Case No. S274943

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE N.R., Minor

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND HUMAN SERVICES,
Plaintiff and Respondent,
v.

O.R.,
Defendant and Appellant.

From an Unpublished Decision by the Court of Appeal
Second Appellate District, Division Five, Case No. B312001
On Appeal from the Los Angeles Superior Court,
Case Nos. 20CCJP06523, 20CCJP06523A
The Honorable Martha Matthews

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT & APPELLANT, O.R.

and

[PROPOSED] BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION, NATIONAL CENTER FOR YOUTH LAW, & CHILDREN'S RIGHTS, INC.

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Certificate of Interested Parties

Pursuant to Rules 8.208(e) of the California Rules of Court, Amici certify that they know of no other person or entity that has a financial or other interest in this case.

Dated: April 5, 2023

By: */s/ Minouche Kandel*
Minouche Kandel

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA

Attorney for Amici Curiae

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Application for Leave to File Amici Curiae Brief in Support of Defendant and Appellant Father, O.R.

Pursuant to California Rules of Court, Rule 8.520(f), proposed amici curiae the American Civil Liberties Union ("ACLU") of Southern California, ACLU of Northern California, (collectively "ACLU Affiliates"), ACLU, Children's Rights and the National Center for Youth Law respectfully request leave to file the accompanying [Proposed] Amicus Curiae Brief in Support of Defendant and Appellant O.R.

The ACLU Affiliates are regional affiliates of the ACLU, a national nonprofit, nonpartisan organization dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this Nation's civil rights laws. The ACLU Affiliates work to advance the civil rights and civil liberties of Californians in the courts, in legislative and policy arenas, and in the community. The ACLU Affiliates have participated in numerous prior cases, both as direct counsel and as amicus, that involve enforcing the state and federal constitutions' guarantees of due process, as well as statutory substantive civil rights protections and procedural safeguards.

The ACLU Affiliates recognize that the family regulation system in the United States, otherwise known as the child welfare system, was built on a foundation of white supremacy and attempted cultural genocide. The organizations have an interest in protecting the due process rights of parents, guardians, and children who are Black, Indigenous, immigrants,

LGBTQ, and people with disabilities as they navigate the family regulation system. The ACLU of California Affiliates present this brief to provide analysis regarding the privacy and due process concerns raised under the U.S. and California Constitution by state determinations of child abuse or neglect, particularly where such determinations could result in the harmful investigations of families and/or the separation of children from their families.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with nearly two million members and supporters dedicated to the preservation and defense of civil liberties. The ACLU has long been committed to protecting individuals' rights to make their own decisions to shape their lives and intimate relationships, to protect against government overreach into the family and home, and to ensure federal and state laws are interpreted and applied in conformity with constitutional guarantees, including due process rights.

The National Center for Youth Law ("NCYL") is a private, non-profit law firm that uses the law to help children and youth grow and thrive. For over 50 years, NCYL has worked to protect the rights of children, promote their healthy development, and ensure that they have the knowledge, skills, resources, agency, and decision-making power to achieve their goals. NCYL pursues both litigation and policy solutions to ensure that children and youth are safer than they are now and that they are supported in healing and thriving in families and their communities. Part of NCYL's work focuses on children and youth

in foster care, those at risk of entry into foster care, and their families and communities. NCYL strives to stop coercive and harmful state interventions by the family regulation system into the lives of children and secure supports in communities so that children can experience safe and supportive family and community connections.

Children's Rights, Inc. ("Children's Rights") is a national advocacy organization dedicated to improving the lives of children in and impacted by government systems. Through relentless strategic advocacy and legal action, Children's Rights holds governments accountable for keeping kids safe and healthy. It uses civil rights impact litigation, advocacy and policy expertise, and public education to create lasting systemic change. Their work challenges racist, discriminatory laws, policies, and practices that punish parents experiencing poverty by taking their children and unnecessarily placing them in foster care. Children's Rights' advocacy centers on building solutions that will advance the rights of children for generations.

This application is timely under Rule 8.520(f)(2) of the California Rules of Court.

In accordance with California Rules of Court, Rule 8.520(f)(4), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending appeal made a monetary contribution intended to fund the brief's preparation or submission. No person or entity other than counsel for the

proposed amici made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Rule 8.520(f) of the California Rules of Court, the ACLU Affiliates, ACLU, National Center for Youth Law, and Children's Rights, Inc. respectfully request that they be granted leave to file the accompanying amicus curiae brief.

Dated: April 5, 2023

ACLU Foundation of Southern California

ACLU Foundation of Northern California

By: */s/ Minouche Kandel*
Minouche Kandel

National Center for Youth Law

By: */s/Brenda Star Adams*
Brenda Star Adams

Attorneys for Amici Curiae

Brief of Amici Curiae in Support of Defendant and Appellant O.R.

I. Introduction

This case involves what scholars now identify as "the family regulation system."[1] Instead of supporting children within their families, the family regulation system was designed to take children from parents the state deemed inadequate, particularly Black, Indigenous and other parents of color, as well as parents living in poverty. The systemic, forced "removal" of children from their families does not result in an increase in child safety: it has devastating outcomes for children, including exceedingly low graduation rates, high incarceration rates, poor health outcomes, and high rates of physical and sexual violence experienced while in foster care.[2]

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[1] Amici use the term "family regulation system" to refer to the "child welfare system" because it more accurately describes a system meant to *"regulate and punish black and other marginalized people."* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation,* The Imprint (June 16, 2020, 5:26 AM), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480. *See also* Nancy D. Polikoff & Jane M. Spinak, *Forward: Strengthening Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 Colum. J. Race & L. 427, 431 (2021) at https://journals.library.columbia.edu/index.php/cjrl/issue/view/789/188.

[2] 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. Public Child Welfare 500, 503 (2020), https://www.tandfonline.com/doi/full/10.1080/15548732.2020.1814542; J. William Spencer & Dean D. Knudsen, *Out of Home*

Amici, ACLU Affiliates, ACLU, the National Center for Youth Law, and Children's Rights, in this brief first describe the origins of the family regulation system—how it was designed to separate families and to control and punish parents of color and those living in poverty—and how that design perpetuates the profound inequities of the system today, particularly with respect to the forced separation of families based on "neglect." The brief then describes the harms to children of forced separation, particularly with respect to children under the age of six, like N.R.

Here, the Los Angeles Department of Children and Family Services (DCFS) initially removed N.R. from Father without any evidence that there was "substantial risk of harm to N.R.," much less actual or imminent harm to N.R. Indeed, DCFS trusted N.R. to live with Father for over two weeks, without incident, and *after* Father's single, positive drug test. Further, despite Father's testing negative on numerous subsequent random drug tests, the agency sought continued removal of N.R. based on hypothetical, non-specific and unreasonably subjective assessments of "substance abuse" and "risk" that in fact did not manifest.

The juvenile court later took jurisdiction over N.R. and ordered continued removal from Father for "neglect" based on Father's prior occasional use of cocaine on weekends when he was not with N.R. Removal—though technically a separate question

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Maltreatment: An Analysis of Risk in Various Settings for Children, 14 Children and Youth Services Rev. 485, 488 (1992).

from that of jurisdiction—is often, as it was here, conflated and resolved at the same hearing, based on the same evidence, and often, as here, leads to separation.

On appeal, the Court upheld the orders for jurisdiction and disposition of removal based on a judicially-created presumption that drug "abuse" constitutes "substantial risk of harm" to a child under the age of six—which itself was erroneously applied here, as there is no evidence that Father's drug use constituted "abuse" under any medically accepted standard. In upholding the removal of N.R., the court failed to both identify an actual risk of harm to N.R. posed by Father's prior drug use, and to consider the very real risk of harm to N.R. that would result from the separation.

This senseless and harmful intervention and forced separation of Father and N.R.—which prevented Father and son from sharing in N.R.'s first steps—violated both Father's and N.R.'s constitutional rights. The U.S. and California Constitutions have long been interpreted to recognize the central importance of the rights of children and parents to family integrity without state intervention. The agency and court action in this case trampled on those rights. Amici argue that these constitutional violations should be considered within the broader context of the family regulation system as one that targets families of color and those living in poverty and is oriented to separation.

Amici urge the Court to take steps to ensure that future California families are not subject to the same baseless state control and family separation as Father and N.R. by: (1)

eliminating the judicially-created presumption that drug abuse poses a risk of harm to children under six; (2) requiring courts to utilize the clinical definition of substance "abuse"; and (3) requiring courts to weigh the harm to the child of separation when deciding whether removal is necessary.

