New York Supreme Court

Appellate Division—Second Department

Docket No.: 2023-10606

In the Matter of

SAPPHIRE W. (Anonymous).

ADMINISTRATION FOR CHILDREN'S SERVICES,

Petitioner-Respondent,

KENNETH L. (Anonymous),

Respondent,

SHARNEKA W. (Anonymous),

Non-Party Appellant.

MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE*

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Family Court, Kings County Docket No. N-17879-2023

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NEW YORK SUPREME COURT
APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of SAPPHIRE W. (Anonymous). ADMINISTRATION FOR CHILDREN'S SERVICES, *Petitioner-Respondent;* KENNETH L. (Anonymous), *Respondent;* Sharneka W. (Anonymous), *Nonparty-Appellant*.	Appellate Docket No.: 2023-10606 Kings Cnty. Fam. Ct., Docket No.: NN-17879/23 **NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

PLEASE TAKE NOTICE that, upon the accompanying affirmation of Lara Flath, dated March 21, 2024, and the papers annexed thereto, Sanctuary for Families, Empire Justice Center, Her Justice, Incendii Law, Lawyers Committee Against Domestic Violence, Legal Momentum, New York Legal Assistance Group, New York State Coalition Against Group, and New York State Coalition Against Domestic Violence (collectively, "*amici curiae*") will move this Court at the courthouse for the Supreme Court of the State of New York, Appellate Division, Second Department, at 45 Monroe Place, Brooklyn, NY 11201 on the 8th day of April, 2024, at 9:30 a.m. or as soon thereafter as counsel may be heard for an Order granting *amici curiae* permission to appear and file the proposed Brief in Support of

the Nonparty-Appellant Sharneka W. as *amici curiae*, pursuant to 22 NYCRR § 500.23(a)(1), and for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b), answering affidavits and any other papers in opposition to the above motion, if any, are required to be served upon the undersigned at least two days before the return date of this motion.

Dated: New York, New York
March 21, 2024

Respectfully submitted,

By: 

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NEW YORK SUPREME COURT
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In the Matter of SAPPHIRE W. (Anonymous). ADMINISTRATION FOR CHILDREN'S SERVICES, *Petitioner-Respondent;* KENNETH L. (Anonymous), *Respondent;* Sharneka W. (Anonymous), *Nonparty-Appellant*.	Appellate Docket No.: 2023-10606 Kings Cnty. Fam. Ct., Docket No.: NN-17879/23

AFFIRMATION OF LARA FLATH

LARA FLATH, an attorney duly admitted to the Bar of the State of New York, affirms the following under penalty of perjury under CPLR 2106:

1. I am a member of the bar of the State of New York, attorney for Sanctuary for Families, Day One, Empire Justice Center, Her Justice, Incendii Law PLLC, Lawyers Committee Against Domestic Violence, Legal Momentum, New York Legal Assistance Group, and New York State Coalition Against Domestic Violence (collectively, "*amici curiae*").

2. I submit this affirmation in support of *amici curiae*'s motion for leave to file a brief as *amici curiae* in the above-captioned matter.

3. I am fully familiar with the facts set forth in this affirmation, either from personal knowledge or from documents in my files.

4. Annexed as Exhibit A is the proposed Brief of *Amici Curiae* in Support of Nonparty-Appellant (the "Proposed *Amici* Brief").

5. Annexed as Exhibit B is a true and accurate copy of the Opening Brief for Nonparty-Appellant Sharneka W., *In the Matter of Sapphire W.*, No. 2023-10606 (2023).

The Matter on Appeal

6. After reports of domestic violence, the Administration for Children's Services ("ACS") investigated Ms. W.'s allegation that Mr. L., had abused her in her home. ACS then filed an Article 10 petition in Kings County Family Court. The petition charged Mr. L. with neglecting Sapphire by committing acts of domestic violence against Ms. W. in Sapphire's presence. *Id.* ACS filed no charges against Ms. W., designating her a "non-respondent mother." Ms. W. had no history with ACS before this case.

7. However, on or about August 31, 2023, the Family Court issued an order against Nonparty-Appellant releasing custody of Ms. W's daughter on the condition that ACS could enter and search her home and supervise her parenting.

8. The principal question presented in this appeal is whether the family court erred in believing that Family Court Act § 1017 gave it authority to order ACS to make unlimited announced and unannounced inspection of Ms. W's home.

9. As detailed in the Proposed *Amici* Brief, the instant case raises important issues about the negative impacts ACS inspections have on non-respondent survivor and their children. ACS inspections represent a form of double victimization, inflicting invasive and demeaning intrusions that amplify the stress experienced by survivors of domestic violence and their families.

10. Proposed Lead *Amicus*, Sanctuary for Families, is a nonpartisan, nonprofit organization that serves survivors of domestic violence, sex trafficking, and related forms of gender violence. It is New York's leading service provider and advocate for survivors, and the largest provider of free legal services for victims of gender-based violence in the United States. Integral to Sanctuary for Families' mission is advocating for policies that enable survivors to achieve safe and stable lives. Additional information regarding Proposed Amicus' purpose and mission is available at https://sanctuaryforfamilies.org/about-us/.

11. Proposed *Amicus* Day One is a non-profit organization dedicated to supporting NYC youth aged 24 and under. It focuses on ending dating abuse and domestic violence through various initiatives, including community education, support services, and legal advocacy, and also represents clients in matters related

to orders of protection, paternity, custody, visitation, child protective services, and child support.

12. Proposed *Amicus* Empire Justice Center has provided technical assistance, litigation support, policy advocacy, training, and informational resources to over 11.5 million people since 1973. The organization's core mission focuses on three key areas: teaching the law through training and technical assistance, practicing the law by offering direct civil legal assistance and undertaking impact litigation, and improving the law through policy analysis, research, and advocacy.

13. Proposed *Amicus* Her Justice is an organization dedicated to making a real and lasting difference in the lives of low-income, underserved, and abused women by offering them legal services designed to foster equal access to justice and an empowered approach to life. Her Justice provides legal services to over 3,000 women every year in all five boroughs of New York City.

14. Proposed *Amicus* Incendii Law PLLC is a law firm that represents anyone whose rights, personhood, or privacy have been violated or stripped away from them. The firm represents clients in a range of matters including civil litigation and law enforcement advocacy on behalf of victims of sexual and gender-based violence, child or adult.

15. Proposed *Amicus* Lawyers Committee Against Domestic Violence is a coalition of almost 200 lawyers from the greater New York City area whose work has supported victims of domestic violence and their children for almost 20 years.

16. Proposed *Amicus* Legal Momentum is the nation's pioneering legal defense and education fund for women, leading the charge for gender equality through targeted litigation, education, policy advocacy, and research.

17. Proposed *Amicus* the New York Legal Assistance Group is a leading civil legal services organization combatting economic, racial, and social injustice by advocating for people in poverty or crisis. The organization empowers survivors of intimate partner violence through client-centered legal representation, offering services such as safety planning, obtaining orders of protection, divorce representation, custody issues, financial support advocacy, and assistance with immigration matters.

18. Proposed *Amicus* the New York State Coalition Against Domestic Violence is a nonprofit organization focusing on advocating for effective services for domestic violence survivors through outreach, training and policy development, and emphasizing domestic violence as a human rights issue.

WHEREFORE, I respectfully request that this Court enter an order (i) granting *amici curiae* leave to submit its Proposed *Amici* Brief; (ii) accepting the

brief that has been filed and served along with this motion; and (iii) granting such other and further relief as this Court deems just and proper.

I affirm this 21st day of March, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: New York, New York
March 21, 2024

Lara Flath

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Attorney for Amici Curiae

EXHIBIT A

Proposed Amici Brief

New York Supreme Court

Appellate Division—Second Department

Docket No.: 2023-10606

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SAPPHIRE W. (Anonymous).

ADMINISTRATION FOR CHILDREN'S SERVICES,

Petitioner-Respondent,

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Respondent,

SHARNEKA W. (Anonymous),

Non-Party Appellant.

BRIEF FOR *AMICI CURIAE* SANCTUARY FOR FAMILIES, DAY ONE, EMPIRE JUSTICE CENTER, HER JUSTICE, INCENDII LAW, LAWYERS COMMITTEE AGAINST DOMESTIC VIOLENCE, LEGAL MOMENTUM, NEW YORK LEGAL ASSISTANCE GROUP, AND NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE IN SUPPORT OF NON-PARTY APPELLANT

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INTEREST OF *AMICI CURIAE*

Lead *Amici*, Sanctuary for Families, is a nonpartisan, nonprofit organization that serves survivors of domestic violence, sex trafficking, and related forms of gender violence. It is New York's leading service provider and advocate for survivors, and the largest provider of free legal services for victims of gender-based violence in the United States. Integral to Sanctuary for Families' mission is advocating for policies that enable survivors to achieve safe and stable lives. To that end, Sanctuary for Families files *amicus curiae* briefs in cases, like this one, raising important issues that shape the lives of survivors. *See, e.g.*, Sanctuary for Families' Br., *People v. Addimando*, Dkt. No. 2020-02485 (2d Dep't).

This appeal is of significant interest to Sanctuary for Families because it spotlights the pitfalls survivors face when subjected to unlimited home inspections by the City of New York's Administration for Children's Services ("ACS"). What the family court ordered in this case—imposing ACS inspections on a survivor who is a non-respondent parent in an Article 10 proceeding and is not accused of doing anything wrong—creates many problems. Sanctuary for Families sees these problems up close, counseling survivors who endure highly invasive home inspections and investigations that can last for months, aggravating the effects of previous domestic abuse and hobbling survivors' attempts to rebuild their own lives. Understanding how ACS inspections actually work, and how they often damage

those they are meant to protect, is essential to evaluating the propriety of the family court's order. To uphold the rights of survivors, like Appellant Sharneka W., and protect them from future harm, Sanctuary for Families respectfully urges the Court to vacate the family court's order as it relates to Ms. W.

