affordable child care. Community-based organizations must also receive adequate funding so they can help families obtain adequate housing, transportation, and other basic needs.²⁶⁴

Finally, states and municipalities should consider programs to provide pre-petition legal services to indigent families prior to the initiation of formal dependency proceedings.²⁶⁵ These services should be independent from the child welfare agency, should not rely on referrals from the agency for locating families in need of services, and should not result in any additional monitoring of the family by the agency. Recognizing the impact that a family’s civil legal needs have on child welfare proceedings, ACF has recently advocated for the development of civil legal advocacy programs to address family needs that could result in removal of a child if unaddressed—such as public benefits, housing, and special education.²⁶⁶ These programs should both use multi-disciplinary models to address family needs as they arise and provide direct representation during any investigation.

Advocates should consider legislation that would ensure provision of services that address issues of poverty, housing, income supports, child care, and other necessary services for children and families, *apart and delinked from Title IV-E and the child welfare system*.

7 STRATEGY SEVEN

Reimagining Federal Abuse and Neglect Definitions

Legal definitions of child abuse and neglect are broad, vague, and inconsistent across states. The statutory use of general terms like “maltreatment,” “harm,” abuse,” “neglect,” and “suspicion” ... without operational definitions places a significant level of discretion with mandatory reporters and child welfare workers and allows bias to infect decision-making. Among other problems, this discretion allows reporters and agency workers to superimpose their own cultural values on the values of the families reported. This also leads to inconsistency across states—as certain acts can be grounds for family separation in one state, while those same acts would not warrant an investigation in others—and even within systems as individual decision makers consider similar fact patterns. The exercise of discretion by mandatory reporters and child welfare workers is often plagued with issues stemming from implicit biases and a lack of appropriate training, significantly contributing to the disproportionate investigation and separation of Black families.²⁶⁷

CAPTA contains the following federal definitions of abuse and neglect, differentiating the two by defining abuse as “acts” and neglect as the “failure to act”: “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation;” or “an act or failure to act which presents an imminent risk of serious harm.”²⁶⁸ CAPTA sets these definitions as the minimum acts a state must identify as child abuse or neglect in order to receive federal funding for the provision of child welfare services.²⁶⁹ With an extremely broad minimum defined by federal statute, states have adopted varying definitions of abuse and neglect. While some states have narrowed their definitions and included meaningful exclusions, others have adopted definitions that are, troublingly, both broad and vague. In some states, the definitions of neglect and abuse have even been conflated, where neglect is listed as a type of abuse, or the two are defined collectively instead of distinctly.²⁷⁰

Federal legislators should consider removing the entire category of neglect from CAPTA, with the possibility of defining circumstances of “extreme neglect” within the definition of child abuse. Additionally, federal law should require states to adopt definitions that, at a minimum, avoid conflating the consequences of poverty with neglect, by excluding conditions or circumstances related to poverty or a lack of financial resources. By clarifying and narrowing the federal definitions that trigger the receipt of federal funding for states, federal law likely would incentivize many states to adopt modified and more circumscribed definitions of abuse and neglect. These limitations would themselves limit the discretion of mandatory reporters and child welfare workers, and could lower the risk that racial stereotypes and implicit biases would result in the disproportionate removal of Black children.

Notably, some states have crafted definitions of child abuse and neglect that already include these proposed changes. These definitions can serve as a powerful tool to guide the amendment of the current federal definitions. For example, a number of state definitions of abuse and neglect exclude circumstances directly related to a lack of financial resources.²⁷¹ Iowa defines child

The statutory use of general terms like “maltreatment,” . . . without operational definitions places a significant level of discretion with mandatory reporters and child welfare workers and allows bias to infect decision-making.

abuse as: “[t]he failure on the part of a person responsible for the care of a child to provide for the adequate food, shelter, clothing, medical or mental health treatment, supervision, or other care necessary for the child’s health and welfare *when financially able to do so or when offered financial or other reasonable means to do so.*”²⁷² This definition distinguishes between the lack of financial resources to provide for a child, and the willful failure to use available resources when financial resources are not a barrier to provide appropriate care for a child. Louisiana’s statute similarly provides that, “the inability of a parent or caretaker to provide for a child *due to inadequate financial resources* shall not, for that reason alone, be considered neglect.”²⁷³

The explicit exclusion of the conditions of poverty from neglect definitions should encourage the availability of community services that can assist families in need, rather than calling on the child welfare system to do so and subjecting families to coercive surveillance, investigations, and separations. This proposed exclusion would shift the response to conditions of poverty away from investigations and removals and toward the provision of services, such as mental health

Additionally, federal law should require states to adopt definitions that, at a minimum, avoid conflating the consequences of poverty with neglect, by excluding conditions or circumstances related to poverty or a lack of financial resources.

services, housing support, and transportation. Combining this proposed exclusion with the availability of federal funding under Title IV-E for differential response programs would magnify this shift.²⁷⁴ These measures could preclude many children—and especially Black children—from entering the system as a result of family poverty and provide families with the support needed to remain together.

8

STRATEGY EIGHT

Identifying Changes to Mandated Reporting Statutes that Reduce the Surveillance of Black Families

As discussed, mandated reporting is a critical front-end point that triggers the involvement of Black children and families with the child welfare system. The circumstances under which a reporter must, or may, report potential child maltreatment vary by state. Typically, a report must be made when the reporter suspects or has reason to believe that child maltreatment has occurred.

The reporting process usually involves a telephone call to either a decentralized or centralized hotline. A decentralized system involves calls into a local or regional child welfare office, whereas a centralized system requires reports be made to a central hotline that receives reports from all over a particular jurisdiction.²⁷⁵ These centralized structures screen in a signifi-

cantly higher percentage of reports for investigation when compared to systems with decentralized structures.²⁷⁶ The decentralized systems have significantly lower percentages of cases screened in for investigation and significantly lower screened-in report rates.²⁷⁷

Approximately forty-seven states require reporting by designated reporters that include professionals, such as social workers, healthcare workers, teachers and school personnel, and therapists.²⁷⁸ Eighteen states and Puerto Rico require universal reporting: *every adult* in the state is required by law to report a suspicion or belief of child maltreatment, regardless of their familiarity or experience with children or their knowledge of what

constitutes abuse or neglect.²⁷⁹ Only nineteen states require reporters to give their name and contact information when making a report.²⁸⁰

Reporting requirements have been used as a system of surveillance, power, and control over Black families and as a means to discredit the ability of Black parents to care for their children.²⁸¹ Recognizing a key problem with mandated reporting, Diane Redleaf, Co-Chair of United Family Advocates, wrote, “[h]otline reporters generally do not fret over the potential impact of their calls on the accused. They reasonably expect [CPS] authorities to competently investigate each case and accurately assign blame.”²⁸² Unfortunately, misplaced allegations are not infrequent. For example, federal data indicates that 56.3% of calls screened in for investigation of abuse and neglect were unsubstantiated.²⁸³

In universal reporting states, every adult is recruited to be part of a government surveillance system that disproportionately impacts, in particular, women of color and serves to distort women’s ability to mother without fear of the surveillance and potential removal of their children.²⁸⁴ Adding to the problems posed by universal reporting, anonymous reporting enables

reporters to call in reports without being accessible for follow-up conversations or being held accountable for the allegations they make.²⁸⁵ By contrast, confidential reporting, which requires callers to identify themselves and provide contact information, allows states to track false and malicious reporting in order to stop abusers from

using the system to re-victimize and terrorize children and parents.²⁸⁶

Legislation has been introduced in New York that would change mandated reporting from anonymous to confidential.²⁸⁷ Similarly, a bill was recently introduced in Texas that would prevent child welfare agencies from accepting anonymous reports.²⁸⁸

Low-income, minority, and especially Black families are more

likely to be reported to child protective services, which disproportionately burdens Black families.²⁸⁹ The number of unsubstantiated reports demonstrates unnecessary state intrusion into family life, especially among poor and Black families. To reduce unnecessary surveillance and state intervention, federal law, such as CAPTA, should require all states to move away from universal, centralized, and anonymous reporting, toward non-universal, confidential, and decentralized reporting.

Reporting requirements have been used as a system of surveillance, power, and control over Black families and as a means to discredit the ability of Black parents to care for their children.

9

STRATEGY NINE

Holding Systems Accountable to Center the Known Trauma of Family Separation at the Front End and Throughout the Child Welfare System

The child welfare system can no longer ignore the trauma caused by the decision to separate a child from their parent. The resulting attachment disruption and trauma must be considered at every decision point at the front end of the child welfare system and at all points thereafter. Study after study demonstrates that children suffer complex and long-lasting harms when they are removed from their parents and placed into foster care. Yet, in most states, courts consider only whether a child is at risk of harm if they remain in their parents' care, without explicitly weighing the harm that results from the child's removal from their home and family.²⁹⁰ Disrupting the strong bond between children and their parents is damaging to a child—even when the parents are imperfect.²⁹¹

At least three jurisdictions have focused on the trauma of removal. In Washington, D.C., courts are required by statute to consider the harm of removal to a child before ordering removal.²⁹² Similarly, the New York Court of Appeals, in *Nicholson v. Scoppetta*, held that courts must balance the risk of imminent harm with the risk of removal when determining what is in a child's best interest.²⁹³ Prior to removing a child from their home, Connecticut's Department of Children and Families requires a "Considered Removal Child and Family Team Meeting" to be held with all persons connected with the child, to discuss planning and services.²⁹⁴ According to that agency's policy, "[t]his approach is consistent with the essential elements of a trauma-informed

system as it attempts to minimize disruptions to safe, healthy relationships as well as separations from attachment figures, thereby supporting children exposed to trauma and reducing potential secondary trauma."²⁹⁵

Study after study demonstrates that children suffer complex and long-lasting harms when they are removed from their parents and placed into foster care.

Federal and state policy must mandate the consideration of trauma associated with disrupting a child's attachment to the only family they know, the grief and loss that will result from being ripped from their communities, and the potential for long-term impact on that child's development and life trajectory. Likewise, child welfare systems must be held accountable and put practices in place for the thorough assessment and regular consideration

of the trauma of removal. Advocates for children and families should constantly center the clinical and fact-specific evidence of trauma to inform decision-making in individual cases and impact litigation. To ignore the research available to us is yet another way to prioritize the forcible destruction of families, especially Black families, rather than to honor the bonds that exist between parents and children.

Call to Action

Children's Rights firmly believes that the ongoing harm to Black children and families must be addressed by disrupting institutional racism and its effects on the child welfare system. The front end of this system has historically subjected Black families to unnecessary interference and forced separation. As a result, so many of the families caught up in the child welfare system should have never entered the front door. We encourage each and every one of our readers to take action: to educate themselves and those around them about the ways in which the front-end system works to destroy and further oppress Black families. It is our hope that our readers will join us in using the strategies outlined here to disrupt and ultimately end the destructive footprint of the front end of the child welfare system.

At the same time, Children's Rights will not stop fighting to protect the rights of children and families already in the system. These children and families can never be forgotten or effectively viewed as casualties of a changing child welfare system, even as advocates successfully drive radical transformation, and ultimately abolition, of that system.