II. Relevant Facts and Procedural History

A. N.R. Is Removed from Mother's Home.

DCFS' involvement in this case stemmed from a search warrant that had nothing to do with either parent. (CT 10). In fact, no reports concerning N.R. had ever been made to DCFS. (CT 14). The Los Angeles County Sheriff's Department (Sheriff's Department) was executing a search of Mother's home for weapons and drugs allegedly belonging to relatives with whom she lived. (CT 10). The Sheriff's Department notified DCFS that they were searching Mother's home, and a social worker from DCFS was present when deputies conducted the search. (CT 9-10). DCFS had no information that Mother posed any risk of harm to her child (CT 9-10). The agency investigated solely because its standard operating procedure involves accompanying law enforcement when certain warrants are executed on a home where children live.[3]

[3] *DCFS Policy 0070-548.09*, Multi-Agency Response Team (MART) Referrals (July 1, 2014), http://m.policy.dcfs.lacounty.gov/Src/Content/Multi_Agency_Response_Te.htm.

The search turned up no evidence relating to the warrant or anything that the Sheriff's Department deemed illegal. (CT 11). However, the social worker who investigated the house found it important enough to note that, among other things, she observed marijuana paraphernalia, alcohol, and a "large" sex toy—all legal items—and did not explain why any of these items might pose a risk of harm to the child.[4] (CT 11). N.R. was just over twelve months old and not yet walking at this time. (CT 7, 74).

Mother informed the social worker that the maternal grandmother, with whom she lived, sometimes cared for N.R. (CT 10-11). Mother's minor sister had been previously removed by DCFS from maternal grandmother based on maternal grandmother's substance abuse, but maternal grandmother had not used drugs since Mother was thirteen.[5]

Based *only* on her observations and maternal grandmother's DCFS history, the social worker told Mother that she did not want to leave N.R. with Mother, and asked Mother if N.R. could stay with Father during the Department's investigation. (CT 10-11). Mother agreed and called Father. (CT 11). Father headed to the home immediately. (CT 11).

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[4] The social worker also noted "a faint smell of marijuana;" a plastic water bottle of yellow liquid; and some "brandy on a dresser low enough that it was accessible to the child." (CT 11).
[5] *In re N.R.*, No. B312001, 2022 WL 1284250, at *2 (Cal. Ct. App. Apr. 29, 2022), *reh'g denied* (May 13, 2022), *review granted* (Aug. 24, 2022).

B. N.R. is Placed with Father.

Father lived with his mother and older brother. (CT 72). At the time, he was working in a warehouse twenty hours per week. (CT 72). He was a licensed barber who had worked at a barber shop for four years, but lost his job earlier that year when his shop shut down due to the COVID-19 pandemic. (CT 72-73). Father had no criminal history, gang affiliation, mental health history, or any significant health problems. (CT 73). No referral to DCFS had ever been made regarding Father's care of N.R. (CT 14). In fact, DCFS acknowledged that Father was housed, employed, co-parented well with Mother, and had a strong support system. (CT 74). Prior to DCFS involvement, N.R. had overnight weekend visits with Father. (CT 74).

Mother had no concerns with N.R. being in Father's care. (CT 11). Father was willing to care for N.R., and took N.R. home with him. (CT 12). The social worker immediately went to Father's home to assess it. (CT 12). The only safety concern noted by the social worker was that N.R. slept in the bed with Father, and the social worker was concerned about the dangers of co-sleeping and that the bed was by a window. (CT 12). (The social worker did not explain why a bed by a window posed a safety issue.) Father agreed to buy a "pack and play" for N.R. to sleep in instead. (CT 12). The social worker observed that N.R. seemed comfortable with his father, and presented as "clean, neat and on target with all developmental milestones." (CT 12).

C. DCFS Detains N.R., Separating Him from Father.

Even though there was no evidence that Father abused substances, the social worker asked him to take a drug test. (CT 12). Father agreed and took a drug test that same day. (CT 11-12). Father denied abusing any substance. (CT 12).

Four days later on November 23, 2020, the social worker received the result for Father's drug test. (CT 12, 21). It was positive for cocaine. (CT 12, 21). The social worker waited a week, until November 30, 2020, to discuss the drug test results with Father. (CT 12). Father explained that he had been scared to tell the social worker that he had used cocaine on the weekend, four days before N.R. started living with him unexpectedly and he took the drug test. (CT 13, 66). That weekend was Father's birthday weekend, and he explained that he had used cocaine with friends to celebrate. (CT 13). Father further explained that he is "not an active user and ha[d] not used since then." (CT 13).

A week later, on December 8, 2020, prior to any court hearing, DCFS took N.R. from his father and moved him to the home of a maternal uncle. (CT 13). At this point, N.R. had been in Father's care for almost three weeks and was safe and well-cared for while with his Father. (CT 13). Nonetheless, the social worker took N.R. into protective custody and sought a removal order from the Court, stating "this family *can* be considered to be at 'High Risk' for future abuse/neglect." (CT 15 (emphasis added)).

The Juvenile Court held a detention hearing on December 15, 2020, to determine whether N.R. would remain in DCFS

protective custody or return to his parents. (CT 51). In order to continue to detain N.R., the court had to find a prima facie showing that N.R. met at least one of the criteria for jurisdiction set forth in California Welfare and Institutions Code section 300; that continuance in the homes of the parents was contrary to N.R.'s welfare; and that there was a substantial danger to N.R.'s physical health or N.R. was suffering severe emotional damage and no reasonable means existed to protect N.R.'s physical or emotional health without removing him from his parents' physical custody. (Cal. Welf. & Inst. Code § 319 (West)).

DCFS filed a petition alleging that N.R. met the criteria for neglect in section 300(b)(1)(D), which requires that "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of . . . [t]he inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's . . . substance abuse." (CT 1). DCFS alleged that N.R. met this criteria because Father had a history of "substance abuse" and "is a current abuser of cocaine," and that Father's "substance abuse" "endangers the child's physical health and safety and places the child at risk of serious physical harm, damage, [and] danger." (CT 4). The same count alleged that jurisdiction applied as to Mother because she had failed to protect N.R. from Father's alleged substance abuse. (CT 4). The petition also contained a second allegation, which only

applied to Mother.[6] The removal application contained no further details regarding why Father's prior occasional drug use posed a risk to N.R. (CT 24-28).

The social worker submitted a detention report to the court, which claimed "[r]easonable efforts were made to prevent or eliminate the need for the child[]'s removal from the home." (CT 15). The report listed as "reasonable efforts" only the following: interviewing the parents and law enforcement; assessing the child; requesting contact information for relatives; initiating and returning phone calls; referring the parents for on-demand drug testing; and explaining the court process to "all involved parties." (CT 16). Additionally, the social worker claimed she "provided crisis intervention services as well as emotional support to family and children." (CT 16).

The court approved the detention without applying a scientifically accepted definition of substance abuse, without any specific evidence of risk of harm to N.R., and without considering the harm to N.R. that the separation would cause. (RT 30).

After N.R.'s removal, Father spoke to Mother daily about their son. (CT 74). Father was sad to miss N.R.'s first steps. (CT 74). The maternal uncle who was caring for N.R. had no concerns about Father prior to hearing about the positive test. (CT 69). He reported N.R. recognized and was happy to see Father at a visit,

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[6] The other count alleged that N.R. was at substantial risk of serious harm because Mother allowed maternal grandmother to care for him. (CT 3).

and that their interactions were positive. (CT 69). The social worker concluded that N.R. could not be released to Father as "the risk level for the child appears to be moderate." (CT 75). Father did not believe he had a problem with cocaine, but was willing to participate in services if court ordered. (CT 74). Father stated he had never used cocaine while taking care of N.R., (CT 66), and the Department had no evidence to the contrary. There was no evidence that Father had ever used drugs while caring for N.R., or that any drug use was interfering with Father's daily activities.

D. The Court Takes Jurisdiction Over N.R. and Continues Separation of N.R. from Father.

At the jurisdiction/disposition hearing on April 7, 2021, the social worker provided the Juvenile Court with information regarding Father's drug testing. (CT 158). Father attended four drug tests scheduled on days when he was not working, and did not test positive on any of them. (CT 158). (He tested negative for three tests, and one test was invalid through no fault of Father.) Two tests were scheduled on Tuesdays, when Father worked, and he missed those tests. (CT 158). The social worker had denied Father's request to not test on days of the week when he worked, stating the testing must be "random." (CT 158). The social worker reported she had referred Father verbally to "services" on March 23, 2021, and sent him an email "with services" on March 31, 2021, one week before the hearing. (CT 159). The worker did not identify any specific services to which she had referred Father. (CT 159).

The Juvenile Court sustained the petition against Father based on his alleged substance abuse, and took jurisdiction over N.R. for neglect under section 300(b)(1)(D). Even though the court itself acknowledged that Father would be ineligible for a treatment program because he was no longer using drugs, it nevertheless ordered N.R. removed from Father's care and ordered Father to take 12 additional drug tests. (RT 33). In doing so, it again failed to consider the risk of harm to N.R. of being separated from his father. (RT 33). At the disposition stage, the Court ordered N.R. could return to Mother. (CT 191).