Lead *Amici* are joined by the following signatory organizations who share similar concerns against ACS interventions that are punitive rather than supportive.

Day One is a non-profit organization dedicated to supporting NYC youth aged 24 and under. It focuses on ending dating abuse and domestic violence through various initiatives, including community education, support services, and legal advocacy, and also represents clients in matters related to orders of protection, paternity, custody, visitation, child protective services, and child support.

Empire Justice Center has provided technical assistance, litigation support, policy advocacy, training, and informational resources to over 11.5 million people since 1973. The organization's core mission focuses on three key areas: teaching the law through training and technical assistance, practicing the law by offering direct civil legal assistance and undertaking impact litigation, and improving the law through policy analysis, research, and advocacy.

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The New York State Coalition Against Domestic Violence is a nonprofit organization focusing on advocating for effective services for domestic violence

survivors through outreach, training and policy development, and emphasizing domestic violence as a human rights issue.

INTRODUCTION

Amici respectfully submit this brief to highlight certain dangers posed to domestic violence survivors and their children by ACS practices. These dangers underscore why imposing indefinite, unannounced, and unlimited ACS home inspections on a non-respondent survivor violates their rights. In this case, by initially conditioning Ms. W.'s custody of her child, Sapphire, on compliance with ACS "supervision," the family court's order exposed both parent and child to a well-documented litany of harms. And for no valid reason. The family court acknowledged that (i) Ms. W. was "not accused of anything," (ii) Ms. W. was "able to care for Sapphire," (iii) Ms. W. did not want Mr. L., her abuser, in her home, and (iv) ACS "already checked out [Ms. W.'s] home" and it was "fine." Yet the family court ordered Ms. W. to allow ACS into her home whenever it wants and without any justification. In reaching this conclusion, the family court plainly failed to consider the pernicious real-world effects the order would have on Ms. W. and Sapphire.

First, ACS home inspections can constitute "double abuse" of non-respondent domestic violence victims such as Ms. W. What the family court's order describes as mere "supervision" in fact entails a host of "invasive and insulting" intrusions into a survivor's home life. ACS inspections can feel like an extension of the same coercive control employed by abusers, microscopically scrutinizing the non-

respondent's behavior in her own home for signs of child neglect and administering punishment for perceived offenses. Moreover, unbounded ACS inspections, and the concomitant obligations they impose, inflict economic costs that can prevent survivors from rebuilding their lives. Biases against domestic abuse victims are frequently at the root of such onerous regulation, as the family court's findings reflect. On the whole, ACS "supervision" serves to punish, not protect, survivors like Ms. W.

Second, ACS home inspections can also traumatize children. ACS visits often involve the arrival of unfamiliar adults into a child's home, accompanied by questioning and observation that may feel invasive and intimidating. And since marginalized communities are disproportionately targeted in ACS investigations, the harmful effects these practices produce further deepen racial disparities.

Third, for parents and children alike, ACS practices are not effective. Despite (or because of) the intrusive means used, ACS investigations yield a relatively low rate of confirmed cases of abuse or neglect, deter survivors and their children from seeking help in the first place, and reflect chronic resource constraints that further undermine the agency's effectiveness.

As explained in further detail below, repeated ACS home inspections like the ones ordered by the family court exact an intolerable toll on both the non-respondent survivor and the child.

ARGUMENT

I. ACS HOME INSPECTIONS CAN CONSTITUTE "DOUBLE ABUSE" OF DOMESTIC VIOLENCE VICTIMS

A. ACS Inspections are Highly Intrusive

Subjecting domestic violence victims to indefinite, unannounced ACS home inspections aggravates the abuse these individuals have already suffered. ACS home inspections can be "invasive and insulting."[1] In a typical case, within 24 to 48 hours after a report is filed alleging abuse or maltreatment of a child, investigators will show up at the door with police officers and no warrant.[2] For parents who are domestic violence survivors—and, like Ms. W., not accused of doing anything wrong—these entries can trigger physical, emotional, and psychological stress. In one instance, ACS caseworkers arrived unannounced at the home of a domestic violence survivor who had never been accused of child abuse and "inspect[ed] her kitchen, her bathroom and her bedroom—and her children's bodies—without a

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[1] Abigail Kramer, New Sch., Ctr. for N.Y.C. Affs., *Backfire: When Reporting Domestic Violence Means* You *Get Investigated for Child Abuse* 1 (Mar. 2020) [hereinafter *Backfire*], https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e8415953033ef109af7172c/158571458.

[2] The first home visit by CPS occurs within the first 24 to 48 hours if a case is non-priority and 24 hours if a case is considered priority. In New York, ACS is mandated to investigate all reports in the New York State Central Registry that contain allegations which, if true, would constitute abuse or maltreatment. *See* Siya U. Hegde, *I Am Not a Nuisance: Decriminalizing Domestic Violence Across New York's Civil Housing & Criminal Justice Systems*, 29 Geo. J. on Poverty L. & Pol'y 1 (2021).

warrant."[3] In another instance, the survivor filed for an order of protection against her child's father, only to have ACS repeatedly visit her home unannounced for over two months. And during that time, ACS caseworkers inspected the baby, "checked the refrigerator, checked his crib, [and] checked the cupboards."[4]

ACS caseworkers can visit at any time, causing trauma and stress to children and families. Often, caseworkers conduct home visits in the evening, particularly if they believe the Respondent might be in the home against an order of protection, or if the non-respondent parent has not been "cooperative" with unannounced daytime home visits. During these night visits, the caseworker will require the non-respondent parent to wake the children so the caseworker can speak to them and conduct physical examinations.[5] As one victim describes the experience, "I can't sleep. I'm up. I'm hugging my child. I'm feeling like he's gonna be removed from my home. And these are things that are unhealthy for a mom."[6]

What's more, ACS's intrusive methods can turn survivors into suspects. Once an investigation begins, the "most intimate pieces of a family's life are open to

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[3] Eli Hager, *CPS Workers Search Millions of Homes a Year. A Mom Who Resisted Paid a Price.*, NBC News (Oct. 13, 2022), https://www.nbcnews.com/news/us-news/child-abuse-welfare-home-searches-warrant-rcna50716.

[4] *Backfire*, *supra* note 1.

[5] Sanctuary for Family attorney and former ACS agency attorney, Olivia Brenner.

[6] Zach Ahmad & Jenna Lauter, *How the So-Called "Child Welfare System" Hurts Families*, NYCLU (Oct. 29, 2021).

inspection: [u]nwashed dishes, kids' sleeping arrangements, a mother's sex life—all can become subject to judgment in Family Court."[7] Further intruding on the survivor's privacy, a typical ACS caseworker will initiate "collateral contacts" —speaking with neighbors, friends, employers, co-workers, school staff, or clergy— and disregard whether such person has any personal knowledge of the allegations. These groups are asked invasive questions regarding the abuse the children have witnessed, but also more broadly about the family's schedule, their relationship dynamics, and more.[8]

In one case, ACS found supposed evidence of child maltreatment because the domestic abuse survivor had let her bedroom get "dusty and stuffy" and had not disposed of a "large garbage bag."[9] One Sanctuary for Families client had a child who was removed from school because of multiple forced transfers that stemmed from domestic violence—and instead of protecting the survivor and her child, ACS filed a case against the survivor for educational neglect.[10] In short, ACS's intrusive methods can punish survivors for seeking the help they need and deserve.

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7 *See Backfire*, *supra* note 1.

8 Associate Program Director of the Queens Family Justice Center Family Law Program at Sanctuary for Families, Lindsey Song.

9 *See* Hager, *supra* note 3.

10 Song, *supra* note 8.

B. ACS Inspections Are Coercive

Requiring domestic abuse survivors like Ms. W. to submit to invasive ACS inspections also reinforces the coercive control underpinning abusive relationships. ACS inspections—and, by extension, the court orders authorizing them—continue the basic mechanisms of abuse. Abusive partners "exert power by force, coercion, or manipulation to control the other's finances, freedom of movement, work . . . parenting . . . and other facets of life."[11] Control, not physical violence, in many instances defines abusive relationships. The abuser's control over the victim corresponds with the victim's loss of control over his or her own life. "[T]he main means used to establish control is the microregulation of everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually."[12] Once in place, the "oppressive power and control dynamics within the abusive relationship" can manifest as physical violence.[13] Such coercive control can continue long after physical violence has ended.[14]

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[11] Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J. L. & Fam. Stud. 35 (2008).

[12] *Id.* at 47 (quoting Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007)).

[13] *Id.* at 65.

[14] *See* Heather Douglas & Emma Fell, *Malicious Reports of Child Maltreatment as Coercive Control: Mothers and Domestic and Family Violence*, 35 J. Fam. Violence 827, 828 (2020).

Thus, to survivors, ACS home inspections can feel like an extension of this coercive control. Inspections involve the same microscopic regulation of everyday behavior. ACS caseworkers may monitor how the victim behaves with her children, for example, without any basis for believing that the victim did anything wrong. In some instances, ACS may require victims to obtain services, such as seeking shelter or an order protection—even when these are not safe options—further inhibiting their decision-making autonomy.[15] Other times, the abuser exerts control through ACS, maliciously reporting false complaints as an abuse tactic, even after the victims are separated from their abuser.[16] Therefore, instead of strengthening a victim's self-perception following abuse, ACS inspection orders can continue the victim's loss of autonomy.

The family court's order deprived Ms. W. of autonomy in this case. It authorized ACS to exercise unreasonable control over Ms. W's life as a result of Mr. L's abusive behavior. The family court reasoned that ACS would "make sure that Mr. L is not there," even though the court made no finding whatsoever that Ms. W. was likely to invite him in.[17] As the brief for Ms. W explains, "the family

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[15] *See* The "Failure to Protect" Working Group, *Charging Battered Mothers With "Failure to Protect": Still Blaming the Victim*, 27 Fordham Urb. L.J. 849, 855 (2000).