— “ —

***Whether we prevail
is determined not
by all the challenges
that are present, but
by all the change
that is possible.***

Amanda Gorman,
Fury and Faith

— ” —

Endnotes

- 1 Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, THE IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>.
- 2 RISE MAG., <https://www.risemagazine.org/rise-magazine/> (last visited May 4, 2021); Lisa Sangoi, *How the Foster System Has Become Ground Zero for the U.S. Drug War*, MOVEMENT FOR FAM. POWER (2020), at 70-74, 77-81, [https://www.movementforfamilypower.org/ground-zero; 2020 Casey Excellence for Children Awards, Brejea "Bre" Colthirst, CASEY FAM. PROGRAMS \(Jan. 13, 2020\), https://www.casey.org/ceca-2020/](https://www.movementforfamilypower.org/ground-zero; 2020 Casey Excellence for Children Awards, Brejea); *The New Jane Crow*, YOUTUBE (Feb. 13, 2020), <https://www.youtube.com/watch?v=mGIMIEWzDy4>; When the Bough Breaks on Motherhood, YOUTUBE (Oct. 16, 2020) [hereinafter Goldie Tibbs Statement], [https://www.youtube.com/watch?v=a-sa8B-00uOw&list=PLdfitpNUoh_2DMb1YP-LI-WdgqhzCkW1C5; Oversight - Impact of Marijuana Policies on Child Welfare Before the N.Y. City Council Comm. on Gen. Welfare, 242nd Leg. Sess. \(N.Y. Apr. 10 2019\) \(statement of Shakira Kennedy\) \[hereinafter Shakira Kennedy Statement\], https://legistar.council.nyc.gov/DepartmentDetail.aspx?ID=6906&GUID=3A095E28-DEC4-4B6A-A2A3-E5C95F87200D; Molly Schwartz, Do We Need to Abolish Child Protective Services?, MOTHER JONES \(Dec. 10, 2020\), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/](https://www.youtube.com/watch?v=a-sa8B-00uOw&list=PLdfitpNUoh_2DMb1YP-LI-WdgqhzCkW1C5; Oversight - Impact of Marijuana Policies on Child Welfare Before the N.Y. City Council Comm. on Gen. Welfare, 242nd Leg. Sess. (N.Y. Apr. 10 2019) (statement of Shakira Kennedy) [hereinafter Shakira Kennedy Statement], https://legistar.council.nyc.gov/DepartmentDetail.aspx?ID=6906&GUID=3A095E28-DEC4-4B6A-A2A3-E5C95F87200D; Molly Schwartz, Do We Need to Abolish Child Protective Services?, MOTHER JONES (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/); Dorothy Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125, 129-147 (2008), <https://cap.law.harvard.edu/wp-content/uploads/2015/07/robertsrdr.pdf>; Effrosyni D. Kokaliari et al., *African American Perspectives on Racial Disparities in Child Removals*, 90 CHILD ABUSE & NEGLECT 139 (2019).
- 3 Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 538 (2019) (internal quotation marks omitted).
- 4 This Call to Action focuses on the harms caused by unnecessary surveillance, investigation, and separation of Black families in cases of so-called "neglect," but the trauma caused by enduring racist structures applies to cases of reported abuse as well. See, e.g., Kimberly M. Bernstein et al., *Racial Stereotyping and Misdiagnosis of Child Abuse*, 51 AM. PSYCH. ASS'N, JUD. NOTEBOOK 35 (2020), <https://www.apa.org/monitor/2020/07/jn> (identifying disproportionality in abuse diagnoses when the child is Black rather than white). While the strategies discussed in Section IV focus on moving toward abolition of intervention in cases of neglect, the authors recognize that different and/or additional strategies may be warranted to address cases of severe child abuse and actual safety risks to children.
- 5 The total percent of removal reasons exceeds 100% as more than one removal reason may be documented for each child (physical abuse - 15.2%; sexual abuse - 3.0%; neglect - 63.1%; alcohol abuse by a parent - 4.0%; drug abuse by a parent - 21.9%; alcohol abuse by child - 0.2%; drug abuse by child - 1.5%; child disability - 1.8%; child behavior problem - 9.3%; parent death - 1.0%; parent incarceration - 5.7%; caretaker inability to cope - 15.7%; abandonment - 6.3%; relinquishment - 1.5%; inadequate housing - 10.3%). Adoption & Foster Care Analysis & Reporting System ("AFCARS") 2019 Data Set (analysis by Children's Rights' Policy Department).
- 6 AFCARS 2019 Data Set (analysis by Children's Rights' Policy Department) (showing for all children who are in foster care, regardless of race, 12.7% had a removal reason of physical abuse, 4.0% had a removal reason of sexual abuse, and 65.2% had a removal reason of neglect).
- 7 AFCARS 2019 Data Set (analysis by Children's Rights' Policy Department).
- 8 Information Memorandum Log No: ACYF-CB-IM-21-02, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (Jan. 12, 2021), at 5, <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2102.pdf>.
- 9 *Id.*
- 10 *A Proclamation on National Foster Care Month*, 2021, THE WHITE HOUSE (Apr. 30, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/30/a-proclamation-on-national-foster-care-month-2021/>.
- 11 Alan J. Dettlaff et al., *It Is Not a Broken System, It Is a System That Needs to Be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 508-513 (2020); Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, THE IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>; Alan Dettlaff et al., *What It Means to Abolish Child Welfare As We Know It*, THE IMPRINT (Oct. 14, 2020), <https://imprintnews.org/race/what-means-abolish-child-welfare/48257>.
- 12 Richard P. Barth et al., *Outcomes Following Child Welfare Services: What Are They and Do They Differ for Black Children?*, 14 J. PUB. CHILD WELFARE 477, 483-86, 488-89 (2020) (summarizing existing literature on the negative outcomes experienced by Black youth in care, including adverse educational outcomes and increased likelihood of involvement with the criminal legal and public housing systems); E. Michael Foster et al., *Explaining the Disparity in Placement Instability Among African-American and White Children in Child Welfare: A Blinder-Oaxaca Decomposition*, 33 CHILD. & YOUTH SERVS. REV. 118, 122-123 (2011) (finding that Black youth were assigned to out-of-home placements more frequently than white youth); Oronde Miller et al., *Changing Course: Improving Outcomes for African American Males Involved with Child Welfare Systems*, CTR. STUDY SOC. POL'Y (2014), at 4-11, https://cssp.org/wp-content/uploads/2018/08/Changing-Course_Improving-Outcomes-for-African-American-Males-Involved-with-Child-Welfare-Systems.pdf; Toni Naccarato et al., *Employment Outcomes of Foster Youth: The Results from the Midwest Evaluation of the Adult Functioning of Foster Youth*, 32 CHILD. & YOUTH SERV. REV. 551, 556-57 (2010); Megan Martin & Dana Dean Connelly, *Achieving Racial Equity*, CTR. STUDY SOC. POL'Y (2015), at 6, <https://cssp.org/resource/achieving-racial-equity-child-welfare-policy-strategies-improve-outcomes-children-color/>; *Fostering Youth Transitions: Using Data to Drive Policy and Practice Decisions*, ANNIE E. CASEY FOUND. (2018), at 2, <https://www.aecf.org/resources/fostering-youth-transitions/>.
- 13 See e.g., Memorandum Opinion & Verdict of the Court, *M.D. v. Abbott*, No. 11-CV-84, at *56 (S.D. Tex. Dec. 17, 2015) ("The Court does not base any system-wide findings solely on the Named Plaintiffs' experiences in foster care. Their experiences, however, paint a similar picture: children often enter foster care at the Basic service level, are assigned a carousel of overburdened caseworkers, suffer abuse and neglect that is rarely confirmed or treated, are shuttled between placements—often inappropriate for their needs—throughout the State, are migrated through schools at a rate that makes academic achievement impossible, are medicated with psychotropic drugs, and then age out of foster care at the Intense service level, damaged, institutionalized, and unable to succeed as adults."); Complaint, *M.B. v. Kelly*, No. 18-cv-2617 (D. Kan. Nov. 16, 2018) (alleging extreme placement instability and deprivation of mental health treatment in foster care); Plaintiffs' Original Complaint for Injunctive and Declaratory Relief as a Class Action, *Michelle H. v. McMaster*, No. 15-cv-134-RMG (D.S.C. Jan. 12, 2015) (alleging unnecessary institutionalization, dangerous lack of child safety oversight and failure to ensure basic health check-ups and treatment in foster care). See generally Ira Lustbader & Elissa Glucksman Hyne, *The Urgent Need to Disrupt Structural Violence Against Children in American Foster Care*, in VIOLENCE AGAINST CHILDREN: MAKING HUMAN RIGHTS REAL (Gertrud Lenzer, ed., 2018).
- 14 Robert B. Hill, *Institutional Racism in Child Welfare*, 7 RACE & SOCIETY 17 (2004); Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, THE ANNALS AM. ACAD. POL. & SOC. SCI. 253, 255 (2020). Even attempting to say racism is the root cause is fraught. See *infra* note 102.
- 15 See Angela Glover Blackwell, *The Curb-Cut Effect*, STAN. SOC. INNOVATION REV. (2017), https://ssir.org/articles/entry/the_curb_cut_effect (defining the curb-cut as "[i]aws and programs designed to benefit vulnerable groups, such as the disabled or people of color, often end up benefiting all of society.").

- 16 Hill, *supra* note 14, at 19 (citing ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, *CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE* (1972)).
- 17 Camara Phyllis Jones, *Levels of Racism: A Theoretic Framework and a Gardener's Tale*, 90 *Am. J. Pub. Health* 1212, 1212 (2000).
- 18 Zanita E. Fenton, *Colorblind Must Not Mean Blind to the Realities Facing Black Children*, 26 *B.C. Third World L. J.* 81, 83 n.9 (2006) (explaining that the racism in the child welfare system "can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people"); Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 *CUNY L. REV.* 23 (2016) (tracing how notions of pure, good, white motherhood formed the basis for an expansion of the intrusion into the private family life of those whose parenthood did not conform to that ideal).
- 19 The developing systems of organized child protection could not serve Black children while Jim Crow laws were in place. Unsurprisingly, even after de jure segregation was dismantled, Black children continued to experience discrimination. Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 *Nw. J. L. & Soc. Pol'y* 303, 305 (2006), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1003&context=njls>; DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 7 (2002).
- 20 Almshouses were originally formed as extensions of churches to provide charitable housing and later adopted by local governments. They came to be known as 'poorhouses' and to be considered a means of segregating undesirable populations and outcasts of society. Melissa Marie Hamilton & Jennifer June Anderson, *Revisiting Child Welfare Policy and the Field of Social Work*, 2 *INT'L J. ARTS, HUMAN, & SOC. SCI.* 21, 22 (2021); Carrie Jefferson Smith & Wynetta Devore, *African American Children in the Child Welfare and Kinship System: From Exclusion to Over Inclusion*, 26 *CHILD. & YOUTH SERVS. REV.* 427, 429 (2004) (noting that Black children were subject to more hostile treatment in these placements than their white peers).
- 21 Ramona W. Denby & Carla M. Curtis, *Child Welfare in Perspective: Historical Factors Influencing African American Families and Policy Formulation*, in *AFRICAN AMERICAN CHILDREN AND FAMILIES IN CHILD WELFARE: CULTURAL ADAPTATION OF SERVICES* 42, 43-44 (Colum. Univ. Press 2013) (describing the destruction and devaluation of the Black family during slavery and the prevalence of former slave owners refusing to relinquish custody of enslaved children during the reconstruction era); Dettlaff & Boyd, *supra* note 14, at 259-260 (asserting that the trauma of involuntary removal can be heightened by this legacy of forced family separation); Smith & Devore, *supra* note 20, at 429 (explaining that, in keeping with kinship care patterns, Black children who were orphaned by the death, auction, or incapacitation of their enslaved parents were absorbed into the slave community by other adults).
- 22 Ruth McRoy, *The Color of Child Welfare*, in *THE COLOR OF SOCIAL POLICY* 37, 38 (King E. Davis & Tricia B. Bent-Goodley eds., 2004); Smith & Devore, *supra* note 20, at 429 (noting that a white mob destroyed the Philadelphia Association for the Care of Colored Children, the first Black orphanage, fifteen years after its was established).
- 23 ROBERTS, *supra* note 19, at 7.
- 24 McRoy, *supra* note 22, at 38.
- 25 *Id.* (noting that churches, schools, and social organizations, including the short-lived and under-funded Freedmen's Bureau, responded to the child welfare needs of Black children); Patricia Turner Hogan & Sau-Fong Siu, *Minority Children and the Child Welfare System: An Historical Perspective*, 33 *Soc. WORK* 493, 494 (1988); Smith & Devore, *supra* note 20, at 431 (explaining that in the few exceptions where the early systems of organized child protection did not exclude Black children entirely, they offered services through segregated branches or during special hours).
- 26 Mulzer & Urs, *supra* note 18, at 48.
- 27 Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, *CTR. FOR THE STUDY OF SOC. POL'Y* (2018), at 17, <https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf>.
- 28 Mulzer & Urs, *supra* note 18, at 49-50.
- 29 *Id.* (citing Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, in *A CENTURY OF JUVENILE JUSTICE* 3, 19) (Margaret K. Rosenheim et al. eds., 2002) (noting that many cases involved "disease and malnutrition, children left unattended while their parents worked, children not warmly dressed, houses without heat, bedding crawling with vermin, unchanged diapers, [and] injuries left without medical treatment.").
- 30 Linda Gordon, *"The Cruelty": Child Protection, 1880-1910*, in *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, 1880-1960* 27, 28, 46-47 (1988) (noting that early reformers working with SPCCs saw child maltreatment "as a vice of inferior classes and cultures which need correction and 'raising up' to an 'American' standard" and found their sense of mission in "a feeling of unquestioned superiority to the masses among whom child neglect and abuse were so widespread").
- 31 Margaret D. Jacobs, *The Great White Mother: Maternalism and American Indian Child Removal in the American West, 1880-1940*, in *ONE STEP OVER THE LINE: TOWARD A HISTORY OF WOMEN IN THE NORTH AMERICAN WESTS* 191, 202 (Elizabeth Jameson & Sheila McManus eds., 2008), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1105&-context=historyfacpub> (describing how many reformers believed that white women, in either institutions or homes, would parent American Indian children better until their "poor, ignorant mothers" could be properly trained).
- 32 *Id.* at 199-202.
- 33 John E.B. Myers, *A Short History of Child Protection in America*, 42 *FAM. L. Q.* 449, 452-453 (2008) (explaining that the creation of the Children's Bureau in 1912 and the increased role of state and federal governments in social services following the Great Depression gave way to the federalized administration of child welfare).
- 34 ROBERTS, *supra* note 19, at 7 (noting that Black children were excluded from 711 of the 1,070 child-caring agencies reported by northern states in the 1923 census).
- 35 Between 1945 and 1961, the proportion of nonwhite children on public child welfare caseloads steadily increased. By 1961, 24% of the children served by public agencies were Black. Even after the child welfare system began to include Black children, however, religious charities continued to practice blatant racial discrimination. Through the 1990s, they used religious preferences, gradations of skin shade, and hair texture to justify the exclusion of Black children. *Id.* at 7-8.
- 36 Hogan & Siu, *supra* note 25, at 494 (citing ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, *CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE* (1972)). Some states used discriminatory policies, such as "home suitability clauses," "substitute father rules," "man-in-the-house rules," and "illegitimate child clauses," which prevented many Black families from receiving public welfare benefits under the 1935 Aid to Dependent Children program, to label Black children as neglected. Despite their children having been labeled as such, Black families generally received no follow-up services. The 1962 Public Welfare Amendments later attempted to remedy this by requiring caseworkers to provide services to "neglectful" parents. This ultimately amounted to "oppressive inclusion," however, because it subjected Black families to culturally insensitive services that they could not refuse and to unnecessary removal. Claudia Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, 76 *CHILD WELFARE* 9, 12-21 (1997); See Ruth G. McRoy, *An Organizational Dilemma: The Case of Transracial Adoptions*, 25 *J. APPLIED BEHAV. SCI.* 145, 146-147 (1989) (noting that adoption and institutional care were among the services least available to Black children).
- 37 Lawrence-Webb, *supra* note 36, at 23 (noting that by 1963, 81% of children in out-of-home care were placed because their parents were unmarried or because they came from broken homes and the largest