Father appealed both the Court's jurisdiction and disposition orders. DCFS argued that Father's history of substance use, his one positive drug test prior to removal, and his denial of a substance abuse problem provided sufficient evidence that Father had a substance abuse problem. DCFS also argued that this alleged substance abuse alone, without any evidence of a specific risk of harm to N.R., was sufficient to support the court's jurisdiction. (Resp't Br. filed Dec. 1, 2021 in *In re N.R.*, No. B312001, (Cal. Ct. App.)).

The Court of Appeals affirmed the exercise of jurisdiction under section 300(b)(1)(D). Without articulating a clear standard or referencing any diagnostic criteria, the court concluded that Father's admitted past use of cocaine constituted sufficient evidence to justify a conclusion that Father was a "recent" abuser of cocaine. (*In re N.R.*, 2022 WL 1284250, at *3). Even if Father's prior occasional cocaine use constituted substance "abuse," substance abuse alone is typically insufficient to support

jurisdiction under section 300(b)(1)(D). Substance abuse can only support jurisdiction where "the child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of … the inability of the parent or guardian to provide regular care for the child due to the parent's … substance abuse." (Cal. Welf. & Inst. Code § 300(b)(1)(D)).

Here, there was no evidence that Father could not care for N.R., or that N.R. was at substantial risk of physical harm. (CT 14). Despite this, the Court of Appeals applied a judicially-created rule that, as to children under six, "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*In re N.R.*, 2022 WL 1284250, at *5, citing *In re Christopher R.*, 225 Cal. App. 4th 1210, 1219 (2014)). *Christopher R.* affirmed jurisdiction over a child under the age of one solely on the basis of father's "persistent and illegal" use of marijuana and affirmed jurisdiction over children under age six on the basis of mother's alleged abuse of cocaine, relying on *In re Drake M.*, 211 Cal. App. 4th 754, 767 (2012). *Drake M.* established the presumption as to children under six, but limited its application to cases where the parent or guardian had been "diagnosed as having a current substance abuse problem by a medical professional" or "has a current substance abuse problem as defined by the DSM-IV-TR." Under the standard applied in this case, a parent of a child under six who "abuses" substances is presumptively guilty of neglect, even when

no finding of harm or specific risk of harm to the child has been made.

The Court of Appeals also affirmed the disposition of removal of N.R. from Father's care. Welfare and Institutions Code section 361(c)(1) provides that a dependent child may only be removed from a parent if the dependency court finds "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (Cal. Welf. & Inst. Code § 361(c)(1)). Applying its conclusion that Father was a "recent," but not "current," abuser of cocaine, and the presumption that substance abuse is prima facie evidence of an inability to safely parent a young child, the Court of Appeals found that N.R. would be in substantial danger if he returned to Father's home, and that there were no reasonable means to mitigate this danger. (*In re N.R.*, 2022 WL 1284250, at *6).

Father appealed the exercise of the juvenile court's jurisdiction to this Court, challenging the definition of substance abuse applied by the lower courts and their application of the judicially-created presumption that substance abuse alone creates a risk of harm that is sufficient to support juvenile court jurisdiction when a child is under the age of 6.

III. The Family Regulation System is Designed to Target People of Color and Poor Families Like N.R.'s.

Forced family separation has deep and troubling roots in the United States as a coercive measure to exploit, control, or force assimilation to European cultural standards. Current laws and policies have yet to account for this history, and they continue to threaten family separation to force compliance with vaguely defined and biased notions of parental fitness and to disproportionately target, investigate, surveil, and separate families of color.

A. The Deep and Racist Roots of Forced Family Separation.

Family separation in the United States dates back to the 1600s, when enslavers routinely forcibly separated or threatened to separate enslaved Black children from their families as a form of social control and exploitation.[7] Indigenous children were also separated from their parents throughout the 1800s and 1900s: tribal children were kidnapped and forced to assimilate into white cultural norms through Indian Boarding Schools and later the Indian Adoption Project.[8] Through these unjust yet legal

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[7] Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World* 90 (2022); Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 Colum. J. of Race & L. 767, 781-782 (July 1, 2021).

[8] Roberts, *Torn Apart*, at 103; Bryan Newland, *Federal Boarding School Initiative Investigative Report*, United States Department of the Interior, (May 2022),

family separations, up to 90% of separated children were placed with non-Indigenous families.[9]

Also beginning in the 1800s, orphanages and other nongovernmental societies like the Children's Aid Society[10] separated white families based on conditions of poverty under the auspice of "child protection"[11] and imposed middle-class norms on working-class families, finding them unfit.[12] Beginning in 1854 and lasting 75 years, over 200,000 mostly white, Catholic, poor immigrant children were sent from Eastern cities on "orphan trains." Many of these children were exploited as unpaid laborers to help settle the West.[13] Much like the current family regulation

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https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf; Laura Briggs, *Taking Children: A History of American Terror* 46-75 (1st ed. 2020).

[9] Diane F. Reed & Kate Karpilow, *Understanding the Child Welfare System in California* 4 (2nd ed. 2009).

[10] 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?*, 692 The Annals of the Am. Acad. of Pol. and Soc. Sci. 253, 262 (2020).

[11] Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, Center for the Study of Social Policy, 17 (Nov. 2018), https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf.

[12] Ethan G. Sribnick & Sarah Johnsen, *Finding Homes for Poor Children: Orphanages and Child Welfare Policy*, 4.1 UNCENSORED 28, 29-30 (2013), https://www.icphusa.org/wp-content/uploads/2015/01/ICPH_UNCENSORED_4.1_Spring2013_HistoricalPerspective_FindingHomesforPoorChildren.pdf.

[13] Dettlaff & Boyd, *supra* at 262; Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 The Modern Am. 3, 4-6 (2009).

system, these societies facilitated extensive family policing by working with community members, police, and the courts to intervene where children were perceived as abused, neglected, or "vagrant."[14]

The social policy that shapes the modern-day family regulation system was birthed out of this harsh legacy of racism, classism, and family separation.

B. Legislation Prioritizes Family Separation Over Family Preservation.

The current family regulation system is also shaped by decades of federal legislation that financially incentivizes separating families over providing services—like monetary assistance—to keep families together. [15] The States continue to use the threat of separation to force conformity with societal norms, and prioritize funding that tears families apart.

In the early 1900s, welfare programs were established to provide financial aid to widowed or unwed mothers living in poverty.[16] But these "mother's pensions" were limited to women who provided "suitable" homes, a pseudonym for children born to married parents, designed to exclude Black families from

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[14] Trammell, *supra*, at 4. Children were disproportionately removed from widowed mothers because of biased notions that such mothers would be unable to provide financially for their children. *Id.* at 3.

[15] In addition to incentivizing separation generally, these policies only funded needed services after children were separated, rather than providing services as a preventative measure to avoid separation. Roberts, *Torn Apart*, at 144.

[16] Roberts, *Torn Apart*, at 115.

receiving aid.[17] Southern white politicians were also motivated to deny public benefits to Black mothers in order to keep "poor Black mothers available for cheap domestic labor."[18] This led to the "Flemming Rule," which ended the practice of denying aid to Black mothers based on unsuitability, but also required for the first time that states investigate "unsuitable" homes and, if determined unsafe, forcibly separate children from their families.[19]

Later, the 1962 amendments to the Social Security Act emphasized separating children from their families as an intervention in "unsuitable homes."[20] The Child Abuse Prevention and Treatment Act (CAPTA) of 1974 subsequently formalized the shift away from preventative financial support and toward investigation and reporting,[21] and required states to add "neglect" — often a euphemism for conditions of poverty — to the list of mandated reporting requirements.[22]

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[17] Mack, *supra*, at 771-73; Dettlaff & Boyd, *supra,* at 263; *see also* Roberts, *Torn Apart*, at 115. For example, following the U.S. Supreme Court's *Brown v. Board of Education* ruling in 1954, some southern states enacted laws to deny benefits to children born out of wedlock, including those born to parents in a common law marriage, which had disparate impacts on families headed by Black women. Roberts, *Torn Apart*, at 116.
[18] Roberts, *Torn Apart*, at 117.
[19] Dettlaff & Boyd, *supra*, at 263.
[20] Detlaff & Boyd, *supra*, at 263.
[21] 42 U.S.C. § 5101-5119c (2010).
[22] Melody R. Webb, Esq., *Building A Guaranteed Income to End the "Child Welfare" System*, 12 Colum. J. Race & L. 669, 675-677 (2022).