[16] *See* Douglas & Fell, *supra* note 14, at 829-30, 832. The harms of ACS surveillance are evident given that they are used by abusers themselves as a tactic.

[17] Ex. B, Opening Brief for Nonparty-Appellant Sharneka W., *In the Matter of Sapphire W.*, No. 2023-10606 (2023), at 8.

court's unbounded home-search permits ACS, whenever it wants and without any justification, to rummage through Ms. W.'s belongings, inspect labels in her medicine cabinet, and peer into her drawers and refrigerator. They can even strip search her child on demand."[18] Even after excluding Mr. L. from her home, Ms. W. would have continued to answer for Mr. L.'s abusive behaviors. In the name of preventing one form of unwanted intrusion, the family court imposed another.

C. ACS Inspections Inflict Economic Harm

Unbounded ACS inspections, and the resultant obligations they impose, also take an economic toll. Survivors of domestic violence often face economic challenges traceable directly to the abuse they have suffered. According to a report in Forbes Magazine—citing statistics gathered by organizations including the Center for Domestic Peace, the National Institute for Health, and the Center for Abused Women and their Children—survivors "lose a total of 8 million days of paid work each year" and "[b]etween 21-60% of survivors of intimate partner violence lose their jobs due to reasons stemming from the abuse."[19] In addition to lost wages and benefits, survivors often face costs relating to property damage and medical bills.[20]

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[18] *Id.* at 4.

[19] Patricia Fersch, *Why Doesn't the Severe Harm and Costs of Domestic Violence Result in More Women Going to Court?*, Forbes (Dec. 13, 2023, 5:20 PM), https://www.forbes.com/sites/patriciafersch/2023/12/13/why-doesnt-the-severe-harm-and-costs-of-domestic-violence-result-in-more-women-going-to-court/?sh=6c5d234a2a50.

[20] *Id*.

ACS inspections frequently worsen these economic harms. Accommodating the time-consuming obligations that an ACS inspection regime often entails—repeated home visits, service referrals, and required participation in state services, to name a few—makes complying with ACS's conditions a full-time job. In addition, the U.S. District Court for the Eastern District of New York has previously observed that for survivors who do have employment, ACS will make "repeated phone calls to [the survivor's] place of work." *Doe ex rel. Doe v. Mattingly*, Civil Action No. 06-CV-5761, 2006 WL 3498564, at *2 (E.D.N.Y. Nov. 6, 2006). And those burdens, in turn, make it difficult for domestic abuse survivors to maintain or seek income-earning employment.[21] The client files at Sanctuary for Families brim with stories illustrating this problem. In several instances, clients lost time or were forced to take days off from work to keep up with ACS's onerous inspection conditions. And Sanctuary for Families' clients have had to take dozens of days off of work to be home for last minute ACS home inspections, causing them to struggle to keep employment—which further inches families closer to crisis.[22] One client, a

[21] *See, e.g.*, Susanti Sarkar, *Brooklyn Mother and Son Sue New York City Children's Services over 'Traumatic' CPS Investigations Following False Reports*, Imprint (Nov. 22, 2023, 1:02 PM), https://imprintnews.org/top-stories/brooklyn-mother-and-son-sue-new-york-city-childrens-services-over-traumatic-cps-investigations-following-false-reports/246116 ("'Due to ACS's continued investigations, which made it impossible for Ms. B. to do her job, Ms. B. was terminated by her employer,' the lawsuit states. 'She was out of work for months.'" (citation omitted)).

[22] Song, *supra* note 8.

non-respondent parent in a pending ACS case, has been under ACS supervision for nearly seven years, with hundreds of meetings, inspections, phone calls, and other onerous requirements imposed on top of being a single parent to her two children. One of her children also suffers from significant behavioral issues so she is often forced to pick them up from school, adding to the time she is required to take off for ACS visits, court dates, and other obligations.[23]

ACS inspections targeting survivors can also create legal barriers to employment. During the course of investigations ACS will often decide that survivors themselves are subjects of the report and indicate the case against them, resulting in their placement on a state-run child mistreatment registry. For parents who end up on this registry, the record of the investigation can be reported to potential employers under certain circumstances,[24] even when they ultimately are not found guilty, when the evidence weighs greatly in their favor, or when the cases are closed without any action taken:

> Shortly after her case was closed, [one mother] received a letter informing her that her name had been added to a registry of people investigated for child abuse or neglect . . . and it would show up on

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[23] *Id.*

[24] Until 2022, records for indicated cases of neglect or maltreatment in New York were not sealed until the indicated person's youngest child turned 28 years old. Under current law, such records are now sealed after eight (8) years. *See* Keyna Franklin and Shakira Paige, *New SCR Legislation Took Effect January 1st: What it Means for Parents*, Rise Magazine (January 18, 2022), https://www.risemagazine.org/2022/01/what-new-scr-legislation-means-for-parents/.

> background checks for any number of jobs where she might come into contact with children or other vulnerable people.[25]

Or consider the ordeal endured by Anya, a New York City parent who was reported to ACS after her child's father attacked her:

> Anya's caseworker assured her that ACS's primary focus was the baby's father—no one was accusing Anya of being a negligent parent. When the investigation finally ended, however, Anya learned that her name had been added to New York State's child abuse register, with a substantiated allegation of "inadequate guardianship." Her offense, as described in an ACS summary, was "instigating a confrontation and engaging in an altercation" with her son's father.
>
> In other words, Anya says, she was punished for her own assault. . . .
>
> With a child welfare record, Anya didn't lose her baby, but she did lose her job as a nurse.[26]

ACS investigations targeted at non-respondent survivors can inhibit their employment prospects even when such survivors are not listed on the child mistreatment registry. Consider the case of another Sanctuary client who is a non-respondent mother in a pending case and survivor of abuse at the hands of the father of her children.[27] For years, despite having no contact with the incarcerated respondent and despite her never being indicated in the case against him, this client

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[25] Abigail Kramer, New Sch., Ctr. for N.Y.C. Affs., *Banned for 28 Years: How Child Welfare Accusations Keep Women out of the Workforce* 1 (Feb. 2019) [hereinafter *Banned*], https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5c7ed13b24a6949b0b4e5d0d/1551814972000/Banned28Years.pdf.

[26] *Backfire*, *supra* note 1, at 2.

[27] Song, *supra* note 8.

and her children have been subjected to invasive ACS surveillance in every aspect of their lives.[28] The client works as a substitute paraprofessional in schools and has testified that she has been up for a position in one of her children's schools several times only for the opportunity to vanish after ACS visits.[29] The client has stated that the schools always offered a different explanation, but she suspects their rejections were directly related to the ACS visits to her children's schools.[30]

These problems are especially acute for survivors who are people of color or members of other historically marginalized communities, including low-income women broadly:

- Such persons are more likely to be victims of domestic abuse, more likely to already be living in difficult economic situations, and more likely to face additional economic hardship as a result of their being abused.[31]

- Low-income women and Black women are disproportionately targeted by child welfare systems and disproportionately represented in childcare and

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *See* New York City Mayor's Office to End Domestic and Gender-Based Violence, 2020 Report on the Intersection of Domestic Violence, Race/Ethnicity and Sex (2020).

similar employment,[32] and so such women are "likely denied or dismissed from thousands of [such] jobs each year."[33]

- Citywide, more than 90 percent of children who end up in foster care are Black or Latino.[34] Black children make up 15 percent of New York state's population but represent 38 percent of foster system entries, a situation that led the New York State Bar Association to report that the state's child welfare system is "replete with systemic bias" and "inherently stacked against families of color."[35]

Recent attempts at reform "have proven as futile as class action lawsuits at ending the child welfare system's destructive policing of families," and "these reforms serve

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[32] Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment,* 24 CUNY L. Rev. 1, 14-15 (2021).

> Similarly, the categories of jobs requiring registry checks are disproportionately occupied by these same groups. Women make up 98.7% of preschool and kindergarten teachers, 93.4% of child care workers, 89.7% of teacher's assistants, 85.6% of personal care aides, 88.3% of nursing, psychiatric, and home health aides, and 81.9% of social workers. In 2019, Black adults occupied between 13% and 37% of these women-dominated occupations. Finally, because some of these jobs (such as child care workers, home health aides, and personal care aides) require little education and offer low pay, they provide employment opportunities and income-generating potential for women who may have difficulty securing employment elsewhere.

Id. at 15 (footnotes omitted).

[33] *Id.* at 9.

[34] *Banned*, *supra* note 25, at 4.

[35] Hum. Rts. Watch, *"If I Wasn't Poor, I Wouldn't Be Unfit": The Family Separation Crisis in the US Child Welfare System* 48 (Nov. 2022) (citation omitted), https://www.hrw.org/sites/default/files/media_2022/11/us_crd1122web_3.pdf.

only to increase the numbers of families regulated by child protection agencies and expanded state intrusion into Black communities."[36]

In short, when it comes to maintaining employment and economic stability, survivors of domestic abuse face distinct, deeply entrenched problems even without the added burdens imposed by unbounded ACS home visitations and other requirements.

D. ACS Inspections Perpetuate Biases

The family court's order reflects a system plagued by biases and unfounded presumptions about domestic abuse victims. In the seminal case of *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), the district court observed that child welfare services sometimes blame victimized mothers for "failure to protect" children because of the "system's inability to hold the actual perpetrator of violence accountable." *Id.* at 200 (citation omitted). The court recognized that "[a]ccusing battered mothers of neglect aggravates the problem because it blames the mother for failing to control a situation which is defined by the batterer's efforts to deprive her of control." *Id.* at 201. Yet "[t]he practice and policies of ACS often lead to the

[36] Dorothy E. Roberts, *I Have Studied Child Protective Services for Decades. It Needs to Be Abolished.*, Mother Jones (Apr. 5, 2022), https://www.motherjones.com/criminal-justice/2022/04/abolish-child-protective-services-torn-apart-dorothy-roberts-book-excerpt/#:~:text=Yet%20these%20measures%20have%20proven,state%20intrusion%20into%20Black%20communities.

abuser being left unaccountable because it is administratively easier to punish the mother." *Id*. at 210. As the court explained:

> The battered mother . . . may easily be engaged and seen as the parent who is more willing and interested in complying with services to prevent removal of her children or to get them returned from foster care. . . . This unequal treatment sends a message that the mother is more responsible for getting help and is more "sick" for being in an abusive relationship than the actual person who committed the violence.