groups of children in care were Black and American Indian).

38 Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 39-40 (2014), <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3262&context=vlr>.

39 Published in 1962 by pediatrician Henry Kempe and his colleague, *The Battered-Child Syndrome* was the culmination of a stream of scholarship, dating from John Caffey's publication of *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma* in 1946 that was concerned with the abusive origin of childhood injuries. National media coverage of child abuse, which was uncommon prior to the 1960s, accompanied the medical profession's heightened interest in the issue. Myers, *supra* note 33, at 454-455.

40 The proposed legislation required physicians to report if, based on the facts readily available regarding the extent of the injuries and the case history, reasonable cause existed to suspect that a parent or other person responsible for the care of the child inflicted the physical injury. U.S. DEP'T OF HEALTH, EDU., & WELFARE, CHILD. BUREAU, *THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD* (1963), at 5-6, <https://babel.hathitrust.org/cgi/pt?id=pu1.32754078884032&view=1up&seq=6>.

41 *Id.*

42 *Id.* at 12-13.

43 Myers, *supra* note 33, at 456; Brown III & Gallagher, *supra* note 38, at 40-42 (explaining that Nebraska, Tennessee, and Utah went above and beyond the Bureau's recommendation and instituted universal reporting laws).

44 Myers, *supra* note 33, at 456 (noting that the number of reports declined slightly in the early twenty-first century).

45 CAPTA was passed in part due to concern over the lack of federal leadership in the administration of the child welfare system. Senator Walter Mondale, who authored and sponsored the bill, drew attention to this issue in 1973, writing, "[n]owhere in the Federal Government could we find one official assigned full time to the prevention, identification, or treatment of child abuse and neglect." Brown III & Gallagher, *supra* note 38, at 42-43; Myers, *supra* note 33, at 456-457.

46 *About CAPTA: A Legislative History*, CHILD WELFARE INFO. GATEWAY (2019), <https://www.childwelfare.gov/pubPDFs/about.pdf>.

47 In order to receive federal funding, CAPTA required states to institute provisions for individuals to report known and

suspected instances of child abuse and neglect, including legislation that granted reporters immunity from prosecution for reporting. CAPTA, Pub. L. No. 93-247, 88 Stat. 4 (1974). Congress amended CAPTA in 2003 with additional conditions for receiving federal funding. In addition to instituting mandatory reporting requirements, states are now required to certify that they have policies and procedures to address the needs of infants born with and identified as being affected by substance abuse or withdrawal symptoms, including a requirement that health care providers notify child protective services of the occurrence of such conditions. CAPTA, Pub. L. No. 108-36, 117 Stat. 800 (2003). *See also infra* note 81.

48 Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 460 (1978), <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2180&context=vlr> (noting that many states amended their laws and procedures to require reports of suspected neglect as well as abuse in part because of the impetus of CAPTA).

49 Hogan & Siu, *supra* note 25, at 494 (reporting that from 1976 to 1982, between 55 and 65 percent of reports were for neglect situations alone, with Black families being more likely to be involved in reported neglect situations); Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 226-229 (2013) (asserting that parents of color, who are disproportionately poor, are at a higher risk of being involved with the child welfare system because poverty is often conflated with neglect); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610 (2020) (finding that surveilling professionals often invoke reporting laws strategically as a tool to enforce their moral judgments, especially on poor families and families of color).

50 Besharov, *supra* note 48, at 467-469 (observing how reporting laws expanded from the prior focus on physicians to include a wider class of mandated reporters, including teachers, social workers, police officers, child care workers, clergymen, coroners, attorneys, and other professionals).

51 *Id.* Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785 (2018).

52 By 1980, the flood of children entering foster care was so overwhelming that the federal government could not account for many of the children in care, what services they were receiving, or whether any serious attempt was being made to reunite them with their families. Shawn L. Raymond, *Where Are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1241-1243, n.28 (1999); S.

REP. No. 96-336, at 15 (1979) (acknowledging that a major reason for the enactment of AACWA was "the evidence that many foster care placements may be inappropriate and that [the] situation may exist at least in part because Federal law is . . . structured to provide stronger incentives for the use of foster care than for attempts to provide permanent placements.").

53 Jennifer A. Reich, *Child Protection: A Historical Perspective*, in *FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM* 27, 42-43 (2005) (explaining that AACWA requires a "judicial determination" that reasonable efforts have been made prior to removal).

54 McRoy, *supra* note 22, at 41-42 (reporting that while AACWA was initially effective in reducing the number of children in foster care, Black children continued to be overrepresented in out-of-home care between 1982 and 1993); *See also infra* note 97.

55 S. REP. No. 96-336, at 16 (1979).

56 *Id.* (noting the Committees' unwillingness "to accept as a general proposition that judiciaries of the States would so lightly treat a responsibility placed upon them by Federal statute for the protection of children."); Raymond, *supra* note 52, at 1254-1255 (observing that many states provide judges with preprinted court orders with boxes to check to ensure that the words "reasonable efforts" appear in removal orders and that many judges make positive findings based on inaccurate or incomplete information); Trivedi, *supra* note 3, at 558-59 (asserting that "reasonable efforts" continues to be a toothless, poorly-defined requirement).

57 In a 1996 Amendment, The Interethnic Placement Act, further clarified some MEPA language focused on cultural considerations for foster care and adoption procedures. The Interethnic Placement Act also included penalties for jurisdictions that violate MEPA. Pub. L. No. 104-188, 110 Stat. 1755, 1903 (1996).

58 By the end of 1994, Black children comprised 54% of the children in out-of-home care. Six years after entering care, a Black child's likelihood of being adopted was only 1/5 that of a white child's. Furthermore, the lack of targeted recruitment efforts and the institutional racism that Black families who applied for adoption experienced significantly limited the availability of placements for Black children in foster care. Joan Heifetz Hollinger, *A Guide to The Multiethnic Placement Act of 1994 as amended by the Interethnic Adoption Provisions of 1996*, ABA CTR. ON CHILD. & L., NAT'L RES. CTR. ON LEGAL & CT. ISSUES (1998), at 3-4, https://www.americanbar.org/content/dam/aba/administrative/child_law/Guideto-MultiethnicPlacementAct.pdf; McRoy, *supra* note 22, at 53.

59 In at least one federal impact lawsuit, the argument that MEPA applied in the aggregate to structures that delayed or denied adoption to Black children survived a

Motion to Dismiss. See *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360-61 (N.D. Ga. 2005).

60 42 U.S.C.A. § 5115a (West), amended by 42 U.S.C.A. § 1996b(1) (West); Hollinger, *supra* note 58, at 9-13, 22-25 (providing a detailed explanation of these provisions); McRoy, *supra* note 22, at 53-54 (explaining that the 1996 Interethnic Adoption Provisions (“IEP”), which amended MEPA, removed language that permitted agencies to make some consideration of race and added both a strict scrutiny provision and monetary penalties to deter states from violating MEPA-IEP).

61 Agencies based these policies on the widely accepted belief that Black children had a right to placements that met their racial and ethnic needs. Before MEPA, agencies viewed transracial placements as a “last resort” for Black children because they lacked the critical heritage that proponents of racial matching claimed Black children needed. Critics of racial matching contended that matching policies were harmful because they assumed that racial and ethnic needs outweighed other important needs, particularly the need for an early, continuing stable relationship, and that only matched families could adequately meet these needs. Hollinger, *supra* note 58, at 4-6; McRoy, *supra* note 36, at 149-150 (noting that the Child Welfare League of America had encouraged transracial adoptions in 1968, but reversed its policy in 1973 after the National Association of Black Social Workers passed a resolution stating in relevant part that “[o]nly a black family can transmit the emotional and sensitive subtleties of perceptions and reactions essential for a black child’s survival in a racist society”).

62 42 U.S.C.A. § 622(b)(7) (West); Hollinger, *supra* note 58, at 13-14, 26-27 (providing a detailed explanation of the pool provision).

63 Lorelei B. Mitchell et al., *Child Welfare Reform in the United States: Findings from a Local Agency Survey*, 84 CHILD WELFARE 5, 15 (2005) (finding that only 8% of the 97 agencies included in the 1999-2000 Local Agency Survey created new recruitment efforts following the passage of MEPA); Ruth McRoy et al., *Making MEPA-IEP Work: Tools for Professionals*, 86 CHILD WELFARE 49, 56 (2007) (noting that since the enactment of the 1996 IEP, OCR has exclusively directed its enforcement efforts to the “no delay or deny” provision); *Finding Families for African American Children: The Role of Race & Law in Adoption from Foster Care*, EVAN B. DONALDSON ADOPTION INST. (2008), at 35-36, 40, <https://library.childwelfare.gov/cwlg/ws/library/docs/gateway/Blob/62864.pdf?r=1&rpp=10&upp=0&w=+NA-TIVE%28%27recno%3D62864%27%29&m=1> (reporting the same); *Child and Family Services Reviews Aggregate Report, Round 3: Fiscal Years 2015-2018*, ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (June 5, 2020), at 46, https://www.acf.hhs.gov/sites/default/files/documents/cb/cfsr_aggregate_report_2020.pdf (reporting that only seventeen states

received a ‘strength’ rating for diligently recruiting diverse foster and adoptive families).