In 1980, the Adoption Assistance and Child Welfare Act (AACWA) required child welfare workers to make "reasonable" efforts to preserve or reunify the family and to provide social supports.[23] The supports were time-limited and did not address families' material needs,[24] such as housing or food insecurity. As a result, the legislation ultimately led to a sharp increase in separations in part because the underlying cause of the parents' so-called unfitness was poverty, which the legislation failed to mitigate.[25]

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[23] Adoption Assistance and Child Welfare Act of 1980, H.R. 3434, 96th Cong. § 471 (1980); Roberts, *Torn Apart*, at 120.

[24] While child welfare workers rarely provide financial support to families who need it to address the root causes of their poverty and the purported neglect, significant financial support is given to foster families once a child is removed, and much more is paid to the foster home than would have been needed to address the need of the family. In Texas, for example, foster families are paid between $812-$2,773 per month, whereas the state pays between $100-$812 to needy families. Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 Stan. L. and Pol'y Rev. 217, 256 (2022); *see also* 42 U.S.C. § 675(4)(A) (listing the items for which the state must provide financial support to foster families).

[25] Mical Raz, *Abusive Policies: How the American Child Welfare System Lost Its Way* 89 (2020). The increase was also due in part to increased homelessness, reporting of substance use as neglect, HIV status, and other punitive child welfare policies. Drug Policy Alliance, *Report: The War on Drugs Meets Child Welfare,* Uprooting the Drug War, 1-2 (Feb. 4, 2021), https://uprootingthedrugwar.org/wp-content/uploads/2021/02/uprooting_report_PDF_childwelfare_02.04.21.pdf.

Moreover, without any guidance as to what "reasonable efforts" meant,[26] and as exemplified here by the social worker's mere provision of an unspecified list of "services" to Father shortly before the hearing, the requirement became a box for social workers to check off rather than ensuring that the services were accessible, effective, and tailored to the families' needs.[27] In fact, a study by the federal Child and Family Services Reviews found that states failed in 58% of cases to adequately assess parents' service needs and in 51% of cases to make adequate efforts to reunify families.[28] Despite this data, another study found that 90% of judges "rarely" or "never" made findings that an agency failed to make reasonable efforts.[29]

The Adoption and Safe Families Act (ASFA) enacted in 1997 shifted financial incentives to prioritize permanent adoption

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[26] Gupta-Kagan, *supra*, at 253-54.
[27] ACLU & Human Rights Watch, *If I Wasn't Poor, I Wouldn't Be Unfit, The Family Separation Crisis in the US Child Welfare System* 112 (2022), https://www.hrw.org/sites/default/files/media_2022/11/us_crd1122web_3.pdf; Kristen Weber & Bill Bettencourt, *Different Year, Different Jurisdiction, But the Same Findings: Reforming Isn't Enough*, 12 Colum. J. Race L. 690, 699 (2022).
[28] Gupta-Kagan, *supra*, at 254.
[29] *Id*. Moreover, the only consequence for an agency's failure to make reasonable efforts is loss of federal funding. See Judge Leonard Edwards, *Overcoming Barriers to Making Meaningful Reasonable Efforts*, American Bar Ass'n (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/.

over family preservation. The ASFA requires states to seek to terminate parental rights if a child was in foster care for 15 months in a 22-month period, in order to obtain federal funds.[30] It requires child welfare workers to concurrently plan for adoption while also ostensibly attempting reunification, a conflict of interests that favors separation since adoptions are financially incentivized over reunifications.[31] Only three percent of the funding has been dedicated to family preservation programs.[32] Many child welfare experts, including a consultant who helped craft the law,[33] are now calling for amending or repealing the law, noting the harms caused to children and families.[34]

The Family First Prevention Services Act of 2018 (FFPSA) attempts to enhance access to services—including substance use interventions—for families at risk of separation by providing services while the child remains in the home.[35] Unfortunately,

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[30] Adoption and Safe Families Act of 1997, H.R. 867, 105th Cong., U.S.C. 42 § 103 (1997); Roberts, *Torn Apart*, at 121.
[31] Adrienne Whitt-Woosley & Ginny Sprang, *When Rights Collide: A Critique of the Adoption and Safe Families Act from a Justice Perspective*, 93 Child Welfare 111, 124-125 (2014).
[32] Mack, *supra,* at 778.
[33] Agnel Phillip et al., *The 'death penalty' of child welfare: In 6 months, some parents lose their children forever*, Yahoo! (Dec. 20, 2022), https://www.yahoo.com/now/death-penalty-child-welfare-6-153040628.html.
[34] Michael Fitzgerald & Kate Gonzalez, *Advocates and Officials Press Case for Overhauling Key Adoption and Child Welfare Law*, The Imprint (Feb. 21, 2022), https://imprintnews.org/child-welfare-2/advocates-and-officials-asfa-overhaul/62671.
[35] *Family First Prevention Services Act (FFPSA) Part I*, Cal. Dep't of Soc. Serv., https://cdss.ca.gov/inforesources/cdss-

because the legislation lacks a mandate, and because of the historically ingrained emphasis within the system and among child welfare workers on separation, the legislation has not resulted in widespread change. Exemplifying this orientation to separation, rather than offer substance abuse interventions to Father while N.R. remained in the home, the social worker opted to separate N.R. from his Father.

C. Family Separation Based on Neglect Penalizes Poverty and Disproportionately Harms Families of Color, Like N.R.'s.

While federal laws set the minimum requirements for state and local family regulation systems, each state has its own system and definition of abuse and "neglect," which is often a proxy for poverty-related circumstances and is the primary basis for removal in the vast majority of cases.[36]

California's neglect definition includes the failure to provide adequate food, clothing, shelter, or medical care in ways that threaten the child's well-being, and does not require establishing the child has suffered harm, or that such harm is "imminent"—just that there is "substantial risk" of harm.[37] The

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programs/ffpsa-part-iv/ffpsa-part-i (last visited Apr. 2, 2023).

[36] Webb, *supra*, at 675-676; *Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2021 Data*, U.S. Dep't of Health and Human Serv. Admin., 2 (2022), https://adoptioncouncil.org/content/uploads/2022/11/afcars-report-29.pdf.

[37] Cal. Welf. & Inst. Code § 300(b)(1)(C) ("The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of … the willful or negligent

very premise of this definition—that the lack of adequate food, clothing, or shelter is the result of a parental choice that requires separation by the child welfare agency[38]—is flawed and pretends that "wealthier parents are superior simply because they have the money to insulate their families from child protective services."[39]

This logic of deeming poverty "neglect" also ignores structural and historical racism and other equity factors that lead to the disproportionate representation of families of color living in poverty. This is especially true in California, where Black and Hispanic children live in poverty at a rate double that of white children.[40] As in the present case, neglect was a factor for more than eighty percent of children for whom a maltreatment allegation was sustained in California.[41]

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failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment...."). [38] Dorothy E. Roberts, *Child protection as surveillance of African American families*, 36 J. of Soc. Welfare and Fam. L., 426, 427 (2014) (citing U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau (2014) The AFCARS Report).
[39] *Id.*
[40] Kaiser Family Foundation, *Poverty Rates by Race/Ethnicity*, (2021), https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited April 2, 2023).
[41] Cal. Child Welfare Indicators Project, *Entries to Foster Care Report*, https://ccwip.berkeley.edu/childwelfare/reports/Entries/MTSG/r/a

Parental substance use, which is considered "neglect" in California, is also a leading cause for family separation. (Cal. Welf. & Inst. Code § 300(b)(1)(D)). The number of children separated due to parental substance use has more than doubled nationally over the last two decades,[42] despite the fact that research does not indicate substance use alone necessarily impairs parenting abilities.[43] Moreover, according to the

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b636/s (last visited Apr. 2, 2023); ACLU & Human Rights Watch, *supra*, at 35.

[42] National Center on Substance Abuse and Child Welfare, *Child Welfare and Alcohol and Drug Use Statistics*, (2019), https://ncsacw.acf.hhs.gov/research/child-welfare-and-treatment-statistics.aspx (last visited April 2, 2023).

[43] Movement for Family Power, "*Whatever They Do, I'm Her Comfort, I'm Her Protector." How the Foster System Has Become Ground Zero for the U.S. Drug War* 21-23 (2020), https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf; National Center on Substance Abuse and Child Welfare, *supra.*

[43] Mark Hardin, *Foster Children in the Courts* 206 (1983) (many parents "suffer from drug or alcohol dependence yet remain fit to care for a child. An alcohol or drug dependent parent becomes unfit only if the dependency results in mistreatment of the child, or in a failure to provide the ordinary care required for all children"); Susan Boyd, *Gendered drug policy: Motherisk and the regulation of mothering in Canada*, 68 Int'l J. of Drug Policy 109, 114 (2019) ("Research findings conclude that many women who use illegal drugs are adequate parents and, like non-drug using parents, adopt strategies to mitigate harm"). The source most often cited for the claim that drug use increases the likelihood of abuse is a self-published report which was not subject to peer review. (Allison E. Korn, *Detoxing the Child Welfare System*, 23 Va. J. Soc. Pol'y & L. 295, 320 (2016)).