Id. at 211 (first omission in original) (citation omitted). This punitive attitude toward battered women pervades child welfare services.

Nicholson also described the policy and practice of ACS to hold the abuser and abusee "liable as a unit," based on "unfounded presumptions about the negative character and abilities of battered women." *Id.* at 250. Indeed, domestic abuse survivors are routinely met with disparaging and sexist commentary by ACS caseworkers. Attorneys at Sanctuary for Families speak with hundreds of clients each year, and dozens of these clients have reported ACS caseworkers asking them questions such as, "Why didn't you leave earlier?" "You knew it would make him mad to go out, why did you?"[37] And ACS caseworkers provide unsolicited and even incorrect advice to clients, telling them that it is *their fault* that they are in danger

[37] Song, *supra* note 8.

because they did not leave the abusive relationships earlier, or criticizing and cajoling them for their parenting choices.[38]

The view that domestic violence is a "mutual problem" is "at the root of many courts' unsatisfactory responses" to domestic violence.[39] Because women are often held to higher behavior and parenting standards than fathers, the legal system shifts blame to the battered mother for her abuse and equates it with a parenting failure. This perpetuates the stereotype that it is the mother's sole responsibility to protect her children. Legal and child protective systems also overlook that many "character flaws" of abused women—such as failure to keep the house or children clean—are the product of the battering. Many criticized behaviors of abused mothers are predictable occurrences of when the mother is living in constant fear of violence and operating to survive.[40]

Ms. W's case reflects these systemic problems. The family court made no finding whatsoever that Ms. W. was likely to invite Mr. L. into her home. Quite the

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[38] *Id.*

[39] Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 Am. U. J. Gender, Soc. Pol'y & L. 657, 694 (2003); *see also* Federica Taccini & Stefania Mannarini, *An Attempt to Conceptualize the Phenomenon of Stigma Toward Intimate Partner Violence Survivors: A Systematic Review*, Behav. Scis., Mar. 2023, at 11 (reporting findings that 63% of women survivors did not want to return to the courtroom because they experienced secondary victimization characterized by feelings of blame, being disbelieved, or dismissed).

[40] *See Id.* at 696-97.

opposite, the court acknowledged that Ms. W. "did not want Mr. L. in the home."[41] Ms. W. explained to the family court that she did not even want to be around Mr. L. at the court hearing.[42] Further, Ms. W. sought assurances that Mr. L would not be able to visit her daughter without approved supervision: "I just don't feel comfortable with him being around Sapphire[.]"[43] Nonetheless, the family court justified its order by opining that, "[s]ometimes people follow [orders of protection] very carefully but *sometimes people, including the victims*, sometimes change their mind and then the orders get violated."[44] In so ruling, the family court held the abuser and abusee "liable as a unit" based on a negative generalization about "people" that was unsupported by the record before it.

II. ACS HOME INSPECTIONS CAN ALSO TRAUMATIZE CHILDREN

Curtailing ACS's authority to make unlimited and unannounced inspections would also benefit the children of non-respondent parents. Despite its stated objective to safeguard children from abuse and neglect, the negative consequences of ACS involvement on children can be profound and long-lasting.

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41 Ex. B, *supra* note 17, at 8.

42 *Id*.

43 *Id*.

44 *Id.* (emphasis added).

A. ACS Inspections are Distressing

To begin, ACS home inspections can be deeply unsettling for children. Strangers enter a child's home to ask uncomfortable questions, rummage through their things, and examine their body. Indeed, "children are expected to remove as much of their clothing as the [ACS] caseworker deems necessary, up to and including their underwear, and allow their bodies to be examined by total strangers, often with no advance notice to the parent."[45]

ACS's questioning can be just as invasive. Children are forced to answer questions about their homelife and caregivers, which can lead to feelings of shame, guilt, and betrayal. Worse, it can prompt a child to make false accusations about a parent under pressure from the ACS caseworker.[46] And looming over these visits is the constant threat of removing children from their home and separating them from their families, further aggravating the emotional toll ACS visits inflict.[47]

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[45] Hum. Rts. Watch, *supra* note 35, at 64.

[46] After being pulled into a room with several adults and questioned about her home life, a 10-year-old child, under pressure—and wanting to provide the right answer—said that her mom, Gabriela, had hit her, a charge that Gabriela denies. Rebecca Klein & Caroline Preston, *When Schools Use Child Protective Services as a Weapon Against Parents*, Hechinger Report (Nov. 17, 2018), https://hechingerreport.org/when-schools-use-child-protective-services-as-a-weapon-against-parents/.

[47] A parent who had experienced an ACS visit revealed during an interview that ACS investigations "had 'traumatized' the child, who was 'upset by having to continue to go through these examinations by ACS and being asked about these things . . . . He doesn't want ACS, the police to come and talk to him about this and like have to be physically examined.'" Louise Feld et al., *When Litigants Cry Wolf: False Reports of Child Maltreatment in Custody Litigation and How to Address Them*, 24 N.Y.U. J. Legis. & Pub. Pol'y 111, 136 (2021) *(cont'd)*

Encounters like these can trigger feelings of fear, anxiety, and helplessness in children, particularly those who have experienced abuse or neglect:

- Michelle Parker, a mother in New York, shared with Human Rights Watch that her "children were petrified [every time] ACS came out to my home; they would hide in the closet under the beds. [When the investigator started] asking questions [and saying], 'Let me check your body,' [my children would ask me], 'Mommy, why are they checking our bodies?'"[48]

- Violet Sanchez, a 35-year-old mother from California, said her oldest daughter is still processing the trauma of her experience with child welfare services, years after the case was closed. "My oldest daughter experienced all of it, and she has difficulty trusting people. You can see that she carries it with her. My youngest son, who was born when my case was nearly closed, is so different and unencumbered compared to her."[49]

B. ACS Inspections Disrupt Children's Development

ACS interventions can significantly impede the development of children, both academically and socially. Children can struggle to focus in school—or to attend school at all—due to disruptive ACS home visits at all hours of the day and night.[50] ACS workers can also remove children from their classes and further interrupt the child's education.[51] To make matters worse, the interruption in learning can make it difficult for the child to concentrate on lessons after discussing family issues with

(omission in original) (citation omitted), https://nyujlpp.org/wp-content/uploads/2022/04/JLPP-24.1-Feld_Glock-Molloy_Stanton.pdf.

48 Hum. Rts. Watch, *supra* note 35, at 65 (alterations in original) (citation omitted).

49 *Id.* at 64-65 (citation omitted).

50 Song, *supra* note 8.

51 Brenner, *supra* note 5.

the caseworker, or may force children to face the stigma and bullying from classmates who witness their removal.[52]

The fear of being ridiculed or ostracized can cause children to withdraw socially, hindering their ability to form friendships and engage in typical childhood activities. For example, children may hesitate to invite friends to their home for fear of further humiliation.[53] This isolation and alienation can contribute to long-lasting effects on a child's social development. Some parents may also discourage their own children from interacting with children involved in ACS cases, fearing guilt by association or concerns about their own child's safety.[54] The stigma associated with ACS intervention can create a sense of shame and secrecy, further isolating children from their peers and hindering their ability to create meaningful relationships.

C. ACS Inspections Damage the Parent-Child Relationship

The intrusion of ACS workers into the family's private space disrupts the sense of security and safety that children associate with their home environment,

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[52] A Sanctuary for Families' client reported that ACS had visited their children's school approximately 75 times, frequently pulling them out of class and causing so much shame and embarrassment that the client transferred her four children to different schools. The client also shared with Sanctuary for Families that their children are hesitant to invite friends over out of fear that an ACS worker will unexpectedly arrive while their friends are there, and that other parents discourage their children from interacting with the client's own. Song, *supra* note 8.

[53] *Id*.

[54] *Id*.

diminishing trust and harming parent-child bonds.[55] ACS caseworkers can be perceived as authority figures and their presence can undermine existing parental authority and family hierarchies. Children may feel torn between loyalty to their parent, on the one hand, and the pressure to comply with ACS directives, on the other, which can lead to feelings of resentment and confusion.[56] Further, children may experience feelings of guilt, shame, and betrayal for disclosing any neglect, particularly if they perceive their actions as leading to negative consequences for their parents:

> [I]f a child is old enough to know that their mother may be held accountable for the child's abuse at the hands of another, the child will be less likely to seek help in order to protect the mother. *Forcing children, who are already victims of abuse, to live through (and possibly participate in) the conviction of a non-abusive parent will be traumatic for a child of any age.*[57]

D. ACS Inspections Disproportionately Impact Black and Brown Children and Families

ACS practices compound racial disparities. Research consistently demonstrates that children from racial and ethnic minority backgrounds, particularly African American children, are disproportionately represented in the child welfare

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[55] Participants in a survey noted that those children's relationships with reporting litigants became strained, especially when the children were subjected to repeated ACS investigations and/or more litigation. Feld et al., *supra* note 47, at 138.

[56] Song, *supra* note 8.