64 Ruth McRoy & Amy Griffin, *Transracial Adoption Policies and Practices: The US Experience*, 36 ADOPTION & FOSTERING 38, 42-43 (2012) (reporting that Black children on average remain in foster care for nine months longer than white children); Richard Wertheimer, *Youth who “Age Out” of Foster Care: Troubled Lives, Troubling Prospects*, CHILD TRENDS RSCH. BRIEF (2002), at 2, <https://www.childtrends.org/publications/youth-who-age-out-of-foster-care-troubled-lives-troubling-prospects>; Megan Martin & Dana Dean Connelly, *Achieving Racial Equity*, CTR. STUDY SOC. POL’Y (2015), at 8, <https://cssp.org/resource/achieving-racial-equity-child-welfare-policy-strategies-improve-outcomes-children-color/>; David L. Sandles & Kenneth R. Magdaleno, *Factors Impeding the Social and Academic Progress of African American Males in Foster Care*, 3 CLEARVOJ. J. 1, 3-4 (2016), <https://repository.library.fresnostat.edu/bitstream/handle/10211.3/181786/Factors%20Impeding%20the%20Social%20and%20Academic%20Progress%20of%20African%20American.pdf?sequence=1>.

65 Dorothy E. Roberts, *Is There Justice in Children’s Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 122-23 (1999).

66 Politicians increasingly espoused “individual responsibility” as the prevailing political value, reneging on the commitment to “social responsibility” that was at the core of AACWA. They perpetuated the racist notion that Black people were “living off” the system in order to attack public assistance programs and bolster arguments in favor of welfare reform. White, *supra* note 19, at 308-10.

67 Reich, *supra* note 53, at 51-52; Trivedi, *supra* note 3, at 558-559 (explaining that ASFA introduced exceptions to the reasonable efforts provisions, including cases where a parent has subjected the child to “aggravated circumstances,” committed a serious crime, or previously had their parental rights terminated).

68 42 U.S.C.A. § 675(5)(E) (West).

69 Roberts, *supra* note 65, at 131.

70 In FFY 2019, 61.3% of Black children in care experienced 2 or fewer placements, compared to 67.8% of white children. 21.9% of Black children who exited care during the same period exited to adoption, compared to 27.5% of white children. AFCARS 2019 Data Set (analysis by Children’s Rights’ Policy Department).

71 Kathleen Creamer & Chris Gottlieb, *If Adoption and Safe Families Act Can’t Be Repealed, Here’s How to At Least Make it Better*, THE IMPRINT (Feb. 9, 2021), <https://imprintnews.org/uncategorized/afsa-repealed-how-make-better/51490>; see also

Dettlaff et al., *supra* note 11, at 512-513; Minn. Afr. Am. Fam. Pres. Act, H.F. 342, 91st Leg. Sess. (Minn. 2019).

72 While beyond the scope of this paper, additional legislation, including the Chafee Statute, the Fostering Connections to Success and Increasing Adoptions Act, and the 2010 CAPTA amendment that authorized federal funds for counsel for children, permitted states to opt into deeper support programs for youth without mandate. John H. Chafee Foster Care Program for Successful Transition to Adulthood, CONG. RSCH. SERVS. (Jan. 15, 2019), <https://fas.org/sgp/crs/misc/IF11070.pdf>; *Fostering Connections to Success and Increasing Adoptions Act of 2008*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 7, 2008), <https://www.ncsl.org/documents/cyf/FosteringConnectionsSummary.pdf>; Amy C. Harfeld, *The Right to Counsel Landscape After Passage of the ABA Model Act – Implications for Reform*, 36 NOVA L. REV. 325, 333-339 (2012), <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1051&context=nlr>; Caitlyn Garcia, *Replacing Foster Care with Family Care: The Family First Prevention Services Act of 2018*, 53 FAM. L. Q. 27 (2019) (noting that Congress passed FFPSA to “prevent children from entering foster care.”).

73 Karen U. Lindell et al., *The Family First Prevention Services Act: A New Era of Child Welfare Reform*, 135 PUB. HEALTH REP. 282, 282-284 (2020) (explaining that states may seek reimbursement for eligible services, including mental health services, substance abuse prevention and treatment services, and in-home parent skill-based programs); Garcia, *supra* note 72 (noting that the target population for services consists of both children and families at “imminent risk” of involvement with the child welfare system).

74 Lindell, *supra* note 73, at 283.

75 Garcia, *supra* note 72 (discussing key limitations of FFPSA, including the 12-month time limit for prevention services and programs, which is particularly inadequate for families affected by substance abuse); Jessica Pryce, *What Will It Take for the Child Welfare System to Become Anti-Racist?*, THE IMPRINT (June 25, 2020), <https://imprintnews.org/child-welfare-2/what-will-take-for-child-welfare-system-become-anti-racist/44702> (observing how Family First’s “imminent risk” criteria targets families who have already come to the attention of child welfare agencies).

76 Sangoi, *supra* note 2, at 50 (questioning whether the foster system should ever be the vehicle for service provision for families given its historical roots, its power to surveil and separate families, the fact that it currently delivers services in a punitive and degrading manner, and the fact that it is understood by the populations it purports to serve as a law enforcement agency). Notably, the other major component of the Family First legislation is a significant restriction in federal funding for institutional and other group facilities that will not qualify

for reimbursement under new rules. See *Information Memorandum Log No: ACYF-CB-IM-18-02*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (Apr. 12, 2018), at 2, <https://www.acf.hhs.gov/sites/default/files/documents/cb/im1802.pdf>. The unnecessary use of institutions and other group facilities is yet another form of structural violence that disproportionately hurts Black youth in foster care, and a continuing problem that can be alleviated by, among other things, ending unnecessary removals at the front end of the system. See generally, Ira Lustbader et al., *Families over Facilities: Ending the Use of Harmful and Unnecessary Institutions and Other Group Facilities in Child Welfare Systems*, CHILD. RIGHTS (2021), <https://www.childrensrights.org/familiesoverfacilitiesreport/>.

77 In addition to this intersection, the child welfare and criminal legal systems also share remarkable procedural similarities; officials within both systems exercise vast discretion and are only required to provide a low burden of proof when initiating investigations. Further, the primary concern of both systems is to manage and control offenders rather than to prevent crime or abuse and neglect from occurring by investing in communities at risk of system involvement. Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124 (2019); Erin Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68, 84 (2017).

78 Sangoi, *supra* note 2, at 15.

79 Dorothy E. Roberts, *Marginalized Mothers and Intersecting Systems of Surveillance: Prisons and Foster Care*, in REASSEMBLING MOTHERHOOD: PROCREATION AND CARE IN A GLOBALIZED WORLD 185, 187-88 (Yasmin Ergas et al. eds., 2017).

80 Sangoi, *supra* note 2, at 16.

81 See *supra* note 47; Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 945-948 (1997) (explaining that child welfare reports from hospitals are the government's main source of information about prenatal drug use and disproportionately target Black mothers). Sangoi, *supra* note 2, at 52-53 (noting that 19 states and the District of Columbia define prenatal exposure as sufficient to make a child maltreatment finding and 7 states make evidence of prenatal exposure grounds to terminate parental rights involuntarily when there was a prior child with prenatal exposure or non-participation in treatment).

82 Roberts, *supra* note 81, at 938, 941-943 (describing, for example, the disparate impact of South Carolina's "Interagency Policy on Cocaine Abuse in Pregnancy," which allowed the Office of the Solicitor to charge mothers with drug possession, child neglect, or distribution of drugs to a minor and resulted in the arrests of 42 patients, all but one of whom were Black).

83 Kathi L. H. Harp & Amanda M. Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 SOC. POL. 258, 269 (2020) (asserting that certain U.S. policies, such as the use of mandatory minimums have contributed to the increased incarceration of Black women, including Black mothers who are the sole source of care for their children).

84 *Id.*

85 *Racial Double Standard in Drug Laws Persist Today*, EQUAL JUST. INITIATIVE (Dec. 9, 2019) <https://ejournal.org/news/racial-double-standard-in-drug-laws-persists-today/>; Anjali Om, *The Opioid Crisis in Black and White: The Role of Race in Our Nation's Recent Drug Epidemic*, 40-4 J. PUB. HEALTH 614, 614-615 (2018), <https://doi.org/10.1093/pubmed/fdy103> (asserting that an overwhelming number of opioid addicts are white, which is in itself a result of racial biases because doctors are more likely to prescribe opioids to white patients due to biases regarding the drug-seeking behavior of Black patients).

86 Harp & Bunting, *supra* note 83, at 269.

87 Like the child welfare and criminal legal systems, these systems have a disparate impact on Black children and parents. Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U. L. REV. 1123, 1138-39, 1145 (2016) (explaining that the 1996 "One Strike" policy, which gave Public Housing Authorities broad discretion to police tenants with criminal legal system involvement or even evidence of drug or alcohol abuse, has reinforced racial stigma because Black individuals experience mass criminalization more acutely, making them more vulnerable to exclusions from subsidized housing); *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities*, U.S. GOV'T ACCOUNTABILITY OFF. (Mar. 2018), at 12-13, <https://www.gao.gov/assets/700/690828.pdf> (reporting that while Black students represent 15.5% of all public school students, they account for 39% of students suspended from school); Prudence L. Carter et al., *You Can't Fix What You Don't Look At: Acknowledging Race in Addressing Racial Discipline Disparities*, 52 URB. EDUC. 207, 216 (2017) (observing that punitive consequences, including suspension, expulsion, arrests, and zero tolerance are more likely to be used at schools with a higher proportion of Black students); Kellee White et al., *Elucidating the Role of Place in Health Care Disparities: The Example of Racial/Ethnic Residential Segregation*, 47 HEALTH SERVS. RSCH. 1278, 1282 (2012) (observing that vestiges of historic patterns of segregation continue to fuel health care disparities in treatment and utilization by maintaining geographic variation in health care financing, spending, and service delivery).

88 *Child Maltreatment 2019*, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD. BUREAU (2021), at 9, <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> (reporting that

professionals, including education personnel, legal and law enforcement personnel, medical and mental health personnel, social services personnel, child daycare providers, and foster care providers, collectively submitted 68.5% of screened-in reports in 2019); Fong, *supra* note 51, at 1806 (observing that the child welfare system's expansive surveillance state blurs the supportive and coercive capacities of systems designed to serve families, forcing mothers to balance the tradeoff between potential assistance and intervention when engaging with mandated reporters).

89 Roberts, *supra* note 65, at 140 (asserting that "[t]he excessive disruption of black families affects the stability of the group as a whole, weakening its ability to struggle against the many forms of institutional discrimination.").

90 Schwartz, *supra* note 2.

91 Shakira Kennedy Statement, *supra* note 2.

92 Goldie Tibbs Statement, *supra* note 2.

93 AFCARS 2019 Data Set (analysis by Children's Rights' Policy Department).

94 AFCARS 2019 Data Set (analysis by Children's Rights' Policy Department); *Child population by race in the United States*, ANNIE E. CASEY FOUND, <https://datacenter.kidscount.org/data/tables/103-child-population-by-race?loc=1&loc=1#detailed/1/any/false/1729,37,871,870,573,869,36,868,867,133/68,69,67,12,70,66,71,72/423,424> (last visited May 4, 2021).