American Medical Association, the commonly employed intervention of drug testing does not inform the harm or risk to children of parental drug use because it fails to assess frequency of use, dosage, individual tolerance or dependence, or whether the drug use impairs the parent's functioning.[44] Confoundingly, and consistent with DCFS's actions in the present case, nearly every state acts more quickly when drugs are involved than when there are concerns about physical or sexual abuse.[45] And, consistent with the lower court's application of the judicially-created presumption of risk to children under six in this case, sixty percent of all children removed due to parental drug or alcohol use were under the age of five.[46]

Because neglect in California does not require establishing harm or imminent risk of harm,[47] it is subject to the biased interpretations of often undertrained social workers,[48] resulting

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[44] American Medical Ass'n House of Delegates, *Report of Reference Committee E: Resolution 520 – Substance Abuse During Pregnancy*, 20-21 (2019), https://www.ama-assn.org/system/files/2019-06/a19-refcomme-report.pdf. *See also* amicus brief submitted by Association for Multidisciplinary Education and Research in Substance Use and Addiction and California Society of Addiction Medicine (hereinafter "AMERSA amicus brief").

[45] Phillip et al., *supra*.

[46] National Center for Substance Abuse and Child Welfare, *supra*.

[47] Cal. Welf. & Inst. Code § 300(b)(1)(A)-(D).

[48] See, e.g., Orange County Social Services Agency, *CFS Operations Manual*, (2009), https://www.ssa.ocgov.com/sites/ssa/files/import/data/files/53467.pdf ("The Federal Child and Family Services Review (CFSR) of September 2002 indicated California was insufficient in

in the disproportionate removal of hundreds of thousands of children of color each year.[49] The fact that the social worker in this case made note of the alcohol, marijuana paraphernalia, and a sex toy in the home—all legal items that posed no risk to the child—evidences this bias. The American Bar Association and Institute for Judicial Administration's Juvenile Justice Standards Project found that neglect's breadth and vagueness "facilitate[s] arbitrary, and even discriminatory, intervention," including interventions that harm children.[50] Even child welfare workers acknowledge the role racial bias plays not only in their own decision-making, but in assessment measures and interventions.[51]

In fact, bias is so problematic in California that the Legislature last year passed a law requiring a race-blind pilot program, in which decisions to separate children are made without knowledge of the race or ethnicity of the child or

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mandatory training for line-staff social workers and supervisors ...").

[49] Cal. Child Welfare Indicators Project, *supra*; Additionally, the lack of hierarchy of more and less severe forms of maltreatment that could be tied to the severity of state interventions, fails to limit those interventions in less severe cases and contributes to the high numbers of removals in neglect cases. Gupta-Kagan, *supra*, at 233.

[50] Inst. of Jud. Admin. & Am. Bar Ass'n, Juv. Just. Standards Project, *Standards Relating to Abuse and Neglect* 52-53 (2nd ed. 1981).

[51] Detlaff & Boyd, *supra*, at 265.

guardians, with a particular focus on "Black, Native American, and Latin[e] children."[52]

D. The Family Regulation System Polices, Monitors, and Surveils Families of Color, Like N.R.'s.

Other complex factors combined with bias and poverty result in the disproportionate policing and surveillance of families of color, which in turn leads to increased involvement with the family regulation system and engagement in unnecessary "services" that expose families to ongoing monitoring, offering more opportunities to separate children. In fact, "the child welfare system is organized around surveillance, monitoring, compliance, and control."[53] This is why many

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[52] A.B. 2665, Reg. Sess. (Cal. 2022) ("It is further the intent of the Legislature to address the racial disparities in the child welfare system by eliminating bias in the decision making process determining whether children are removed from the physical custody of their parent or guardian by utilizing a blind removal strategy.") This bill was vetoed by Governor Newsom for fiscal reasons. *See* Jeremy Loudenback, *Citing Costs, California Gov. Gavin Newsom Nixes Child Welfare Reforms, Signs on to Juvenile Bill of Rights*, The Imprint (Sept. 30, 2022), https://imprintnews.org/child-welfare-2/citing-costs-california-gov-gavin-newsom-nixes-child-welfare-reforms-signs-on-to-juvenile-bill-of-rights/233911#:~:text=Assembly%20Bill%202085%20limits%20the,being%20convicted%20of%20a%20crime.

[53] ACLU and Human Rights Watch, *supra*, at 47; see also Dorothy Roberts, *The Regulation of Black Families,* The Regulatory Review, (April 20, 2022), https://www.theregreview.org/2022/04/20/roberts-regulation-of-black-families/.

advocates refer to the child welfare system as the "family policing" or "family regulation system."[54]

Due to historical and structural inequities, families of color experience much higher rates of poverty[55] and therefore have a disproportionate need for social services, which in turn subjects them to higher rates of state surveillance and scrutiny than those with greater resources.[56] Every time families access health care, mental health services, financial benefits like food stamps or disability payments, or even send their children to school, they encounter mandated reporters, making them more likely to be reported and investigated for abuse or "neglect."[57] Public health studies show that medical providers are more likely to report people of color and children living in poverty for suspected abuse or neglect than their peers, even when the injury precipitating

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[54] Polikoff & Spinak, *supra*, 431-432.
[55] Children's Defense Fund, *Child Poverty in America 2019: National Analysis*, (2020), https://www.childrensdefense.org/wp-content/uploads/2020/12/Child-Poverty-in-America-2019-National-Factsheet.pdf.
[56] Kathi Harp & Amanda M. Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 Soc. Polit. 258 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7372952/.
[57] Maria Cancian, et al., *The Effect of Family Income on Risk of Child Maltreatment*, Institute for Research on Poverty (August 2010), https://www.irp.wisc.edu/publications/dps/pdfs/dp138510.pdf; G lnguanta & Catharine Sciolla, *Time Doesn't Heal All Wounds: A Call to End Mandated Reporting Laws*, 19 Columbia Social Work Review 116, 123-124 (2021).

the medical visit was similar.[58] In fact, the fear of being reported to child welfare agencies is so great that it prevents many families from accessing needed services or speaking candidly with service providers.[59] Thus, families of color and families living in poverty are separated based on the same conditions that exist in white, middle- and upper-class households, simply because they are more exposed to public systems and mandated reporters.

Moreover, the investigation process introduces additional surveillance opportunities that transform conditions that otherwise would not justify even an investigation into grounds for separation.[60] Commonly, these "prevention plans" are neither

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[58] Modupeola Diyaolu, et al., *Black Children Are Disproportionately Identified as Victims of Child Abuse: A National Trauma Data Bank Study*, 147 Pediatrics 929 (2021); Natalie A. Cort, et al., *Investigating Health Disparities and Disproportionality in Child Maltreatment Reporting: 2002-2006*, 16 J. of Public Health Management and Practice 329 (2010); Cynthia J. Najdowski & Kimberly M. Bernstein, *Race, social class, and child abuse: Content and strength of medical professionals' stereotypes*, 86 Child Abuse Negl. 217 (2018).

[59] Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement,* 97 Social Forces 1785, 1793 (2019); *see also* DeAnna Y. Smith & Alexus Roane, *Child Removal Fears and Black Mothers' Medical Decision-Making*, 22 Contexts 18 (2023), https://doi.org/10.1177/15365042221142834.

[60] *See* Gupta-Kagan, *supra*, at 226, discussing the *In Re A.M.* case. In *In re A.M.*, the child was removed after her mother left her alone while she went to work. The case plan required the mother to submit to drug and alcohol abuse and mental health assessments despite no allegations of substance abuse or mental health issues, and to maintain stable employment despite the fact that unemployment is not a ground for removal. *Id.* The child

individualized nor tailored to the incident that precipitated the investigation and instead consist of standardized checklists a parent must complete before being eligible for reunification.[61] Unquestioning compliance becomes the primary concern, overshadowing the child's needs, the parents' ability to care for the child, or even the truth of the initial allegation.[62] Social workers' perception that parents are engaging in services—regardless of whether those services are needed, whether the service is tied to the precipitating event, or whether there is an actual risk of or harm to the child—is *the* difference between family separation and unity.[63]

This confluence of factors—the system's racist and classist roots, its conflicting goals, the financial incentives that prioritize family separation over preservation, the deference afforded[64] to biased[65] child welfare workers, and the breadth and vagueness of neglect definitions, combined with the disproportionate need for social services, bias in mandated reporters, and ensuing surveillance of families of color—results in a system that disproportionately targets families of color and families living in

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was ultimately removed, based on a perceived failure to comply with the case plan conditions. *Id.* at 226-28. Had these conditions been defined by the precipitating incident—the lack of childcare while mother worked—the family would not have been separated. *Id.*

[61] Mack, *supra*, at 803.