[57] Amanda Mahoney, *How Failure to Protect Laws Punish the Vulnerable*, 29 Health Matrix 429, 453-54 (2019) (emphasis added) (footnote omitted).

system. The harmful effects ACS practices produce, coupled with the overrepresentation of marginalized communities in ACS investigations and child removal proceedings, reflect systemic biases, structural inequalities, and institutionalized racism:

- Nationally, black children are roughly twice as likely as white children to enter foster care, and in New York, more than four times as likely. Research reveals racial disparities at every step, from the numbers of calls to the child welfare hotline to the numbers of investigations and court findings of neglect.[58]

- A 2020 ACS-commissioned report found that even some ACS staffers felt the agency's approach to child welfare was racist.[59] Many of their critiques mirrored complaints that have been levied against ACS for years, as the agency has consistently failed to undertake structural overhauls to address the disproportionate number of Black and Latino families that come under investigation.[60]

- "When a family in a wealthy Brooklyn neighborhood learned roughly two years ago that their child's school had initiated an ACS investigation against them, they sued the city education department. Parents from lower-income, majority-black and Latino neighborhoods, few of whom can afford that option, say such investigations can be a regular, even expected, part of parenting. *According to ACS data, there were 2,391 abuse and neglect investigations last year in East New York/Starrett City, a low-income neighborhood in Brooklyn, compared with 255 in the affluent, and far more populous, Upper East Side*."[61]

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[58] Klein & Preston, *supra* note 46.

[59] Daniel Moritz-Rabson, *'Never Designed to Help': How New York's 'Child Welfare' System Preys on Families*, Appeal (May 15, 2023), https://theappeal.org/acs-new-york-city-administration-for-childrens-services/.

[60] *Id.*

[61] Klein & Preston, *supra* note 46 (emphasis added).

III. ACS PRACTICES ARE NOT EFFECTIVE

For parents and children alike, the results of these highly intrusive, often traumatizing, ACS investigations do not come close to justifying the means. First, ACS investigations yield a relatively low rate of confirmed cases of abuse or neglect. In New York City, less than 4% of the agency's more than 56,000 cases each year end up revealing a safety situation requiring the removal of a child from a home, according to data provided by an ACS spokesperson.[62] Rather than rescuing children from danger, most ACS inspections result in children witnessing their parent being scrutinized, humiliated, and rendered powerless in their own homes.[63] This discrepancy between the intensity of ACS's investigative practices and the reported outcomes have raised serious doubts about the effectiveness of ACS investigations.

Second, survivors may hesitate to seek help or disclose abuse in the first instance for fear of inviting ACS intervention, further undermining ACS's effectiveness. Because ACS often prioritizes child removal and other punitive measures over holistic support or safety planning, survivors may fear losing custody of their children if ACS intervenes.[64] And because calling the police may result in

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[62] Hager, *supra* note 3.

[63] *Id.*

[64] A study conducted by the U.S. Department of Justice concluded that most instances of intimate partner violence go unreported. One reason for this is that abusees are often concerned about *(cont'd)*

the loss of custody, victims of intimate partner violence may be deterred from requesting support from the criminal justice or welfare systems when they need it.[65] The reluctance of survivors to report abuse not only jeopardizes their own safety but also places their children at risk of continued harm and exposure to violence. Children who remain with their abusers may suffer long-term physical, emotional and psychological consequences, perpetuating cycles of intergenerational trauma and abuse.[66] The fear of further intervention or removal may also deter children from seeking support or confiding in their caregivers, worsening feelings of isolation and mistrust.

Finally, ACS oftentimes lacks the resources to help the vulnerable communities it is supposed to serve. High caseloads and limited resources contribute to burnout among ACS caseworkers, impeding the agency's ability to provide timely, comprehensive services to both children and their families.[67] The

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keeping custody of their children if the abuse is reported. *See* P. Powell, *Domestic Violence: An Overview*, Extension | U. Nev., Reno (2011), https://extension.unr.edu/publication.aspx?PubID=2808.

[65] *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L. Rev. 1657, 1684 (2004).

[66] Off. on Women's Health, U.S. Dep't of Health and Hum. Servs., *Effects of Domestic Violence on Children*, https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children (last updated Feb. 15, 2021).

[67] *See* Abigail Kramer, New Sch., Ctr. for N.Y.C. Affs., *Long Hours, High Caseloads: An Ongoing Surge of Cases Weighs on Child Welfare Workers*, https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5bd8d1230e2e726f1130a997/1540935971723/Long+Hours%2C+High+Caseloads.pdf (last visited Mar. 18, 2024).

lack of culturally competent practices and trauma-informed care further undermines the effectiveness of ACS intervention, particularly for children from diverse backgrounds who may require unique support services.[68]

CONCLUSION

In practice, ACS home inspections and investigations often punish non-respondents and their children, even though they have not been accused of doing anything wrong. ACS's highly intrusive tactics retraumatize survivors of domestic violence or abuse—aggravating these individuals' emotional distress, undermining their sense of safety and control, disrupting their jobs, and perpetuating biases about survivors like them. The effects ACS's practices have on children are just as harmful. In the end, ACS's invasive practices intensify the trauma experienced by families—survivors and their children alike—without providing effective support or intervention. For all these reasons, the family court's order as it relates to Ms. W. should be vacated.

[68] Moritz-Rabson, *supra* note 59.

Dated: New York, New York
March 21, 2024

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Dated: New York, New York
March 21, 2024

Lara Flath

EXHIBIT B

To Be Argued By:
DAVID SHALLECK-KLEIN
15 minutes requested

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

IN THE MATTER OF SAPPHIRE W. (ANONYMOUS).

Administration for Children's Services,
Petitioner-Respondent;

KENNETH L. (ANONYMOUS),
Respondent;

Sharneka W. (ANONYMOUS),
Nonparty-Appellant.

DOCKET NO.
2023-10606

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Kings County Family Court Clerk's Index No. NN-17879/23

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QUESTIONS PRESENTED

1. Family Court Act § 1017 allows family courts to authorize the Administration for Children's Services (ACS) to enter and inspect homes in certain circumstances. Section 1017, however, applies only when a "court determines that a child must be removed from his or her home." In this case, the child was never removed from her home. Instead, she remained with her mother, Ms. W., a non-respondent parent in this case. The respondent father, Mr. L., was excluded from the home by both the mother and an order of protection. Did the family court err in believing § 1017 gave it authority to order ACS to make unlimited announced and unannounced inspections of Ms. W.'s home?

2. The family court acknowledged that Ms. W. is able to safely care for her child. The child's father, who committed acts of domestic violence against Ms. W., is no longer allowed in Ms. W.'s home. The family court has nevertheless authorized ACS to enter and search Ms. W.'s home and supervise her parenting. The order does not restrict the time, frequency, or scope of these searches. Does the family court order violate Ms. W.'s Fourth Amendment right to be free from unreasonable searches, because the order lacks probable cause and particularity?

3. After acknowledging that Ms. W. is able to safely care for her child, the family court authorized government agents to enter Ms. W.'s home and ordered her to comply with their supervision. They will observe in minute detail how she

raises her daughter. Does this intrusion into Ms. W.'s home life violate her substantive due process rights, because it infringes a fit mother's liberty interest in the care, custody, and control of her child?

The non-respondent mother, Ms. W., submits that the correct answer to these questions is "Yes."

PRELIMINARY STATEMENT

No one claims that Ms. W. did anything wrong. To the contrary, the family court acknowledged: "You're not accused of anything" and "I know you're able to care for Sapphire[.]" The Attorney for the Child likewise noted that Ms. W. had "done nothing wrong." Similarly, after investigating Ms. W.'s allegations against Mr. L., the Administration for Children's Services (ACS) determined Ms. W. should be a non-respondent parent in the Article 10 neglect case against Mr. L. and asked for Sapphire to remain in Ms. W.'s care. Nevertheless, the family court ruled that Ms. W. could keep custody of Sapphire only if ACS were able to enter and search her home repeatedly.

These court-authorized home searches raise crucial constitutional questions, unaddressed by any New York appellate court, asking whether the government can surveil and search the home of a non-respondent custodial mother and interfere in her care of her child, simply because the child's respondent father—no longer present in the home—previously committed acts of domestic violence against the child's mother.

The family court's order violated Ms. W.'s Fourth Amendment rights. Despite the total lack of even an allegation that Ms. W. is unfit, the state now has the power to conduct unlimited entries into Ms. W.'s home and inspect the intimate

details of her life. Of course, ACS can enter Ms. W.'s home without prior court approval or consent when it has grounds to believe there is an immediate threat to the child. But now, the family court's unbounded home-search order permits ACS, whenever it wants and without any justification, to rummage through Ms. W.'s belongings, inspect labels in her medicine cabinet, and peer into her drawers and refrigerator. They can even strip search her child on demand. There is no probable cause grounding this order. There is no particularity in its terms. And it is contrary to basic American freedoms.

The court's order also violated Ms. W.'s right to substantive due process. The state has absolutely no business interfering in a longstanding relationship between a fit parent and her child—let alone in the home where they have long resided. To the contrary, this intrusion creates exactly the sort of "double abuse" of a domestic violence victim that New York law is designed to avoid—allowing government intrusion simply because her child's father, who no longer resides with her, was abusive. *See Nicholson v. Williams*, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002); *Nicholson v. Scoppetta*, 3 N.Y.3d 357 (2004).[1] "Merely describing" such intrusive government intervention against a survivor of domestic violence – which would "essentially impose[] joint and several liability on both parents" for one

[1] Unless otherwise noted, all internal citations, brackets, ellipses, emphases, and quotation marks are omitted from quotations included below.

parent's alleged misconduct – "foreshadows its constitutional weakness." *In re Sanders*, 495 Mich. 394, 401 (2014); *see also Williams*, 203 F. Supp. 2d at 164 ("[W]ithin wide limits, adults and children in a household are immune from state prying and intrusion.").

But this Court can avoid these substantial constitutional issues because there is no statutory authorization for the family court's ruling. In certain clearly defined circumstances, Section 1017 authorizes family courts to permit ACS to conduct "visits in the home" of non-respondent parents. This provision, however, applies only when the family court first "determines that a child must be removed from his or her home." F.C.A. § 1017(1). The court made no such determination in this case, and the child was never removed. Therefore, there was no statutory authorization to order the home inspections.