95 Black children were more likely to be reported in lower poverty samples. Brett Drake et al., *Race and Child Maltreatment Reporting: Are Blacks Overrepresented?*, 31 CHILD. & YOUTH SERVS. REV. 309 (2009). "There is a small body of research relevant to racial bias and discrimination in the front end of child welfare services, which examines the display of bias by community members and professionals. The majority of these studies are local studies with relatively small samples, thus conclusions that can be drawn from them are limited. What this strand of evidence offers is potential mechanisms by which racial disproportionality exists along the child welfare continuum, which should be tested using more rigorous studies with larger and more representative samples." John Fluke et al., *Research Synthesis on Child Welfare Disproportionality and Disparities, in DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH*, ANNIE E. CASEY FOUND. (2011), at 16, <https://www.aecf.org/resources/disparities-and-disproportionality-in-child-welfare/>. Hospitals have been found to have a higher likelihood of reporting families of color than reporting white families for child maltreatment. Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA PEDIATRICS 1603, 1608 (2002). The scenarios involving white children were accepted for investigation at a lower rate than those involving Black and Latino children. Michael L. Howell, *Decisions with Good Intentions: Substance*

Use Allegations and Child Protective Services Screening Decisions, 2 J. PUB. CHILD WELFARE 293 (2008). Black families were “more likely to be indicated” as victims of child abuse and/or neglect, regardless of whether the caseworker was white or Black. Nancy Rolock, *Disproportionality in Illinois Child Welfare*, CHILD. & FAM. RSCH. CTR., UNIV. OF ILL. AT URBANA-CHAMPAIGN, at 10, https://cfr.illinois.edu/pubs/rp_20081001_DisproportionalityInIllinoisChildWelfare.pdf (citing Nancy Rolock & M. Testa, *Indicated Child Abuse and Neglect Reports: Is the Investigation Process Really Biased?* in THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM: RACE MATTERS IN CHILD WELFARE, 119-130 (Dennette Derezotes et al. eds., 2005)). Black children whose CPS report was made for emotional maltreatment were much more likely to be investigated compared to white children who had a report for emotional maltreatment (25% vs. 10%). This disproportionality has been observed for other types of maltreatment as well, with the exception of sexual abuse. Fluke et al., *supra* at 34 (citing Andrea J. Sedlak & Dana Schultz, *Racial Differences in Child Protective Services Investigation of Abused and Neglected Children*, in THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM: RACE MATTERS IN CHILD WELFARE 97-117 (Dennette Derezotes et al. eds., 2005); Brian M. Gryzlak et al., *The Role of Race in Child Protective Services Screening Decisions*, in THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM: RACE MATTERS IN CHILD WELFARE 63-96 (Dennette Derezotes et al. eds., 2005)).

96 David Cray, *Many Say Now Is the Time to Fight Racial Bias in Foster Care*, ASSOCIATED PRESS (Apr. 14, 2021), <https://apnews.com/article/race-and-ethnicity-foster-care-coronavirus-pandemic-child-welfare-adoption-99afad8c4e512f14c8f9fec5ac0c66af; What the Pandemic Taught Us: Innovative Practice Report>, BETHANY CHRISTIAN SERVS. (2021), at 16, <https://bethany.org/media/resources/blogs/what-the-pandemic-taught-us-innovative-practice-report.pdf> (reporting that Bethany Christian Services sites in Philadelphia, Atlanta, Detroit, and Grand Rapids saw a 9% decrease in Black children leaving foster care between 2019 and 2020, and Black children had the lowest reunification rates at these sites during this period).

97 Andrea J. Sedlak & Diane D. Broadhurst, *Third National Incidence Study of Child Abuse and Neglect: Final Report*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (1996).

98 Andrea J. Sedlak et al., *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (2010), https://www.acf.hhs.gov/sites/default/files/documents/opre/nis4_report_congress_full_pdf_jan2010.pdf.

99 Andrea J. Sedlak et al., *Supplementary Analyses of Race Differences in Child Maltreatment Rates in the NIS-4*, U.S. DEP’T

OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (Mar. 2010), https://www.acf.hhs.gov/sites/default/files/documents/opre/nis4_supp_analysis_race_diff_mar2010.pdf, at 54 (cautioning that the race differences in NIS-4 “must be interpreted with caution,” especially because the key measure in the analysis, socio-economic status, had extensive missing data and obscured important race differences across ranges of household incomes); Robert B. Hill, *Response to A Research Synthesis on Child Welfare Disproportionality and Disparities*, in DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH, ANNIE E. CASEY FOUND. (2011), at 103, <https://www.aecf.org/resources/disparities-and-disproportionality-in-child-welfare/> (explaining how the presence or absence of significant racial differences in NIS-4 depends on the risk level and risk factors that are controlled for and, more importantly, how the NIS studies are not informed by any systematic empirical studies that examine the role of institutional or systemic racism as a determinant of racial disproportionality or disparities in child welfare).

100 Stephanie L. Rivaux, et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 CHILD WELFARE, 151, 161; Marna Miller, *Racial Disproportionality in Washington State’s Child Welfare System*, WASH. STATE INSTITUTE FOR PUB. POL’Y (June 2008), at 29, https://www.wsipp.wa.gov/ReportFile/1018/Wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_Full-Report.pdf; Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1634-1636 (2011).

101 Keva M. Miller et al., *Individual and Systemic/Structural Bias in Child Welfare Decision Making: Implications for Children and Families of Color*, 35 CHILD. & YOUTH SERVS. REV. 1634 (2013); Keva M. Miller et al., *Dynamics That Contribute to Racial Disproportionality and Disparity: Perspectives from Child Welfare Professionals, Community Partners, and Families*, 34 CHILD. & YOUTH SERVS. REV. 2201 (2012).

102 See, e.g., Maya Groos et al., *Measuring Inequity: A Systematic Review of Methods Used to Quantify Structural Racism*, 11 J. HEALTH DISPARITIES RSCH. & PRAC. 190 (2018), <https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1792&context=jhndrp>.

103 Kristcha DeGuerre & Katharine Briar-Lawson, *A Typology of Child Neglect Statutes and Exploration of Rate Variation among States*, (unpublished manuscript) (on file with author), at 6-10.

104 Kathryn Suzanne Krase, *Child Maltreatment Reporting by Educational Personnel: Implications for Racial Disproportionality in the Child Welfare System*, 37 CHILD. & SCHOOLS 89 (2015); Benard P.

Dreyer, *Racial/Ethnic Bias in Pediatric Care and the Criminalization of Poverty and Race/Ethnicity-Seek and Ye Shall Find*, 174 JAMA Pediatrics 751 (2020); *Violence Against Women in the Medical Setting: An Examination of The U.S. Foster System*, MOVEMENT FOR FAM. POWER & NAT’L ADVOCs. FOR PREGNANT WOMEN (May 31, 2019) [hereinafter *Violence Against Women in the Medical Setting*], https://ccrjustice.org/sites/default/files/attach/2019/06/MFP_NAPW_UN_VAW_Submission-20190531-Final.pdf.

105 Krase, *supra* note 104, at 89, 96 (examining racial disproportionality in reports at the national, state, and local levels, with an examination of New York State specifically).

106 Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 109, 118 (2008).

107 *Id.* (citing Susan J. Kelley, *Child Maltreatment in the Context of Substance Abuse*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 105, 106 (John E.B. Myers, et al., 2d ed. 2002)).

108 Krase, *supra* note 104, at 91.

109 Dreyer, *supra* note 104, at 751.

110 *Violence Against Women*, *supra* note 104, at 8.

111 *Violence Against Women*, *supra* note 104, at 8.

112 *Making and Screening Reports of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY (2017) [hereinafter *Making & Screening Reports*], at 3, <https://www.childwelfare.gov/pubPDFs/repproc.pdf>.

113 *Id.*

114 *Id.*; See also Kathy Lemon et al., *Understanding and Addressing Disproportionality in the Front End of the Child Welfare System*, CTR. SOC. SERV. RES. (July 2005), at 29-31 (highlighting evidence suggesting that among low/moderate risk families, differential response systems may reduce out-of-home placements); Fluke et al., *supra* note 95, at 54-55 (suggesting, based on evidence in Ohio and Minnesota, that there is potential for differential response to prevent disproportionality and disparities due to its emphasis on provision of services for families in need, especially families of color).

115 *Making & Screening Reports*, *supra* note 112, at 3.

116 Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 278 (2017); John D. Fluke et al., *Disproportionate Representation of Race and Ethnicity in Child Maltreatment: Investigation and Victimization*, 25 CHILD. & YOUTH SERVS. REV., 359 (2003); Sarah A. Font et al., *Examining Racial Disproportionality in Child Protective Services Case Decisions*, 34 CHILD. & YOUTH SERVS. REV., 2188 (2012).