[62] *Id.* at 803.

[63] *Id.* at 801-802.

[64] Gupta-Kagan, *supra*, at 220.

[65] Dettlaff & Boyd, *supra*, at 265.

poverty at every stage: they "are more frequently reported to CPS agencies, more frequently subject to investigations, more frequently the subject of CPS agency-substantiated allegations, more frequently removed, less frequently reunified, and more frequently spend a longer time in foster care...."[66]

IV. Family Separation Harms Children.

Children experience long-lasting harm when the state separates them from their parents.[67] Even brief separations can cause serious and permanent damage.[68] Indeed, the harm from separation often exceeds the alleged harm or alleged risk of harm from which the child welfare agency is supposedly protecting children.[69] Forced separation from a parent is considered an

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[66] Gupta-Kagan, *supra*, at 261.

[67] *In re Dixson,* 981 N.W.2d 62, 65 (Mich. 2022) (McCormack, C.J. dissenting); *See also* Vivek Sankaran, et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 Marq. L. Rev. 1163, 1168 (2019).

[68] Sankaran, *supra,* at 1167 ("Even brief separations can cause the release of higher levels of cortisol-stress hormones-that begin to damage brain cells. And, unlike other areas of the body, research suggests that 'most cells in the brain cannot renew or repair themselves'").

[69] *Greene v. Camreta*, 588 F.3d 1011, 1016 (9th Cir. 2009), *vacated in part*, 563 U.S. 692, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 (2011), and *vacated in part,* 661 F.3d 1201 (9th Cir. 2011), citing Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 *William & Mary L. Rev.* 413, 417 (2006) ("[I]n the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help.");

adverse childhood experience (ACE).[70] One study analyzing 23 particular adverse childhood experiences that were predictive of emotional or behavioral problems for children found that forced separation from a parent or caregiver was the *most* predictive of a need for behavioral health services.[71] Forced separation proved more harmful than emotional abuse or neglect, natural disaster, incarceration of a family member, physical attack, and community violence.[72]

The state's separation of children from their parents within the family regulation system is as harmful as the much-criticized Trump Administration policy of separating children from their parents at the southern border of the United States. A petition signed by thousands of mental health professionals and medical organizations opposing the Trump administration's policy stated:

> To pretend that separated children do not grow up with the shrapnel of this traumatic experience embedded in their minds is to disregard everything we know about child development, the brain, and trauma.[73]

Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. of L. & Soc. Change 523, 527 (2019).

[70] Kristen R. Choi, et al., *The Impact of Attachment-Disrupting Adverse Childhood Experiences on Child Behavioral Health*, 221 J. Pediatrics 224, 227 (2020).

[71] *Id.* at 226.

[72] *Id.*

[73] William Wan, *What Separation From Parents Does to Children: The Effect is Catastrophic,* Washington Post (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html.

One court hearing a case challenging the separation of children from their parents at the border found compelling evidence that "separating children from parents is a highly destabilizing, traumatic experience that has long term consequences on child well-being, safety, and development."[74] Another court hearing a parallel challenge found that separating a mother from her two sons caused irreparable harm to both parent and children "every minute it persists."[75] The American Association of Pediatrics also noted in this context the "irreparable harm" to a child's brain development and long-term health that separation from a parent causes.[76]

The Ninth Circuit has recognized the harm to children that child welfare agencies create when they improperly investigate allegations of abuse and separate children from their parents:

> In cases of alleged child abuse, governmental failure to abide by constitutional constraints may have deleterious long-term consequences for the child and, indeed, for the entire family. Ill-considered and improper governmental action may create significant injury where no problem of any kind previously existed.

(*Wallis v. Spencer*, 202 F.3d 1126, 1130–31 (9th Cir. 2000)).

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[74] *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1147 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019), and *enforcement granted in part*, *denied in part* sub nom. *Ms. L. v. ICE*, 415 F. Supp. 3d 980 (S.D. Cal. 2020).
[75] *Jacinto-Castanon de Nolasco v. ICE*, 319 F. Supp. 3d 491, 503 (D.D.C. 2018).
[76] Trivedi, *supra*, at 526.

Social workers and courts that separate families inflict harms to children that include: emotional and psychological harm; separation and attachment disorders; trauma from the manner of removal, which can feel like kidnapping; grief and confusion; separation from siblings and community; and disconnection from culture and customs.[77] Separating a young child, like N.R, from their parents inflicts a particular harm on the child. The toxic stress the state causes by separation affects healthy brain development that is crucial during the first few years of life.[78]

No science supports the judicially-created rule applied in this case that substance abuse by a parent of a child under six is presumptively harmful to children.[79] By contrast, research on brain development in young children shows significant harm to children that results from parental separation. As one pediatrics professor at Harvard Medical School described the long-term damage to the brain from child-parent separation at the border:

> The effect is catastrophic. There's so much research on this that if people paid attention to all the science, they would never do this.[80]

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[77] Trivedi, *supra*, at 527-541.
[78] Harvard University Center on the Developing Child, *The Impact of Early Adversity on Children's Development (InBrief),* (2007), https://developingchild.harvard.edu/resources/inbrief-the-impact-of-early-adversity-on-childrens-development/.
[79] *See* AMERSA amicus brief.
[80] Wan, *supra*.

In a challenge to New York City's welfare department's separations of children from domestic violence survivors, the Second Circuit recognized the particular harm suffered by young children like N.R.:

> [T]he District Court considered evidence that removing children from their parent is also a significant source of stress and emotional trauma, especially for young children.

(*Nicholson v. Scoppetta*, 344 F.3d 154, 174 (2d Cir. 2003)). And yet, the court here separated N.R. from his Father based on an unspecific risk of harm, failing to consider these concrete harms of separation to young N.R.

When the family regulation system separates children like N.R. from their families, such children often fare worse than similarly situated children who remain at home.[81] Despite the extraordinary resilience of many children, because of the circumstances they face in foster care, many of these children:

- have higher delinquency rates,[82]
- have higher unintended teen pregnancy and birth rates,[83]
- have lower earnings as adults,[84]

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[81] Joseph J. Doyle Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583, 1584 (2007).
[82] *Id.* at 1599.
[83] Mark E. Courtney, et al., *Findings from the California Youth Transitions to Adulthood Study (CalYOUTH): Conditions of Youth at Age 19*, 141-143 (2016), https://www.chapinhall.org/wp-content/uploads/CY_YT_RE0516.pdf.
[84] Doyle, *supra*, at 1602.

- experience greater involvement with the criminal justice system as adults,[85]
- are twice as likely to have learning disabilities and developmental delays, and six times more likely to have behavioral problems; [86]
- and are more likely to have mental health issues and substance-related disorders as adults.[87]

The American Academy of Pediatrics reports that children and teens in foster care "have a higher prevalence of physical, development, dental, and behavioral health conditions than any other group of children."[88] As one child interviewed about their experience in foster care put it: "[F]oster care is just sick!...You

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[85] Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. of Political Econ. 746, 748 (2008).
[86] Citizens for Juvenile Justice, *Shutting Down the Trauma to Prison Pipeline Early, Appropriate Care for Child-Welfare Involved Youth*, 10 (2018), https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5b47615e6d2a733141a2d965/1531404642856/FINAL+TraumaToPrisonReport.pdf.
[87] Sylvana M Côté, et al., *Out-of-home placement in early childhood and psychiatric diagnoses and criminal convictions in young adulthood: a population-based propensity score-matched study*, 2 The Lancet Child Adolescent Health 647, 670 (2018).
[88] Trivedi, *supra*, at 546, citing Task Force on Health Care for Children in Foster Care, *Fostering Health: Health Care for Children and Adolescents in Foster Care*, Am. Acad. Of Pediatrics (2d ed. 2005), https://www.aap.org/en/patient-care/foster-care/fostering-health-standards-of-care-for-children-in-foster-care/.

get taken away from your parents. It ruins your life! Your heart is totally destroyed…"[89]

The harm to children stemming from parental separation is compounded by the harm they often suffer in out-of-home care. (*Nicholson v. Williams*, 203 F. Supp. 2d 153, 199 (E.D.N.Y. 2002) (incidence of abuse and child fatality in foster homes in New York city is double that in the general population)). Children in foster care suffer more physical or sexual abuse than other children.[90] Children in California suffer abuse and neglect while in foster care at rates four times greater than children in the general population.[91]

California courts have also recognized how children are harmed by state-sanctioned family separations. The Court in *Jamie M.* noted that "[o]ften the harm created by removing a child from its parents may be more serious than the harm which the state intervention seeks to prevent." (*In re Jamie M.*, 134 Cal. App. 3d 530, 541 (Cal. Ct. App. 1982) (court could not remove children from mother with schizophrenic illness based on presumption that her schizophrenia per se created a risk of harm to her children); *see also In re Henry V.*, 119 Cal. App. 4th 522, 530 (2004) ("our dependency system is premised on the notion

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[89] Trivedi, *supra*, at 529, citing Jason B. Whiting & Robert E. Lee III, *Voices from the System: A Qualitative Study of Foster Children's Stories*, 52 Fam. Rel. 288, 292 (2003).
[90] Trivedi, *supra*, at 542-543.
[91] Amici's analysis of data in the California Child Welfare Indicators Project, https://ccwip.berkeley.edu/.

that keeping children with their parents while proceedings are pending, whenever safely possible, serves not only to protect parents' rights but also *children's* and society's *best interests*" (emphasis added))).