The order should be vacated.

STATEMENT OF THE FACTS

Sharneka W. ("Ms. W.") gave birth to her daughter, Sapphire W., a year ago. A5. Ms. W. and Sapphire W. live together in the same home where Ms. W. was raised. A10.

Sapphire's father, Kenneth L. ("Mr. L."), did not reside in the home, but would sometimes visit. A11. Recently, Mr. L. threatened Ms. W. and hit her. A5.

Ms. W. called the police. A5. In response to Ms. W.'s request for assistance, on August 23, 2023, the police "conducted [a] wellness check" to follow up and make sure Ms. W. was ok. A5. After the police left, Mr. L. called Ms. W. "a 'snitch' and 'stupid,' and then slapped her, hit her," and "ripped the dreadlocks out of her hair." A5. Mr. L did all of this with Sapphire "present in the room during the entire incident." A5.

That was the last straw—Ms. W. immediately took action to protect herself and her child. A5. She "told [Mr. L.] that she didn't want to fight and that he needed to leave, at which point he went to her bathroom, urinated in the bathtub, and then left the home." A5. He has not been back in the home since. A7-22. Shortly after telling Mr. L. to leave, Ms. W. reported the abuse to her therapist, who relayed Mr. L.'s abuse to the Administration for Children's Services (ACS). A5.

ACS investigated Ms. W.'s allegation for eight days and then filed an Article 10 petition against Mr. L. in Kings County Family Court. A1-5. The petition charged Mr. L. with neglecting Sapphire by committing acts of domestic violence against Ms. W. in Sapphire's presence. *Id.* ACS filed no charges against Ms. W., designating her a "non-respondent mother." A5. Ms. W. had no history with ACS before this case. A8.

The family court informed Ms. W. that she was "not accused of anything" but that the court nonetheless had "the power to decide where Sapphire goes" and to issue other orders "that can affect your life." A9, 15. ACS requested that the court issue a full stay-away order of protection against Mr. L. on behalf of Ms. W. and Sapphire. A12-13. ACS also requested that the court "release[]" Sapphire to Ms. W. with ACS "supervision." A12.

The Attorney for the Child agreed that the child should remain with Ms. W., but argued that there was no justification for ACS's request for "ACS supervision" of Ms. W. A13. Sapphire's attorney explained that "ACS has not indicated that there are any safety concerns" with Ms. W. and that Ms. W. and the child would be subjected to unnecessary "intrusion in their lives, despite having done nothing wrong." A13. Ms. W.'s attorney joined in the Attorney for the Child's application. A13. ACS did not contest any of these statements or respond to these arguments in any way. A13-22. It never offered any reason for the need to supervise Ms. W. A7-22.

Nonetheless, the family court decided that Ms. W.'s parenting in her own home should be subject to state supervision. A14-15. The family court explained that a "release" with "supervision would mean ACS checking in on you and occasionally showing up to your home." A14-15. The court acknowledged that Ms. W.'s lawyer and the Attorney for the Child had "raise[d] a really important

point" regarding the supervision because "you're not accused of anything and our goal is not to – not to punish you either for being the victim of a crime, assuming that that's what happened." A15. The court explicitly found that Ms. W. was "able to care for Sapphire" and that ACS "already checked out your home and your home is fine." A15. The court nevertheless overruled Ms. W.'s and the Attorney for the Child's objections and ordered ACS supervision as part of its order releasing Sapphire to Ms. W.'s care. A15.

The court noted that ACS would "make sure that Mr. L is not there." A15. The court made no finding whatsoever that Ms. W. was likely to invite him in. A7-22. To the contrary, the court acknowledged that Ms. W. did not want Mr. L. in the home: "I can hear in your voice, it sounds like you don't want him there right now[.]" A15. Indeed, Ms. W. explained to the family court that she did not even want to be around Mr. L. at the court hearing. A10-11. (Mr. L. did not appear. A11.) Further, Ms. W. sought assurances that Mr. L. would not be able to visit her daughter without approved supervision: "I just don't feel comfortable with him being around Sapphire[.]" A17.

Notwithstanding the uncontested findings specific to Ms. W., the family court noted that: "Sometimes people follow [orders of protection] very carefully but sometimes people, including the victims, sometimes change their mind and then the orders get violated." A15-16. The family court then explained the

contours of the orders of protection, stated that Ms. W. should not speak with Mr. L., and asked if Ms. W. understood. A16-19. Ms. W. stated "Yes, I understand. I definitely will not." A19.

That same day, the family court issued a full stay-away order of protection against Mr. L. on behalf of Ms. W. and Sapphire. A24-25. The family court also issued a separate written order that officially "released" Sapphire to Ms. W.'s care (though Sapphire had never left that care). A23. The order did so "with ACS and Court supervision," with terms and conditions requiring that Ms. W. "cooperate with ACS and Court supervision, including maintaining contact with ACS, permitting ACS to make announced and unannounced visits to the home, and accepting any reasonable referrals for services." A23.

Ms. W. timely appealed the release order, A26-27, and this appeal follows.[2]

ARGUMENT

I. The Family Court Act Does Not Allow ACS Into Ms. W.'s Home.

The family court erred when it permitted the Administration for Children's Services (ACS) to repeatedly and indefinitely search the home of a fit, non-respondent mother and surveil her care of her child.

[2] Ms. W. does not appeal the order of protection issued against Mr. L. and wishes for it to remain in effect. Nor does Ms. W. appeal the portion of the release order authorizing Mr. L. to have supervised visitation with the child.

Section 1017 allows a family court, in limited circumstances, to order non-respondent parents to comply with ACS supervision and visits in the home. But § 1017 applies only when "the court determines that a child must be removed from his or her home." F.C.A. § 1017(1).

Here, the child was not removed. To the contrary, she has undisputedly remained in her home with her mother—whose parental fitness has never been questioned. A12. The statute is therefore inapplicable. Because no other statutory provision authorizes this type of home-search order against a non-respondent parent, the family court acted outside its jurisdiction in issuing the orders against Ms. W. "Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute." *Johna M.S. v. Russell E.S.*, 10 N.Y.3d 364, 366 (2008).

A. Article 10 Protects Families From Unnecessary State Interference.

Article 10 of the New York Family Court Act guards against "unwarranted state intervention into private family life." *Matter of Jamie J.*, 30 N.Y.3d 275, 284 (2017). It carefully circumscribes the family court's ability to obtain and sustain jurisdiction over a parent-child relationship. The court has jurisdiction over a parent charged with abuse or neglect only when a petition alleges facts sufficient to

establish that a child was abused or neglected by that parent.[3] F.C.A. § 1031. If the allegations are not sustained, the court loses its authority to issue orders against the accused parent. *Jamie J.*, 30 N.Y.3d at 285.

The statutory scheme also carefully regulates how the government may remove a child from her home. Removal is not figurative; every statutory method of removal involves taking a child out of her home—whether temporarily or permanently. *See* F.C.A. § 1021 (describing how the state "may temporarily remove a child *from the place* where he or she is residing with the written consent of his or her parent") (emphasis added); § 1022 (the "family court may enter an order directing the temporary removal of a child *from the place* where he or she is residing before the filing of a petition" under specified circumstances) (emphasis added); § 1024 (describing emergency procedure for "taking or keeping a child *in protective custody*") (emphasis added); § 1027 (describing various findings a court must make before ordering a child "removed *from his or her home*") (emphasis added).

If the court approves a removal of a child from her home, the court must direct ACS to "conduct an immediate investigation to locate any non-respondent

[3] The definitions of "abuse" and "neglect" are strictly constrained. *See* F.C.A. § 1012(e)-(f); *see also Nicholson*, 3 N.Y.3d at 368-369 (noting that the legislature was "deeply concerned that … imprecise definition[s]" of statutory terms "might result in unwarranted state intervention into private family life").

parent of the child and any relatives of the child." F.C.A. § 1017(1). In cases in which a non-custodial parent is "located," the court must determine whether the child can "appropriately reside" with, and be "released" to, that parent. F.C.A. § 1017(1)-(3). That parent must then submit to the court's jurisdiction with respect to that child. F.C.A. § 1017(3). The court "shall set forth the terms and conditions applicable" to the child's release. *Id.* But nothing in § 1017 allows family courts to force custodial parents against whom no charges have been made and whose children were never removed from their care to submit to the court's jurisdiction or to comply with home entry orders.

B. Section 1017 Does Not Apply Because Sapphire Was Never Removed From Her Home.

Section 1017 does not allow the family court to intervene against a non-respondent parent when a child is not removed from her home. The statute is clear. It applies only "when the court determines that a child must be removed from his or her home." F.C.A. § 1017(1). If there is no removal—for instance, because a child remains in her home with her mother—then the statute does not apply. The Practice Commentaries to § 1017 reinforce this plain-text reading of the statute: "removal" is "a threshold issue," which must be "determined prior to any consideration of what to do with the child under Section 1017." F.C.A. § 1017 Sobie Practice Commentaries (online 2021). The statute's title, too, reinforces this common-sense understanding. The title is "Placement of Children," which

presumes removal—otherwise there would be no cause to place the child anywhere. Even the State has elsewhere recognized that the statute is about physical removal of a child from her home. *See* New York State Office of Children and Family Services Administrative Directive, 17-OCFS-ADM-02-R1, Revised Feb. 28, 2023 at 2 ("FCA § 1017 now requires that an LDSS [Local County Department of Social Services], in its search for potential resources for a child *who is temporarily removed*, must also seek to identify, locate, and notify the following persons about the pendency of an Article 10 proceeding: Any non-respondent parents (not just those deemed 'suitable')."") (emphasis added).[4]

"[W]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." *State v. Patricia II.*, 6 N.Y.3d 160, 162 (2006). A court-authorized removal is therefore a condition precedent to the statute's application.