- 117 A finding of abuse and neglect following an investigation is sometimes referred to as a “substantiated,” “founded,” “indicated,” or “confirmed” report. When an investigation does not result in a finding of abuse or neglect, the report is typically “unsubstantiated,” “unfounded,” “not indicated,” or “unconfirmed.” *Making & Screening Reports*, *supra* note 112, at 5. Nicholas E. Kahn et al., *The Standard of Proof in the Substantiation of Child Abuse and Neglect*, 14 J. EMPIRICAL LEGAL STUD. 333, 336-338 (2017) (discussing variations of evidentiary standards in child welfare).
- 118 Christopher Wildeman et al., *The Prevalence of Confirmed Maltreatment Among US Children, 2004 to 2011*, 168 JAMA PEDIATRICS 706, 706 (2014).
- 119 Dixon, *supra* note 106, at 119.
- 120 Dettlaff et al., *supra* note 11, at 3 (citing Kathryn Maguire-Jack et al., *Child Protective Services Decision-Making: The Role of Children’s Race and County Factors*, 90 AM. J. OF ORTHOPSYCHIATRY 48 (2020); Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services* 37 CHILD ABUSE & NEGLECT 33 (2013)).
- 121 Kathryn Maguire-Jack et al., *Child Protective Services Decision-Making: The Role of Children’s Race and County Factors*, 90 AM. J. OF ORTHOPSYCHIATRY 48, 55 (2020).
- 122 Rivaux et al., *supra* note 100, at 157-162.
- 123 Colleen Kraft, *AAP Statement Opposing Separation of Children and Parents at the Border*, AM. ACAD. OF PEDIATRICS (May 8, 2018), <https://docs.house.gov/meetings/IF/IF14/20180627/108510/HMKP-115-IF14-20180627-SD011.pdf>.
- 124 See Trivedi, *supra* note 3, at 527-532.
- 125 Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 COLUM. J. GENDER & L. 175, 196 (2008).
- 126 Susan L. Brooks & Ya’ir Ronen, *The Notion of Interdependence and Its Implications for Child and Family Policy*, in THE POLITICS OF THE PERSONAL IN FEMINIST FAMILY THERAPY: INTERNATIONAL EXAMINATIONS OF FAMILY POLICY 23, 33 (Anne M. Prouty Lyness ed., 2014).
- 127 Trivedi, *supra* note 3, at 528 (citing Douglas F. Goldsmith et al., *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 JUV. & FAM. CT. J. 1, 6 (2004)) (internal quotation marks omitted).
- 128 *Id.* at 528-532.
- 129 Adrianna Wechsler-Zimring et al., *Posttraumatic Stress Disorder and Removal from Home as a Primary, Secondary, or Disclaimed Trauma in Maltreated Adolescents*, 27 J. FAM. VIOLENCE 813, 814 (2012).
- 130 Bonnie D. Kerker et al., *Adverse Childhood Experiences and Mental Health, Chronic Medical Conditions, and Development in Young Children*, 15 ACAD. PEDIATRICS 510, 510, 514-515 (2015); Michael J. Salomon Weiss & Sheldon H. Wagner, *What Explains the Negative Consequences of Adverse Childhood Experiences on Adult Health? Insights from Cognitive and Neuroscience Research*, 14 AM. J. PREV. MED. 356, 356 (1998); Carryl P. Navalta et al., *Adverse Childhood Experiences, Brain Development and Mental Health: A Call for Neurocounseling*, 40 J. MENTAL HEALTH COUNSELING 266, 268-269 (2018); Elizabeth A. Schilling et al., *Adverse Childhood Experiences and Mental Health in Young Adults: A Longitudinal Survey*, 7 BMC PUB. HEALTH 1, 7-10 (2007); F. Benedetti et al., *Emotional Reactivity in Chronic Schizophrenia: Structural and Functional Brain Correlates and the Influence of Adverse Childhood Experiences*, 41 PSYCHOL. MED. 509, 514-517 (2010); Emily Zarse et al., *The Adverse Childhood Experiences Questionnaire: Two Decades of Research on Childhood Trauma as a Primary Cause of Adult Mental Illness, Addiction, and Medical Disease*, 6 COGNIT. MED. 2, 3, 16 (2019); Julia Herzog & Christian Schmahl, *Adverse Childhood Experiences and the Consequences on Neurobiological, Psychosocial, and Somatic Conditions Across the Lifespan*, 9 FRONTIERS IN PSYCHIATRY 1, 2-5 (2018); Karen Hughes et al., *The Effect of Multiple Adverse Childhood Experiences on Health: A Systematic Review and Meta-Analysis*, 2 LANCET PUB. HEALTH 1, 1 (2017).
- 131 Christopher M. Layne et al., *Introduction to the Special Section: Using the Trauma History Profile to Unpack Risk Factor Caravans and Their Consequences*, 6 PSYCH. TRAUMA: THEORY, RSCH., PRAC., & POL’Y S1 (2014).
- 132 CHILD WELFARE LEAGUE OF AM., CWLA STANDARDS OF EXCELLENCE FOR SERVICES TO STRENGTHEN AND PRESERVE FAMILIES WITH CHILDREN 20 (2003).
- 133 *Child and Family Services (PA-CFS) 11: Separating Children from Their Families, Standards for Public Agencies*, COUNCIL ON ACCREDITATION (2020), <https://coanet.org/standard/PA-CFS/11/>.
- 134 See Trivedi, *supra* note 3, at 531 (citing Monique B. Mitchell, *The Neglected Transition: Building a Relational Home for Children Entering Care* (2016)).
- 135 *Id.* at 532 (citing Monique B. Mitchell, *The Neglected Transition: Building a Relational Home for Children Entering Care* (2016)).
- 136 Bruce D. Perry & Maia Szalavitz, *The Boy Who Was Raised as a Dog and Other Stories from a Child Psychiatrist’s Notebook: What Traumatized Children Can Teach Us About Loss, Love, and Healing* (2006).
- 137 Dinah Ortiz-Adames, *Uplifting Every Voice - Together We Can Change the Perceptions of Parents Created by the Child Welfare System*, RISE MAG. (Oct. 2, 2018), <https://www.risemagazine.org/2018/10/uplifting-every-voice/>.
- 138 *Id.*
- 139 *Id.*
- 140 *Id.*
- 141 Keyna Franklin, *When Schools Use Child Welfare as a Weapon - What a Reporter Learned Investigating Malicious Reports*, RISE MAG. (Oct. 16, 2019), <https://www.risemagazine.org/2019/10/when-schools-use-child-welfare-as-a-weapon/>.
- 142 *Id.*
- 143 Piaadora Footman, *The Fear Stays With Me - Living My Life Right Hasn’t Made Me Feel Safe From an Investigation*, RISE MAG. (Oct. 18, 2016), <https://www.risemagazine.org/2016/10/the-fear-stays-with-me/>.
- 144 *Id.*
- 145 *Id.*
- 146 *Id.*
- 147 Vivek Sankaran et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1163, 1169-1170 (2019).
- 148 Robert T. Carter, *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress*, 35 THE COUNSELING PSYCH. 13, 14 (2007) (citing Hope Landrine & Elizabeth A. Klonoff, *The Schedule of Racist Events: A Measure of Racial Discrimination and a Study of Its Negative Physical and Mental Health Consequences*, 22 J. BLACK PSYCH. 144 (1996); Shawn O. Utsey, *Development and Validation of a Short Form of the Index of Race-Related Stress (IRRS)—Brief Version*, 32 MEASUREMENT & EVALUATION IN COUNSELING & DEV. 149 (1999); Shawn O. Utsey & Don Elligan, *Utility of an African-Centered Support Group for African American Men Confronting Societal Racism and Oppression*, 5 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 156 (1999)).
- 149 Shawn O. Utsey, *Development and Validation of a Short Form of the Index of Race-Related Stress (IRRS)—Brief Version*, 32 MEASUREMENT & EVALUATION IN COUNSELING & DEV. 149, 149 (1999) (citing Nancy Krieger & Stephen Sidney, *Racial Discrimination and Blood Pressure: The CARDIA Study of Young Black and White Adults*, 86 AM. J. PUB. HEALTH 1370 (1996); Shawn O. Utsey & Joseph G. Ponterotto, *Development and Validation of the Index of Race-Related Stress (IRRS)*, 43 J. COUNSELING PSYCHOL. 490 (1996); Sumam Fernando, *Racism as a Cause of Depression*, 30 INT’L J. SOC. PSYCHIATRY 41 (1984); James Jackson et al., *Racism and the Physical and Mental Health Status of African Americans: A Thirteen Year National Panel Study*, 6 ETHNICITY & DISEASE 132 (1996)).
- 150 *Id.*
- 151 See, e.g., See Cloud et al., *supra* note 77; Vivek Sankaran & Itzhak Lander, *Procedural Injustice: How the Practices and Procedures*

of the Child Welfare System Disempower Parents and Why It Matters, 11 MICH. CHILD WELFARE L. J. 11 (2007).

152 Elizabeth Fassler, *Representing Parents During Child Welfare Investigations: Precourt Advocacy Strategies*, ABA (Apr. 1, 2011), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol30/april_20110/representing_parentsduringchild_welfareinvestigationsprecourtadvoc/.

153 See Rachel Blustain, *New Push to Provide Legal Advice to Parents Facing Abuse and Neglect Investigations*, CITY LIMITS (Jan. 8, 2019), <https://citylimits.org/2019/01/08/new-push-to-provide-legal-advice-to-parents-facing-abuse-and-neglect-investigations/?all=1>.

154 Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 1 (2017).

155 *Progressive Caucus Introduces Child Welfare Reform Package, Aiming to Increase Rights, Accountability & Transparency*, PROGRESSIVE CAUCUS OF THE N.Y.C. COUNCIL (Sept. 25, 2019), <https://nycprogressives.com/2019/09/25/progressive-caucus-introduces-child-welfare-reform-package-aiming-to-increase-rights-accountability-transparency/>.

156 Sankaran, *supra* note 154, at 2-3.

157 *Id.* (quoting *Information Memorandum Log No: ACYF-CB-IM-17-02*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (Jan. 17, 2017), at 1, 13 <https://www.acf.hhs.gov/sites/default/files/documents/cb/im1702.pdf>).

158 See Mark Hardin, *Claiming Title IV-E Funds to Pay for Parents' and Children's Attorneys: A Brief Technical Overview*, ABA (Feb. 25, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january--december-2019/claiming-title-iv-e-funds-to-pay-for-parents-and-childrens-attor/#:~:text=For%20the%20first%20time%2C%20states,in%20child%20welfare%20legal%20proceedings;Child%20Welfare%20Policy%20Manual,Section%208.1B,CHILD%20BUREAU,ADMIN.FORCHILD.&FAMILIES,https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36 (last visited May 3, 2021); see also 45 C.F.R. § 1356.60(c)(2).

159 *Mathews v. Eldridge*, 424 U.S. 319 (1976).

160 *Id.* at 335.

161 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26-27 (1981).

162 *Id.* at 38-42 (Blackmun, J., dissenting) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

163 *Id.* at 50-51.

164 Sankaran, *supra* note 154, at 2.

165 As Professor Sankaran has explained, the effects of *Lassiter* have been widespread, as “efforts to persuade courts to recognize an absolute right to counsel in earlier stages of the proceedings—without a statute authorizing that right—have . . . been largely unsuccessful.” Courts in several states have rejected arguments that parents’ physical liberty interests were sufficiently at stake of erroneous deprivation immediately upon removal of a child, let alone pre-removal. Sankaran, *supra* note 154, at 15-16 (collecting decisions from New Hampshire, Texas, Minnesota, Montana, and Nebraska). Other state courts do not appear to have recognized any constitutional need for counsel whenever a parent’s child may be removed, deferring instead to statute. See, e.g., *Matter of R.L.D.*, 456 N.W.2d 919 (Iowa 1990) (holding the juvenile court properly denied appointment of counsel for indigent parents of a child in an involuntary commitment, finding the legislature deliberately made no provision for that appointment); cf. *People v. R.C.*, 529 N.E.2d 756 (Ill. App. Ct. 1988) (finding that parents of child in commitment proceedings were entitled to counsel, but only because they were considered “parties” under the state statute, not as a matter of constitutional law).

166 *Lassiter*, 452 U.S. at 27.

167 See *Id.* at 27 n.3 (“Some parents will have an additional interest to protect. Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions may create.”).

168 For a fuller discussion of the lack of protections guarding against erroneous removals in New York City’s system, see Emma Ketteringham, *Written Testimony of The Bronx Defenders, New York City Council Justice System Committee, Hearing on Family Separation in New York City*, THE BRONX DEF. (Nov. 27, 2018), at 3-7, <https://www.bronxdefenders.org/wp-content/uploads/2019/04/Family-Separation-City-Council-Testimony.pdf> (describing lack of protections that occur during removals); Emma Ketteringham et al., *Written Testimony of The Bronx Defenders, New York City Council General Welfare Committee, Oversight Hearing: Racial Disparities In the Child Welfare System*, THE BRONX DEF. (Oct. 28, 2020), at 11-12 (listing needed reforms of investigations to remedy procedural defects).

169 A written or verbal warning akin to that required for criminal suspects under *Miranda v. Arizona* is another tool that could further protect parents during investigative interviews. See, e.g., Burrell, *supra* note 77, at 144-45; Nikki Pressley & Andrew Brown, *Parental Notification of Rights in Child Welfare Investigations*, TEX. PUB. POL’Y FOUND. (Apr. 7, 2020), <https://www.texaspolicy.com/parental-notification-of-rights-in-child-welfare-investigations/>; Cloud et al., *supra* note 77, at 89-91. Washington State requires that parents receive a comprehensive

overview of their rights in the context of child welfare investigations. See WASH. REV. CODE § 26.44.100. However, the statute and others modeled off of it could go farther by requiring the notification to take place at the initial point of contact between the child welfare agency and families. See Pressley & Brown, *supra* at 3.

170 See, e.g., Blustain, *supra* note 153.

171 *Id.*

172 See, e.g., *Faced with the loss of her twin boys, she asked for a lawyer – and was refused. Her case changed the law in Ohio*, WASH. POST (Apr. 11, 2021), <https://www.washingtonpost.com/opinions/2021/04/10/custody-twins-no-lawyers-injustice/> (“Sometimes it is in a child’s best interest to be removed from a parent; sometimes it isn’t. When state governments allege abuse or neglect, poor parents are generally entitled to a court-appointed lawyer — though sometimes they get one too late in the process to make a difference.”).

173 See, e.g., *In re T.M.*, 319 P.3d 338 (Haw. 2014); *V.F. v. State*, 666 P.2d 42, 45 n.3 (Ala. 1983); *M.E.K. v. R.L.K.*, 921 So.2d 787 (Fla. 5th DCA 2006).

174 *In re T.M.*, 319 P.3d at 353-55.

175 *In re L.I.*, 482 P.3d 1079 (Haw. 2021).

176 See, e.g., *In re J.Z.*, 190 N.W.2d 27, 32 (N.D. 1971) (holding that parents at an “initial interview” with a “juvenile supervisor” “should have been advised of their right to counsel and should have been afforded the opportunity of consulting a lawyer before proceeding with the initial interview”).

177 See, e.g., Trivedi, *supra* note 3 (advocating for appointment of counsel for children and parents alike, prior to removal).

178 See *Id.* at 575.

179 *Id.* at 527-41.

180 *Id.* at 541-52; see also, e.g., Plaintiffs’ Class Action Complaint, *G.K. v. Sununu*, No. 21-CV-00004 (D.N.H. Jan. 5, 2021) (asserting violation of the Fourteenth Amendment for New Hampshire’s failure to guarantee counsel for youth in dependency proceedings, alongside several structural failures of the state’s foster care system).

181 See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984).

182 *Id.* at 620 (“Among other things, therefore, [family relationships] are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.”).