Some jurisdictions now require that juvenile courts weigh the harm of removal to a child against the risk of harm from their parent to determine whether removal is actually in the child's best interests. New York state's highest court interpreted its removal statute—which, like California's, does not specifically mention balancing the risk of harm of separation against the risk of continuing in the home—to require this balancing in *Nicholson v. Scoppetta.*[92] Iowa, New Mexico, and the District of Columbia require consideration of the harms of removal in their statutes.[93] We urge this Court to consider adopting such a standard here, especially where such an analysis is required to ensure the Legislature's "intent" "that this section not disrupt the family unnecessarily…" is fulfilled.[94]

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[92] *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 378 (2004) (*Nicholson* involved the removal of children from mothers who had experienced domestic violence and were alleged to have failed to protect their children).
[93] Iowa Code § 232.67; N.M. Stat. § 32A-4-21(B)(2); D.C. Code Ann. § 16-2310(b)(3) (West).
[94] Cal. Welf. & Inst. Code § 300.

V. The Family Regulation System Implicates the Most Important Liberty Interests and Thus Requires the Highest Level of Due Process

A. Both the U.S. and California Constitutions Recognize Children's Rights, Like N.R.'s, to Family Integrity

Federal and state constitutions protect a broad liberty interest of "family association." Recognized as stemming from the U.S. Constitution's Due Process Clause, as well as the First Amendment, the liberty interest of family association seeks to protect the right to family integrity and preservation of the family unit. In *Overton v. Bazzetta*, a case involving freedom of association in the context of incarceration, the U.S. Supreme Court explained "that the Constitution protects 'certain kinds of highly personal relationships,'" [*citing Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 619–620, (1984)] and that "there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents." (*Overton v. Bazzetta*, 539 U.S. 126, 131 (2003); *see also Keates v. Koile*, 883 F.3d 1228, 1238 (9th Cir. 2018) (finding mother and daughter stated plausible claim for violation of constitutional rights to familial association when CPS worker removed daughter from mother following daughter's hospitalization for depression and suicide without any reasonable cause to believe the daughter was in imminent danger of serious bodily injury from mother); *Ms. L. v. ICE*, 302 F. Supp. 3d 1149, 1161 (S.D. Cal. 2018) (U.S. government's separation of children

and parents at the border implicated right to family association found in the liberty interest protected by the Fifth Amendment)).

The right of familial association protects *both* children and their parents. When the state improperly separates families, it violates the rights of both parents and children. In *Santosky v. Kramer*, parents challenged a New York law that required only a "fair preponderance of the evidence" to support a finding that a child was "permanently neglected," and that resulted in the state terminating the custody of their three children. (*Santosky v. Kramer*, 455 U.S. 745, 748 (1982)). The U.S. Supreme Court held that for the state to completely and irrevocably sever parental rights, a standard of clear and convincing evidence was required, and that parents *and* children share an interest in preventing the termination of their relationship. (*Santosky*, 455 U.S. at 753-54).

The Ninth Circuit has also explicitly held that children have a right to family integrity. In *Smith v. City of Fontana*, Smith's estate and children brought a civil rights action against the city after a police officer shot and killed the unarmed Smith. (*Smith v. City of Fontana*, 818 F.2d 1411, 1414 (9th Cir. 1987), *overruled on other grounds* by *Hodgers–Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc)). In determining whether the children had a substantive due process claim, the Court found that:

> [The] constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial

> bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship…. [A] child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest.

(*Id.* at 1418-1419. *See also Nicholson*, 344 F.3d at 158 (New York child welfare agency violated substantive due process and procedural due process liberty interests of both mothers and their children when it separated children from a parent who had been battered by an intimate partner, based on the theory that the parent's "failure to protect" the child from witnessing the abuse was itself a form of child neglect)).

California law similarly extends to both children and their parents the rights of family association. This Court recognized the opportunity to establish and share a family as a "core" substantive right included in the fundamental interest in liberty and personal autonomy secured by the California Constitution. (*In Re Marriage Cases*, 43 Cal. 4th 757, 781-782 (2008)).

California courts have also recognized that family regulation investigations can impinge on constitutional rights of both children and their parents. (*In re Marilyn H.*, 5 Cal. 4th 295, 306 (1993) (parents and children have independent interests in being part of a family unit); *Arce v. Childrens Hosp. Los Angeles*, 211 Cal. App. 4th 1455, 1473 (2012) (child welfare agency workers violate parents' and children's rights to family association if they separate a child from her parents "absent 'information at the time of the seizure that establishes "reasonable cause to believe that the child is in imminent danger

of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury."""") (citations omitted)).

B. N.R.'s Right to Family Integrity Aligns with Father's Right under the U.S. and California Constitutions to Care and Custody of His Child

The U.S. and California constitutions have long recognized a parent's right to the care and custody of their children as a fundamental liberty interest. (*See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *In re M.S.*, 41 Cal. App. 5th 568, 590 (2019). In *Stanley v. Illinois,* the U.S. Supreme Court deemed it an essential civil right "to conceive and to raise one's children," and further held in the context of child dependency proceedings that "the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment." (*Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *see also Santosky*, 455 U.S. at 753-54 (1982) (due process requires that courts use "clear and convincing" standard of evidence before severing parental rights)).

Similarly, this Court has held that "a parent's interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest." (*In re Marilyn H.*, 5 Cal. 4th 295, 297 (1993)). Indeed, this Court has ranked "a parent's interest in the companionship, care, custody and management of his children" as "among the most basic of civil rights." (*In re B.G.*, 11 Cal. 3d 679,

688 (1974)). Here, these rights align with and bolster N.R.'s rights to family integrity with his Father.

C. The California Constitution Requires that the State Take Affirmative Steps to Preserve Family Integrity

California's Constitution goes beyond protection from government intrusion and affirmatively requires the state to take steps to support families. (*In re Marriage Cases*, 43 Cal. 4th at 819). In finding that privacy and due process provisions of the state constitution protected the rights of same sex couples to marry, this Court explained:

> The substantive protection embodied in the constitutional right to marry, however, goes beyond what is sometimes characterized as simply a "negative" right insulating the couple's relationship from overreaching governmental intrusion or interference, and **includes a "positive" right to have the state take at least some affirmative action to acknowledge and support the family unit**.

(*In re Marriage Cases*, 43 Cal. 4th at 819 (emphasis added)).

As in the marriage context, the State has an obligation in dependency cases both to avoid improper intervention in families and to actively support family integrity. The California Constitution thus requires both that child welfare agencies avoid improper investigations and separations, and that they take affirmative action to keep families together whenever possible — efforts clearly not made in this case.

VI. The Removal of N.R. from Father Violated Both Their Constitutional Rights

The agency and the juvenile court violated the constitutional rights of *both* N.R. and his father when they removed and took jurisdiction over N.R. due to Father's prior occasional use of cocaine when N.R. was not with him. (*Santosky*, 455 U.S. 745 (parents in parental rights termination proceedings have a "fundamental liberty interest…in the care, custody, and management of their child…protected by the Fourteenth Amendment"); *In re Marilyn H.*, 5 Cal. 4th at 306 (parents' interests in the "companionship, care, custody and management" of their children is "ranked among the most basic of civil rights" and children "have a fundamental independent interest in belonging to a family unit")). The rights to parent and of familial integrity are of the highest order, and laws that impinge on them "must be *narrowly drawn* to express only the legitimate state interest." (*In re David B.*, 91 Cal. App. 3d 184, 193 (Cal. Ct. App. 1979) (emphasis added) (parenting rights are of the highest order and the state may sever them only if necessary to the welfare of the child)).