Section 1017 did not give the family court authority to act in this case because Sapphire has never been removed from her home. A12. Notably, as the record makes clear, ACS has no safety concerns about Sapphire's continuing to live with her mother who is not, and never has been, suspected of neglect or abuse. A12-13. Because Sapphire was never removed from her home, the Family Court

[4] Available at https://tinyurl.com/yc37vsmt.

Act provides no authority to authorize searches of the family home, from which the respondent father is judicially barred.

The family court may have concluded that § 1017(3) gave it authority to order ACS supervision in this case because it believed it was "releasing" Sapphire to Ms. W.'s care. That subdivision allows the court to condition an order "temporarily releasing a child to a non-respondent parent" on the parent's willingness to "submit[] to the jurisdiction of the court with respect to the child" and for that parent to comply with "terms and conditions." F.C.A. § 1017(3). Subdivision (3) is wholly inapplicable here, however, because there was no "release" under subdivision three in the absence of any threshold "removal" under subdivision one.

The interlocking structure of § 1017 makes clear that the "release" conditions enumerated under subdivision three rely on an initial "remov[al]" under subdivision one. *See Matter of Avella v. City of New* York, 29 N.Y.3d 425, 434 (2017) ("[A] statute must be construed as a whole and its various sections must be considered together and with reference to each other."). Under § 1017(3), the release must be effectuated "pursuant to subparagraph (ii) of paragraph (a) of subdivision two of this section." Section 1017(2)(a)(ii) allows a temporary release only "upon receipt of the report of the investigation ordered pursuant to subdivision one of this section." And as discussed above, the investigation under

subdivision one occurs only, as relevant here, "when the court determines that a child must be removed from his or her home." F.C.A. § 1017(1). In other words, there must first be a removal determination, then an investigation of a "located" non-respondent parent, then a report of the investigation, and then a release. Only then does the statute permit a family court to require a non-respondent parent to submit to its jurisdiction under subdivision three and to abide by certain "terms and conditions," including potentially "visits in the home." None of those prerequisites occurred here.

This plain-text interpretation advances New York's child-protective scheme. The statutory structure recognizes that a child's needs are best met by growing up in his or her "natural home" with a "normal family life." *Matter of Michael B.*, 80 N.Y.2d 299, 309 (1992). A "natural home" and a "normal family life" necessarily entail parents' rights to raise their children in a zone of private family life that is free from government interference—intruded upon only when "the child would be … endangered." Soc. Servs. Law § 384-b(1)(ii). This limitation on unnecessary governmental intrusion is consistent with the legislature's "fundamental social policy choice[]" to give "biological parent[s]" the "right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit." *Michael B.*, 80 N.Y.2d at 308-10.

Interpreting § 1017 consistent with its plain text, to apply only in situations in which courts have determined that children must be removed from their homes, also avoids the plainly unconstitutional outcome in this case. *See Matter of Lorie C.*, 49 N.Y.2d 161, 171 (1980) ("[I]t is familiar law that a statute should be construed so as to avoid doubts concerning its constitutionality."). As explained *infra* (at 17-30), the order at issue here lacks probable cause or particularity, and therefore violates both the Fourth Amendment of the U.S. Constitution and Article 1, Section 12 of the New York State Constitution. Further, as also explained *infra* (at 30-37), the order impermissibly intrudes on Ms. W.'s private family life and therefore violates her substantive due process rights under the U.S. and New York State Constitutions.

In sum, the family court lacks jurisdiction under § 1017 to issue the provisions of the release order directed to Ms. W., because no court has determined that her child "must be removed from … her home." F.C.A. §1017(1). Furthermore, because the family court "is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute," *Johna M.S.*, 10 N.Y.3d at 366, and no other provision of Article 10 authorizes ACS supervision and surveillance of Ms. W. in her home, the family court's order as it relates to Ms. W. must be vacated. *See also Matter of Zavion O. v. Administration for Children's Services*, 173 A.D.3d 28, 35 (1st Dept. 2019) (holding that while the family court has a "general parens patriae

responsibility … this doctrine cannot create jurisdiction for Family Court that is not provided by statute").

II. THE HOME-SEARCH ORDER VIOLATES MS. W.'S FOURTH AMENDMENT RIGHTS.

Government agents now have free reign to search Ms. W.'s home and her child's body, at any time, allowing them to surveil Ms. W.'s parenting decisions. The family court issued this order without any finding that Ms. W. had done anything wrong, and without imposing any meaningful limitations on the scope of the home searches, in stark violation of Ms. W.'s rights under the Fourth Amendment of the U.S. Constitution and Article I, Section 12 of the New York State Constitution.

A. The Family Court's Order Authorizes Searches Subject To Fourth Amendment and Article I, Section 12 Protections.

The Fourth Amendment and Article I, Section 12 protect against unreasonable searches and seizures by government agents. U.S. Const. amend. IV; N.Y. Const. art. I, § 12.[5] At the "very core" of the Fourth Amendment lies "the right of a man to retreat into his own home and there be free from unreasonable

[5] For simplicity, this brief addresses primarily the Fourth Amendment. Because the Court of Appeals has "on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and [has] developed an independent body of state law in the area of search and seizure," *People v. Weaver*, 12 N.Y.3d 433, 445 (2009), a search that violates the Fourth Amendment also violates Section 12 of Article I of the New York State Constitution, *id*.

governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). "[P]hysical entry of the home is the chief evil against which it is directed." *Lange v. California*, 141 S. Ct. 2011, 2018 (2021). The Fourth Amendment applies "to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life," and "the essence of the offense" is "the invasion of his indefeasible right of personal security, personal liberty and private property." *Boyd v. United States*, 116 U.S. 616, 630 (1886). After all, "private spaces, such as homes," implicate "the most constitutionally compelling expectations of privacy." *People v. Mothersell*, 14 N.Y.3d 358, 363 (2010).

Fourth Amendment protections apply to orders issued under Article 10 of the Family Court Act—including orders authorizing ACS searches of homes. *See Matter of Shernise C.*, 91 A.D.3d 26, 31 (2d Dept. 2011) (applying Fourth Amendment analysis to family court-ordered strip search of the child during Article 10 proceeding); *Southerland v. City of New York*, 680 F.3d 127, 143-49 (2d Cir. 2012) (holding that "plaintiffs' Fourth Amendment unlawful-search claims" against ACS based on court-ordered search of home for children survived summary judgment); *Tenenbaum v. Williams*, 193 F.3d 581, 602 n.14 (2d Cir. 1999) (explaining, in an ACS case, that "[t]he Fourth Amendment's search and seizure provisions are applicable … through the Fourteenth Amendment's Due Process Clause"); F.C.A. § 1034(2)(b)(1) (requiring "probable cause" before a

family court can issue a home-search order during an investigation). As one district court aptly put it, there is "no social worker exception to the strictures of the Fourth Amendment." *Walsh v. Erie Cnty. Dep't of Job & Fam. Servs*., 240 F. Supp. 2d 731, 746–47 (N.D. Ohio 2003) (collecting and citing cases).[6]

This Court has explained that "reasonableness remains the ultimate touchstone of the Fourth Amendment." *Matter of Shernise C*., 91 A.D.3d at 31. Because the Fourth Amendment applies to ACS, home searches by its caseworkers without a warrant are "presumptively unreasonable" unless the searches satisfy a well-established exception to the warrant requirement. *See Kentucky v. King*, 563 U.S. 452, 459 (2011). Courts across the country have thus recognized that child-

[6] Appellate courts across the country have come to the same conclusion. *See Andrews v. Hickman Cnty.*, 700 F.3d 845, 859 (6th Cir. 2012) ("Given the presumption that state actors are governed by the Fourth Amendment and the sanctity of the home under the Fourth Amendment, we agree that a social worker, like other state officers, is governed by the Fourth Amendment's warrant requirement."); *Calabretta v. Floyd*, 189 F.3d 808, 813 (9th Cir. 1999); *Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003), *as amended on denial of reh'g* (May 15, 2003); *Gates v. Tex. Dep't of Protective & Regul. Servs.*, 537 F.3d 404, 419-20 (5th Cir. 2008); *Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989); *Lenz v. Winburn*, 51 F.3d 1540, 1547 n.7 (11th Cir. 1995); *Riehm v. Engelking*, 538 F.3d 952, 965 (8th Cir. 2008); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1240 (10th Cir. 2003); *J.C. v. Dist. of Columbia*, 199 A.3d 192, 201 (D.C. Ct. App. 2018); *Interest of Y.W.-B.*, 265 A.3d 602, 628 (Pa. 2021).

protective workers must obtain a warrant—or the family court equivalent—before entering a home in the absence of exigency or consent.[7]

As the Second Circuit has explained in a New York City case, "a Family Court order is equivalent to a search warrant for Fourth Amendment purposes." *Southerland*, 680 F.3d at 144 n.15; *see also Shaheed v. Kroski*, 833 Fed. Appx. 868, 870 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2766 (2021). Courts outside of New York have said the same.[8] In this context, as in criminal cases, the "Government obtains information by physically intruding on persons, houses, papers, or effects," such that "a 'search' within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Jardines*, 569 U.S. at 5; *see also Arizona v. Hicks*, 480 U.S. 321, 325 (1987) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."); *Kyllo v. United States*,

[7] *See Gates*, 537 F.3d at 420 (noting "warrantless searches of a person's home are presumptively unreasonable unless" an exception to the warrant requirement applies); *Good*, 891 F.2d at 1092; *Heck*, 327 F.3d at 513; *Calabretta*, 189 F.3d at 813; *Roska*, 328 F.3d at 1240; *J.C.*, 199 A.3d at 200–01; *Interest of Y.W.-B.*, 265 A.3d at 628; *Southerland*, 680 F.3d at 159.

[8] *See Greene v. Camreta*, 588 F.3d 1011, 1030 (9th Cir. 2009), *vacated in part on other grounds*, 563 U.S. 692 (2011); *Wernecke v. Garcia*, 591 F.3d 386, 395 (5th Cir. 2009); *Gates*, 537 F.3d at 419-20, 420 n.10; *Heck*, 327 F.3d at 514; *J.B. v. Washington Cnty.*, 127 F.3d 919, 930 (10th Cir. 1997).