- 183** *Id.* at 618-20.
- 184** *Id.*
- 185** *Id.* at 620.
- 186** *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996).
- 187** *Trujillo v. Bd. of Cnty. Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985).
- 188** *La. Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1498 (5th Cir. 1995).
- 189** See e.g., *Doe v. Fayette Cnty. Child. & Youth Servs.*, No. 8-823, 2010 WL 4854070, *1; *Behm v. Luzerne Cnty. Child. & Youth Poly Makers*, 172 F. Supp. 2d 575, 578 (M.D. Pa. 2001) (bringing a First Amendment claim to challenge the removal of plaintiff's children, and the subsequent prohibition of family visitation); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1004 (N.D. Ill. 1989) (bringing a First Amendment associational claim challenging the state of Illinois' policy of placing siblings in separate foster care placements and its subsequent failure to provide sibling visitation on a regular basis).
- 190** *Fayette Cnty.*, 2010 WL 4854070 at *4-6.
- 191** *Id.* at *18 (cleaned up).
- 192** *Id.* at *19.
- 193** See e.g., *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000).
- 194** *Id.* at 956.
- 195** Complaint – Class Action for Declaratory and Injunctive Relief, *Brain A. ex rel. Brooks v. Sundquist*, No. 300-0445 (M.D. Tenn. May 10, 2000), at ¶¶ 12, 92, 103, 166.
- 196** *Brian A.*, 149 F. Supp. 2d at 956.
- 197** See e.g., *Roberts*, 468 U.S. at 618-20.
- 198** *Fayette Cnty.*, 2010 WL 4854070 at *19.
- 199** *Aristotle P.*, 721 F. Supp. at 1006.
- 200** See discussion *supra* pp. 15-16.
- 201** See e.g., *Troxel v. Granville*, 530 U.S. 57, 63 (2000).
- 202** *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).
- 203** *Troxel*, 530 U.S. at 65-67.
- 204** See *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001); *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461-62 (2d Cir. 1996).
- 205** See *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 938-40 (9th Cir. 1997) (applying strict scrutiny to determine whether a state-imposed curfew applying to minors violated their parents' fundamental interest in directing the upbringing of their children). *But see Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1188-1190 (9th Cir. 2006) (applying rational basis to determine whether a school district violated the parents' fundamental interest in directing the upbringing of their children by administering a psychological questionnaire, reasoning that the right did not include the ability to direct how a public school teaches children).
- 206** *Doe v. Heck*, 327 F.3d 492, 519-20 (7th Cir. 2003).
- 207** *Id.* at 520.
- 208** See e.g., *Santosky*, 455 U.S. at 759-61; *M.L.B. v. S.L.J.*, 519 U.S. 102, 117-18 (1996). See also *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (earlier case upholding the parental right to make decisions for one's own child).
- 209** *Santosky*, 455 U.S. at 759-61.
- 210** *Id.* at 758-60.
- 211** *Troxel*, 530 U.S. at 88.
- 212** *J.S.R. by and through J.S.G. v. Sessions*, 330 F. Supp. 3d 731, 741 (D. Conn. 2018) (holding that the forced separations at the border "deprived the children of their right to family integrity"); *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1124 (N.D. Ill. 2018) (stating that the constitutional interest at issue was the "child's right to remain in the custody of his parent").
- 213** *United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997).
- 214** *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985).
- 215** *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).
- 216** *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205-08 (1973).
- 217** *Wayte*, 470 U.S. at 610 (internal quotation marks omitted).
- 218** *Floyd v. City of New York*, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013).
- 219** *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (emphasis added).
- 220** *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) (quoting *Arlington Heights*, 429 U.S. at 266) (internal quotation marks omitted).
- 221** *Washington v. Davis*, 426 U.S. 229, 242 (1976).
- 222** *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 522 (7th Cir. 1994).
- 223** *Floyd*, 959 F. Supp. 2d at 660.
- 224** *Id.* at 661-62.
- 225** *Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013), *adhered to*, No. CV-07-02513-PHX-GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013), *aff'd in part, vacated in part*, 784 F.3d 1254 (9th Cir. 2015), and *aff'd*, 784 F.3d 1254 (9th Cir. 2015).
- 226** *Id.* at 884-85 & n.86.
- 227** *People United for Child, Inc. v. City of New York*, 108 F. Supp. 2d 275, 280, 296 (S.D.N.Y. 2000).
- 228** *Id.* at 296-97.
- 229** *Id.* at 297. In one such example, the "plaintiffs allege[d] that defendants have discriminated against African Americans by failing to take into account the cultural traditions and practices of African Americans when they investigate allegations of child abuse or neglect." *Id.* at 297.
- 230** *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989).
- 231** *Id.* at 389 (internal quotation marks omitted).
- 232** See Edgar Cahn & Cynthia Robbins, *An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives That Work*, 13 U. D.C. L. Rev. 71, 75 (2010). Cahn and Robbins start with the premise that the Supreme Court's rulings in *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *McCleskey v. Kemp*, 481 U.S. 279 (1987), have set a high bar for establishing discrimination by a government agency through proof of disparate impact alone. *Id.* at 73, 83-85. *City of Canton* and its progeny appear to provide at least one avenue for proving municipality intent and liability. *Id.* at 73, 85-86.
- 233** See Cahn & Robbins, *supra* note 232, at 74-75.
- 234** *Id.* at 88.
- 235** *Id.* at 89-90. This strategy also reflects a theory of discrimination embraced by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482 (1977). In that case, the Court held that the plaintiff established a discrimination claim based on a grand jury selection process where Spanish surnames comprised 50% of the list from which the grand jurors were selected, where the plaintiff presented evidence that over an 11-year period, only 39% of persons summoned were Mexican American, while the county's population was 79.1% Mexican American. The disproportionality coupled with a selection procedure susceptible to abuse was sufficient to make a prima facie case of intentional discrimination.
- 236** See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 (1979); *Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001).
- 237** The Department of Justice has also promulgated regulations that prohibit recipients of federal aid from utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." 28 C.F.R. § 42.104(b)(2).

238 *Sandoval*, 532 U.S. at 275.

239 *Id.* at 289.

240 Following the decision in *Sandoval*, a split emerged among appellate courts as to whether federal disparate impact regulations issued under Title VI, other than those at issue in *Sandoval*, such as Department of Transportation or Department of Housing & Urban Development regulations, could be enforced by private litigants bringing claims under 42 U.S.C. § 1983, rather than Title VI. Advocates pressing this theory took cues from Justice Stevens, who pointed out in dissent in *Sandoval* that “[l]itigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief.” *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting). The majority of circuits have concluded there is still no private right to enforce those disparate impact regulations, including under Section 1983. See *Save our Valley v. Sound Transit*, 335 F.3d 932, 963 (9th Cir. 2003) (no private right to enforce Department of Transportation regulations promulgated under Title VI). At least one circuit has found that route viable, however. See *Robinson v. Kansas*, 295 F.3d 1183, 1186-87 (10th Cir. 2002), *abrogated on other grounds*. In *Robinson*, the plaintiffs challenged Kansas’s school financing scheme, which they alleged resulted in less funding for schools where minority students, students of foreign origin, and students with disabilities were disproportionately enrolled. *Id.* at 1186. Citing Justice Stevens’s dissent in *Sandoval*, the Court found that *Sandoval* did not bar litigants from bringing disparate impact claims against state officials for prospective injunctive relief under Section 1983. *Id.* at 1187. In addition, the D.C. Circuit was the first to hold that federal regulations (there, HUD regulations) could create individual federal rights enforceable by an action under Section 1983. See *Samuels v. District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985). While *Sandoval* has cast *Samuels* in doubt, the D.C. Circuit’s holding has not been overturned.

241 See, e.g., *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 980 F.3d 157, 185 (1st Cir. 2020), *petition for cert. filed*, No. 20-1199 (Mar. 1, 2021) (“Title VI’s protections are coextensive with the Equal Protection Clause of the Fourteenth Amendment.”); *The Comm. Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 702-03 (9th Cir. 2009) (explaining that alleged “violations of equal protection and Title VI require similar proofs—plaintiffs must show that actions of the defendants had a discriminatory impact, and that defendants acted with an intent or purpose to discriminate based upon plaintiffs’ membership in a protected class.”).

242 See *Title VI Child Welfare Joint Guidance*, U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. FOR C.R. & U.S. DEP’T OF J., C.R. DIV. (Oct. 2016), <https://www.justice.gov/crt/title-vi-child-welfare-guidance>.

243 See, e.g., *Memorandum of Understanding Between the U.S. Departments of Health and Human Services and Justice*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 9, 2017), <https://www.hhs.gov/sites/default/files/doj.pdf>.

244 See *Draft Amendment of Title VI Regulations 28 CFR Part 42*, RIN 1190-NYD, DEP’T OF JUST., <https://context-cdn.washingtonpost.com/notes/prod/default/documents/1e57c678-5bc3-4849-b92d-3365414bc4cb/notes/d9e70b41-14a0-4ed4-8a59-dcf516b71506>. (last visited May 4, 2021). Specifically, the proposed rule would remove the provision currently at 28 C.F.R. § 42.104(b)(2), the DOJ regulation prohibiting disparate impact discrimination by recipients of federal funding.

245 Letter from Robert C. “Bobby” Scott, Chairman, House Comm. on Educ. and Labor et al., to Russell T. Vought, Director, Off. of Mag. and Budget (Jan. 11, 2021), <https://edlabor.house.gov/imo/media/doc/2021.01.11%20Letter%20to%20OMB%20re%20Title%20VI.pdf>.

246 *Regulatory Freeze Pending Review*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>.

247 *Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies*, THE WHITE HOUSE (Jan. 26, 2021), at § 2, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/>; *Executive Order on Tackling the Climate Crisis at Home and Abroad*, THE WHITE HOUSE (Jan. 27, 2021), §§ 219, 222(b)(i), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

248 In a recent recommendation for a shift to an active efforts requirement, family defense practitioners Kathleen Creamer and Christine Gottlieb recommended that Congress create a private right of action so that families have the clearest path to enforcing their entitlement to these heightened efforts. See Creamer & Gottlieb, *supra* note 71; see also A.J. Dettlaff et al., *supra* note 11, at 512-513; Minn. Afr. Am. Fam. Pres. Act, H.F. 342, 91st Leg. Sess. (Minn. 2019).

249 “A judicial finding in a child’s case that such reasonable efforts were made to prevent removal is necessary for a state to be eligible to receive Title IV-E foster care maintenance payments for that child. When a court makes a judicial finding that the state agency made no reasonable efforts to prevent removal in a child’s case, that child is forever ineligible for IV-E foster care maintenance payments, thereby reducing the overall pool of money the state should receive from the federal government.” Amelia S. Watson, *A New Focus on Reasonable*

Efforts to Reunify, 31 ABA CHILD L. PRAC. 113, 118 (2012), https://www.americanbar.org/content/dam/aba/administrative/child_law/clp/vol31/sept12.authcheckdam.pdf.

250 *Id.* (citing *Child Welfare Policy Manual, Section 8.3C.4, Title IV-E, Foster Care Maintenance Payments Program, State Plan/Procedural Requirements, Reasonable Efforts*, CHILD. BUREAU, ADMIN. FOR CHILD. & FAMILIES, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=59 (last visited May 3, 2021)).

251 *Child Welfare Policy Manual, Section 8.3C.4 (Question 1), Title IV-E, Foster Care Maintenance Payments Program, State Plan/Procedural Requirements, Reasonable Efforts*, CHILD. BUREAU, ADMIN. FOR CHILD. & FAMILIES, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=59 (last visited May 3, 2021).

252 Watson, *supra* note 249, at 118.

253 See *Child Welfare Policy Manual, Section 8.3C.4 (Question 1)*, *supra* note 251.

254 *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, CHILD WELFARE INFO. GATEWAY (2020), at 2, <https://www.childwelfare.gov/pubPDFs/reunify.pdf>. See also Judge Leonard Edwards, *Overcoming Barriers to Making Meaningful Reasonable Efforts Findings*, ABA (Jan. 29, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/overcoming-barriers-to-making-meaningful-reasonable-efforts-find/ (“Several states have legislated definitions of reasonable efforts, but they are very general. The lack of a definition has also made it difficult for a judge to decide if the agency provided reasonable efforts in individual cases.”).