The state violated N.R's and Father's California and federal constitutional rights to family integrity and Father's constitutional parental rights when it: applied a presumption of harm based on Father's alleged substance abuse and N.R.'s young age, without showing any actual harm or risk of harm; utilized a definition of substance abuse not recognized by the medical community; and failed to consider whether separating

N.R. would pose a greater risk of harm to N.R. than staying with Father.

In *Santosky v. Kramer,* the U.S. Supreme Court established that due process in the context of juvenile dependency proceedings requires a court to balance: (1) the private interests at stake; (2) the risk of error created by the dependency scheme; and (3) the governmental interest supporting use of the challenged procedure. (*Santosky*, 455 U.S. at 754). To determine a violation of the constitutional right to due process under the California Constitution, California courts add a fourth factor not relevant in the case at hand: the dignitary interest in providing notice and a hearing to the individual. (*See, e.g., Today's Fresh Start, Inc. v. Los Angeles Cnty. Off. of Educ.*, 57 Cal. 4th 197, 213 (2013)).

The constitutional rights of family integrity and the right to parent are of the highest order of liberty interest. The State maintains the burden to prove facts of harm sufficient for a juvenile court to order that a child be a dependent of the court. (*In re D.C.*, 195 Cal. App. 4th 1010, 1014 (2011)). In this case, the state had the burden to show both that Father had a substance abuse issue *and* that the substance abuse issue put N.R. at substantial risk of serious physical harm or illness. (*In re J.A.*, 47 Cal. App. 5th 1036, 1046 (2020), *as modified* (Apr. 20, 2020); *In re Drake M.*, 211 Cal. App. 4th 754, 766 (2012)).

The judicially-created presumption that a finding of substance abuse by a parent of a young child is prima facie evidence of a substantial risk of physical harm falls short of the

due process required. The risk of error is too great, and the stakes too high. Father's and N.R's fundamental familial rights require the greatest due process and privacy protections. Equating substance "abuse" (even when a young child is involved) with a risk of harm impermissibly removes the burden from the state to prove each fact necessary to find that jurisdiction exists, nullifying the elements established by the Legislature. This judicially-created presumption results in too many cases—like this one—where children are separated from parents where there is no specific evidence of substantial harm or risk of harm to the child.

Without any evidence that this particular father posed a particular risk to this particular child, the government fails to meet its burden of providing "substantial evidence" to prove its case. (*In re Marquis H.*, 212 Cal. App. 4th 718, 727 (2013) ("to be sufficient to sustain a juvenile dependency petition [,] the evidence must be 'reasonable, credible, and of solid value'" (citations and internal quotations omitted))). DCFS provided no evidence that Father's occasional past drug use had ever harmed N.R.; N.R. was not under Father's care when he consumed cocaine; there were no concerns about Father's care for N.R. during the time he lived with Father; and Father's numerous negative tests demonstrated commitment to sobriety and to the care of his child.

A presumption of harm that is untethered from any actual showing of harm or risk of harm to a child creates too great a risk of error that the state will, like here, incorrectly intervene and

separate a parent and child to be compatible with due process. The state's interest in protecting children from parental harm does not outweigh the familial integrity interests of the parent *and* child or the resulting harm to children like N.R. when a standard that does not measure actual harm is used. And this risk of error is compounded by the failure to weigh the concrete and certain harms of separation to N.R. against the alleged risk of harm to keeping the family together.

The Court should find that in order to remove a child there must be a determination that the specific parent's drug abuse puts the child at substantial risk of specific harm. The Court should reject the presumption that a parent's substance abuse creates a generalized risk of harm to a child under six sufficient to meet the standards of Welfare and Institutions Code section 300(b)(1)(D), on the basis that it denies children and parents, including N.R. and his father, the due process required by both the state and federal constitutions.

The Court's reliance on an overly vague definition of substance abuse that is not grounded in scientific understanding also fails to provide the due process required, given the important familial rights at stake and the possibility for error. Utilization of a definition of substance abuse that does not reflect the best medical understanding may result in an erroneous determination that a parent was abusing substances. As noted by amici Drug Policy Alliance and AMERSA, addiction professionals are the most qualified to assess whether a parent suffers from a substance use disorder to such an extent that it interferes with

their ability to parent and creates a substantial risk of harm to their child.

Just as doctors rely on x-rays to diagnose broken bones, addiction professionals rely on their own diagnostic tool: the Diagnostic and Statistical Manual of Mental Disorders (DSM) and its various editions. Even the *In re Drake M.* court—which created the presumption that substance abuse establishes a prima facie showing of harm to children under the age of six—limited its application to situations where the parent or guardian had been "diagnosed as having a current substance abuse problem by a medical professional" or "has a current substance abuse problem as defined by the DSM-IV-TR." (*In re Drake M.*, 211 Cal. App. 4th at 766). Permitting the state to use a definition of substance abuse that is not accepted or recognized by the medical and scientific community can result in unfounded determinations that a parent suffers from substance abuse, leading to improper separations of parents and children. Due process prohibits this, particularly given the essential rights at stake.

The state's use of a definition of substance abuse ungrounded in medical criteria also creates fertile ground for bias in the family regulation system, as evidenced by the "findings" of the social workers in this case. Starting with the investigation of mother's home, the social worker included among other things the presence of alcohol in the refrigerator in their initial report. It is difficult to imagine that a bottle of Chardonnay in the kitchen of a white, middle class home in Los Angeles would

trigger the same scrutiny. Moreover, the social worker denied Father's request to drug test on days he was not working so that he would not have to miss work and the associated, needed income. Yet when Father missed drug tests set on his workdays, the Department and the Court of Appeal interpreted his missed tests as signs of a drug problem. (RT 20; *In re N.R.*, 2022 WL 1284250, at *6).

Finally, the Court should find that, in order to properly assess the risk of harm to N.R., it must weigh the risk of harm of separation against the risk of harm identified by the Agency. Separating children where such separation would cause more harm than keeping children with their families would clearly be erroneous, and such risk of error is inconsistent with due process.

The Legislature has made clear that "It is the intent of the Legislature that this section not disrupt the family unnecessarily or intrude inappropriately into family life…." (Cal. Welf. & Inst. C. § 300). Courts impermissibly run afoul of this intention and the State's duty to protect children from harm when they fail to identify a specific risk of harm (based on fact, not conjecture), weigh that harm against the harm that family separation will cause, and determine whether the harm of separation outweighs the risk posed by keeping the family together. Such failure creates too great a risk of error, and given children's and parents' constitutional rights at stake, due process requires more careful consideration.

VII. Conclusion

At every stage of government action in this case, the government exhibited bias and acted against the interest of keeping this family together, starting with removing N.R. from his mother based on biased observations and outdated information about maternal grandmother, and ending with separating N.R. from his father based on nothing more than his prior occasional drug use. Although the agency and the courts stated their compliance with a range of statutory tests that purport to support families, the system in fact operated as it was historically designed to operate—to separate families, based on societal disapproval of certain parents.

Here, Father was punished by the state for his prior occasional drug use, even though the state had no evidence that such use was substantially harming or creating any substantial risk of harm to N.R. And Father was punished by the state in a way that would likely not have occurred if Father were differently situated—if, for example, Father had a job that allowed him the flexibility to take drug tests on days he was working.

Given the history of the family regulation system and the deep racial and class inequities it continues to perpetuate, Amici urge the Court to review this case with great care. Both the U.S. and California Constitutions recognize children's and parents' rights to family integrity as essential aspects of liberty. Yet Father's and N.R.'s constitutional rights were almost casually disregarded here.

Specifically, Amici urge the Court to (1) overturn the presumption of harm set forth in *Christopher R.* and *Drake M.* and require a determination that the specific parent's drug abuse puts the specific child in substantial risk of specific harm in order to remove that child; (2) require courts to utilize the definition of substance "abuse" set forth in the DSM in determining whether a specific parent's drug use puts the child in substantial risk of specific harm; and (3) require courts to weigh the harm to a child of separation against the risk of harm of remaining with their parent to determine whether removal is necessary to protect the child.

Dated: April 5, 2023

Respectfully submitted,

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Certificate of Word Count

Pursuant to Rule 8.520 (c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed Amici Curiae Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 12,116 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amici Curiae Brief required under Rule 8.520(f)(1-3), this certificate, proof of service, and the signature blocks.

Dated: April 5, 2023 ACLU Foundation of Southern California

By: */s/ Minouche Kandel*
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Proof of Service

I, Dakota Bodell, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is dbodell@aclunc.org. On April 5, 2023, I served the attached,

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT & APPELLANT, O.R.
and
[PROPOSED] BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION, NATIONAL CENTER FOR YOUTH LAW, & CHILDREN'S RIGHTS, INC.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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BY MAIL: I mailed a copy of the document identified above by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 5, 2023 in San Francisco, CA.

__/s/_____
Dakota Bodell
Declarant