255 *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, *supra* note 254, at 36, 42.

256 25 C.F.R. § 23.2.

257 25 U.S.C.A. § 1912(d) (West).

258 See e.g. *In re Nicole B.*, 175 Md.App. 450, 472 (2007) (declaring that active efforts standard requires more effort than a reasonable efforts standard); *In re J.L.*, 483 Mich. 300, 321 (2009) (concluding the same).

259 Steven Jessen-Howard et al., *Costly and Unavailable: America Lacks Sufficient Child Care Supply for Infants and Toddlers*, CTR. AM. PROGRESS (2020), at 1-3, https://cdn.americanprogress.org/content/uploads/2020/08/03133105/Costly-and-Unavailable.pdf?_ga=2.199923174.993326322.1620231562-2139439799.1620231562; Rasheed Malik et al., *America’s Child Care Deserts in 2018*, CTR. AM. PROGRESS (2018), at 3, <https://cdn.americanprogress.org/content/uploads/2018/12/06100537/>

- AmericasChildCareDeserts20182.pdf?_ga=2.243424589.993326322.1620231562-2139439799.1620231562; Dionne Dobbins et al., *Child Care Deserts: Developing Solutions to Child Care Supply and Demand*, CHILD-CARE AWARE AM. (Sept. 2016), at 2, <https://www.childcareaware.org/wp-content/uploads/2016/09/Child-Care-Deserts-Executive-Summary-v2.pdf>; Kathleen B. Simon, *Catalyzing the Separation of Black Families: A Critique of Foster Care Placements Without Prior Judicial Review*, 51 COLUM. J. L. SOC. PROBLEMS 347, 360-361 (2017); Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, THE APPEAL (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/> (observing how the increase in funds available for foster care and adoption paralleled the decrease in funds available for support services for poor mothers).
- 260** Emma Peyton Williams, *Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition* (Apr. 27, 2020) (unpublished B.A. honors thesis, Oberlin College) (on file with the Digital Commons at Oberlin) at 81.
- 261** *Packages of Policies and Programs that Reduce Poverty and Deep Poverty Among Children*, in A ROADMAP TO REDUCING CHILD POVERTY 173 (2019), <https://www.ncbi.nlm.nih.gov/books/NBK547354/>.
- 262** Chuck Marr et al., *American Rescue Plan Act Includes Critical Expansions of Child Tax Credit and EITC*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 12, 2021), <https://www.cbpp.org/research/federal-tax/american-rescue-plan-act-includes-critical-expansions-of-child-tax-credit-and>.
- 263** Zachary Parolin et al., *The Potential Poverty Reduction Effect on the American Rescue Plan*, CTR. ON POVERTY & SOC. POL'Y AT COLUM. U. (Mar. 11, 2021), at 1, <https://www.povertycenter.columbia.edu/news-internal/2021/presidential-policy/biden-economic-relief-proposal-poverty-impact> (finding that the CDCTC expansion would reduce child poverty by roughly 50%); Nicole L. Kovski, *Association of State-Level Earned Income Tax Credits With Rates of Reported Child Maltreatment, 2004-2017*, 20 CHILD MALTREATMENT 1, 7 (2021) (finding that a 10% increase in refundable state EITC policies was associated with a 9% decrease in rates of reported neglect).
- 264** Lenette Azzi-Lessing, *Reform the Child Welfare System to Protect Vulnerable Children*, THE HILL (Feb. 3, 2021), <https://thehill.com/opinion/judiciary/537188-reform-the-child-welfare-system-to-protect-vulnerable-children?r=1>.
- 265** See *Strategy Brief, Transforming Child Welfare Systems*, CASEY FAM. PROGRAMS (Jan. 2020), <https://caseyfamilypro-wpengine.netdna-ssl.com/media/20.07-QFF-TS-Preventive-Legal-Support.pdf>. These programs have shown “nearly 100% prevention of foster care entries and cost savings of 2-to-1 when compared with the cost of foster care placement.” *Id.* at 2.
- 266** See *Information Memorandum Log No. ACYF-CB-IM-21-02*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD & FAMILIES (Jan. 12, 2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2102.pdf>.
- 267** Keva M. Miller et al., *Individual and Systemic/Structural Bias in Child Welfare Decision Making: Implications for Children and Families of Color*, 35 CHILD. & YOUTH SERVS. REV. 1634, 1634 (2013) (arguing both individual and systemic bias contribute to racial disproportionality and disparity in the child welfare system).
- 268** CAPTA, Pub. L. No. 111-320, 124 Stat. 3459 (2010).
- 269** *Definitions of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY (2019), <https://www.childwelfare.gov/pubPDFs/define.pdf>.
- 270** See e.g., Ga. Code Ann. § 19-7-5(b) (which includes “neglect or exploitation of a child by a parent of caretaker thereof” in the statutory definition of child abuse); Iowa Code Ann. § 232.68 (including “[t]he failure on the part of a person responsible for the care of a child to provide adequate food, shelter, clothing, medical or mental health treatment, supervision, or other care necessary for the child’s health and welfare when financially able to do so or when offered financial or other reasonable means to do so,” and “failure to provide for the adequate supervision of a child that a reasonable and prudent person would exercise under similar facts and circumstances and the failure resulted in direct harm or created a risk of harm to the child” in the statutory definition of child abuse); Or. Rev. Stat. § 419B.005 (the term ‘abuse’ includes “negligent treatment or maltreatment of a child, including but not limited to, the failure to provide adequate food, clothing, shelter, or medical care that is likely to endanger the health or welfare of the child.”).
- 271** See e.g., Ark. Code Ann. § 12-18-103; Fla. Stat. Ann. § 39.01; Kan. Stat. Ann. § 38-2202; Mass. Code Regs. Tit. 110 §2.00; N.H. Rev. Stat. Ann. § 169 Ch. 3; Wis. Stat. Ann. §48.02. See also legislation pending in Washington that changes standard of proof from “serious threat of substantial harm” to “imminent physical harm.” Additionally, the bill makes clear that the existence of community or family poverty, single parenthood, age of the parent, crowded or inadequate housing, substance abuse, prenatal drug or alcohol exposure, mental illness, disability or special needs of the parent or child, or nonconforming social behavior does not by itself constitute imminent physical harm. Keeping Families Together Act, H.B. 1227, 67th Leg. Sess. (Wash. 2021).
- 272** Iowa Code Ann. § 232.684(a) (emphasis added).
- 273** La. Child. Code Ann. § art. 603(18) (emphasis added).
- 274** See *Differential Response: A Primer for Child Welfare Professionals*, CHILD WELFARE INFO. GATEWAY (Oct. 2020), https://www.childwelfare.gov/pubPDFs/differential_response.pdf. At the time of the report, twenty-three states had statutes enacting differential response systems and seven states had regulations or policies that made differential response a part of their child welfare practice. *Id.* at 3.
- 275** Julie A. Steen & Lloyd Duran, *Entryway Into the Child Protection System: The Impacts of Child Maltreatment Reporting Policies and Reporting System Structures*, 38 CHILD ABUSE & NEGLECT 868, 869 (2014).
- 276** *Id.* at 872.
- 277** *Id.*
- 278** *Mandatory Reporters of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY (2019), at 2, <https://www.childwelfare.gov/pubPDFs/manda.pdf>.
- 279** *Id.*
- 280** *Id.* at 4.
- 281** Sarah E. Wakeman et al., *When Reimagining Systems of Safety, Take a Closer Look at the Child Welfare System*, HEALTH AFFS. (Oct. 7, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20201002.72121/full/> (asserting that overly broad interpretations of mandated reporting requirements, which often result in false positive investigations and perpetuate trauma, overwhelmingly impact Black women); *Our Systems Meant to Help Are Hurting Black Families*, NAT'L INST. FOR CHILD. HEALTH QUALITY, <https://www.nichq.org/insight/our-systems-meant-help-are-hurting-black-families> (last visited May 4, 2021).
- 282** Diane Redleaf, *After the Hotline Call*, THE ATLANTIC (Jan. 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/problem-child-protective-services/580771/>.
- 283** *Child Maltreatment 2018: Summary of Key Findings*, CHILD WELFARE INFO. GATEWAY (2018), at 2, <https://www.childwelfare.gov/pubPDFs/canstats.pdf>.
- 284** Venezia Michalsen, *Abolitionist Feminism as Prisons Close: Fighting the Racist and Misogynist Surveillance “Child Welfare” System*, 99 PRISON J. 504, 506-507 (2019).
- 285** Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 61-71 (2014) (discussing the flawed aspects of anonymous reporting, including its role in overburdening the child welfare system with unnecessary reports, placing the legal rights of parents at risk, and allowing the public to make malicious reports without accountability).
- 286** Dale Margolin Cecka, *How Child Abuse Hotlines Hurt the Very Children They’re Trying to Protect*, WASH. POST (May 6, 2015), <https://>

www.washingtonpost.com/posteverything/wp/2015/05/06/how-child-abuse-hotlines-hurt-the-very-children-theyre-trying-to-protect/ (noting that the anonymous reporting has played no role in the national decrease in both sexual and physical abuse over the past 20 years); Richard Wexler, *Why It's So Easy to Troll Someone with Anonymous Child Abuse Report*, YOUTH TODAY (Aug. 6, 2018), <https://youthtoday.org/2018/08/why-its-so-easy-to-troll-someone-with-anonymous-child-abuse-report/>.

287 S. 5572, 242nd Leg. Sess. (N.Y. 2019).

288 H.B. 1098, 87th Leg. Sess. (Tex. 2021); Erica Grieder, *Proposal to Ban Anonymous Reporting of Child Abuse and Neglect Allegations Deserves Scrutiny*, HOUSTON CHRON. (Mar. 14, 2021), https://www.houston-chronicle.com/news/columnists/grieder/article/Proposal-to-ban-anonymous-reporting-of-child-16022540.php?utm_medium=email&utm_source=govdelivery.

289 Mical Raz, *Unintended Consequences of Expanded Mandatory Reporting Laws*, 139 PEDIATRICS 1, 2 (2017); See discussion *supra* pp. 13-14.

290 Trivedi, *supra* note 3, at 526; *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY (2020), at 2, <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/> (noting that only 15 states consider the emotional ties and relationships between children and parents in making determinations regarding the best interests of the child and only 28 states reference the importance of family integrity and preference for avoiding removal as guiding principles in making best interest determinations).

291 Trivedi, *supra* note 3, at 527.

292 *Id.* at 568-569.

293 *Id.* at 569-70 (citing *Nicholson v. Scopetta*, 820 N.E. 2d 840, 852 (N.Y. 2004)).

294 *Considered Removal: Child and Family Team Meetings Policy 21-2-1*, CONN. DEP'T OF CHILD. & FAM. (Jan. 2, 2019), at 1, <https://portal.ct.gov/-/media/DCF/Policy/Chapters/21-2-1.pdf?la=en>.

295 *Id.*

AUTHORS AND RESEARCHERS

Shereen A. White

Senior Staff Attorney, Children's Rights

Ira Lustbader

Chief Program Officer, Children's Rights

Nicole Taykhman

Staff Attorney, Children's Rights

Elissa Glucksman Hyne

Senior Policy Analyst, Children's Rights

Makena Mugambi,

Paralegal, Children's Rights

Jill Hayman

National Advisory Council, Children's Rights

Asha Menon

Vanderbilt Law School '21, Legal Intern, Children's Rights

Marisa Skillings

Harvard Law School '22, Legal Intern, Children's Rights

The authors are extremely grateful for the persons with lived experience, child welfare and race equity scholars, child advocates, parent advocates, family defense practitioners, and mental health professionals, who devoted time to critically think about these important issues with us. We cannot thank them enough for their contributions to this Call to Action and the work that they do on behalf of families every day.

© 2021 Children's Rights



PROTECTING KIDS.
PROVIDING HOPE.



@ChildrensRights



facebook.com/childrensrights



@childrensrights

www.childrensrights.org