533 U.S. 27, 37 (2001) ("In the home, … *all* details are intimate details, because the entire area is held safe from prying government eyes.").

The family court authorized exactly such a search of the "intimate details" of Ms. W.'s home. *See id.* The order requires Ms. W. to comply with ACS supervision and to allow "announced and unannounced visits to the home" by ACS. A23. In other words, government agents can come into the home whenever they want, without prior notice, and for an indefinite period of time. The agents can undertake repeated, untrammeled inspections of the home during which they can look wherever they want, inspecting private physical spaces and even strip-searching Ms. W.'s child. *See* Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One.*, ProPublica (Oct. 12, 2022) (former NYPD officer expressing "amazement that [ACS] caseworkers could comb through whatever they wanted within a home as if they had a 'blank check' instead of a warrant—and no deterrent if they overstepped").[9] As the U.S. District Court for the Eastern District of New York has explained, ACS's supervision of a family can come with "significant costs to [the] mother and extended family." *Doe ex rel. Doe v. Mattingly*, No. 06-CV-5761, 2006 WL 3498564, at *2 (E.D.N.Y. 2006). These intrusions include "searches of the home down to the level of inspecting the

[9] Available https://tinyurl.com/ypap5ta7.

refrigerator," "strip searche[s]," interviews with the child's grandparents, and "repeated phone calls to [the mother's] place of work." *Id*.; *see also* Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes.*, N.Y. Times (Nov. 22, 2022) ("Caseworkers making unannounced visits strip-search children looking for bruises and peer into refrigerators and around homes looking for signs of bad parenting"); *id.* (ACS worker comparing the experience to "being stopped and frisked").[10] While ACS's action will vary by case, the point is that the family court's order gives ACS enormous discretionary power to invade Ms. W.'s most cherished zone of privacy. In this case, it wields that power against a domestic violence survivor left in fear that any perceived lack of cooperation with government agents in her home will cause her to lose custody of her daughter.

Because nothing is off limits in Ms. W.'s home, there is an enormous risk that her child will be harmed by ACS's actions. ACS has no grounds to believe the child is currently in imminent risk of harm. If it did, ACS would have ample authority to enter Ms. W.'s home without judicial approval or her consent. *See, e.g.,* F.C.A. § 1024; *Southerland*, 680 F.3d at 158. Instead, government agents are unnecessarily searching Ms. W.'s home. Her child will witness Ms. W. – the authority figure she relies on for security – being forced to acquiesce to strangers'

[10] Available at https://tinyurl.com/mtksxdh.

demands under the implicit threat of family separation. This can be traumatizing. *See, e.g.,* Joseph Goldstein, Albert J. Solnit, Sonja Goldstein, Anna Freud, *The Best Interests of the Child: The Least Detrimental Alternative* 97 (1996). "The younger the child and the greater her own helplessness and dependence, the stronger is her need to experience her parents as her law-givers—safe, reliable, all-powerful, and independent." *Id.* The "invasion of family privacy alters the relationship between family members" and causes children to "react with anxiety even to temporary infringements of parental autonomy." *Id.* Indeed, the ACS Commissioner has acknowledged that home searches by CPS agents are "nerve-wracking for families" and that the issue is "something we really need to work at." Hager, *supra*. A one-year-old child should not have to grow up watching her mother being supervised by strangers in her familial home.

Because family court orders authorizing home searches stand in the place of search warrants, they are reasonable and satisfy the Fourth Amendment only when they are (1) supported by probable cause, and (2) "the scope of the authorized search is set out with particularity." *King*, 563 U.S. at 459; *Nicholson v. Scoppetta*, 344 F.3d 154, 176 (2d Cir. 2003) ("[a] warrant" which "of course, requires probable cause"), *answering certified question*, 3 N.Y.3d 357 (2004); *Clark v. Stone*, 998 F.3d 287, 301 (6th Cir. 2021) (family court order "fell well below the requirements" of the Fourth Amendment because, among other deficiencies, the

order did not "describe with any particularity the area of the home to be searched"), *cert. denied,* 142 S. Ct. 773 (2022). Notably, *Clark* bears a striking resemblance to Ms. W.'s case. The child-protection agency had filed petitions in family court against the parents. *Id.* at 292. The family court allowed the children to remain with their parents during the pendency of the case but ordered the parents to "cooperate with CHFS [child-protective services] and to allow CHFS into their home." *Id.* The Sixth Circuit held that the order violated the Fourth Amendment because it contained "no facts that detail probable cause, nor [did] it describe with any particularity the area of the home to be searched." *Id.* at 301. The same is true in this case.

B. The Order Was Not Supported By Probable Cause.

The family court's order was not based on probable cause—nor anything even approaching that standard. In the criminal context, probable cause requires "information sufficient to support a reasonable belief that *an offense* has been or is being committed or that evidence of *a crime* may be found in a certain place." *People v. Bigelow*, 66 N.Y.2d 417, 423 (1985) (emphasis added). In the family court context, the standard requires – at the very least – information sufficient to support a reasonable belief that a child is currently in a specific place where he or she is, or is in imminent risk of, being abused or neglected or that evidence of this child abuse or neglect may be found in a certain place. *See*, *e.g.*, *Interest of Y.W.-*

B., 265 A.3d at 613 (holding that CPS agency "must establish probable cause that an act of child abuse or neglect has occurred and that evidence relating to the abuse or neglect will be found in the home"); *see also* F.C.A. § 1034(2)(b)(i) (requiring "probable cause to believe that an abused or neglected child may be found on the premises" for court orders authorizing home entries by child protective services).

Enforcing this standard does not in any way suggest a lack of concern for children's safety. As the United States Third Circuit Court of Appeals noted, "It evidences no lack of concern for the victims of child abuse or lack of respect for the problems associated with its prevention to observe that child abuse is not sui generis in this context." *Good*, 891 F.2d at 1094; *see also id.* (rejecting the government's claim "that the principles developed in [criminal] emergency situation cases … will be ill suited for addressing [child-protective] cases like the one before us").

The family court's order was not supported by probable cause in this case. There is no information sufficient to support a reasonable belief that Sapphire is being abused in her home by her mother, or that a search of her home will uncover evidence of abuse or neglect. The exact opposite is true. The court explicitly found that Ms. W. is "able to care for Sapphire," acknowledged that Ms. W. was "not accused of anything," and noted that ACS had "already checked out [Ms.

W.'s] home and [the] home is fine." A15. No one at any point in the hearing suggested otherwise. A7-22.

The family court stated that one value of the home search order was making sure that Mr. L. was "not there." A15. Yet the court acknowledged that Ms. W. displayed no inclination to allow him in, telling Ms. W.: "I can hear in your voice, it sounds like you don't want him there right now." A15. Ms. W. made that extremely clear herself, both prior to and at the hearing. A5, 10-11, 17, 19. No party questioned Ms. W.'s commitment to keeping Mr. L. out of the home. A7-22. And Mr. L. has not been there since she ejected him. *Id.*

Absent any evidence, the court's order was based on generalized speculation and stereotyping. The family court stated, "Sometimes people follow [orders of protection] very carefully but sometimes people, including the victims, sometimes change their mind and then the orders get violated. And I don't want that to happen." A15-16. There was no finding specific to Ms. W.

This comes nowhere close to establishing probable cause to inspect Ms. W.'s home. Probable cause cannot be based on generalized stereotypes and assumptions; rather, it must be "particularized with respect to that person" who is subjected to search, and the "requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize

another." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *cf. Williams*, 203 F. Supp. 2d at 250 (criticizing the reliance "on unfounded presumptions about the negative character and abilities of battered women"). This insistence on particularity is especially important in a situation where, as here, a non-respondent mother is presumed to be fit and to "act in the best interests of [her] children," *Troxel v. Granville*, 530 U.S. 57, 68 (2000), and where the family court has explicitly found her fit, A15.

There is no evidence that would rebut that presumption of fitness and establish probable cause to believe Sapphire was being abused or neglected in the home. The court did not – and could not – make any such finding at the hearing. Because there is not a "substantial basis for concluding that a search would uncover evidence of wrongdoing," *Illinois v. Gates*, 462 U.S. 213, 236 (1983), there was no probable cause. Thus, the order requiring compliance with ACS surveillance of the home by way of announced and unannounced entries violates Ms. W.'s Fourth Amendment and Article I, Section 12 rights and must be vacated. *See Clark*, 998 F.3d at 301 (family court's order "fell well below the requirements of a valid warrant," because it "contain[ed] no facts that detail probable cause"); *Interest of Y.W.-B.*, 265 A.3d at 632 (family court order lacked probable cause where "no nexus existed between the allegations in the Petitions to Compel and [the] [m]other's home").

C. The Order Lacks Particularity.

The Fourth Amendment also requires warrants to state with particularity the place to be searched. This requirement prevents "general searches" and "the issuance of warrants without a substantial factual basis." *United States v. Young*, 745 F.2d 733, 759 (2d Cir. 1984); *see also Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (noting that the particularity requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit"); *United States v. George*, 975 F.2d 72, 74 (2d Cir. 1992) (observing that general warrants have "long been considered abhorrent to fundamental notions of privacy and liberty").

"To meet the particularity requirement, the warrant's directive must be specific enough to leave no discretion to the executing officer." *People v. Brown*, 96 N.Y.2d 80, 84 (2001). For example, in *Interest of Y.W.-B.,* the family court's order permitted only one home search and specified the number of social workers who could enter the home ("two DHS social workers"), the purpose of the search ("to verify if [the] mother's home is safe and appropriate"), the date of the visit ("June 14, 2019"), and the specific time ("5:00 pm."). 265 A.3d at 612. Nevertheless, the Pennsylvania Supreme Court criticized the order's breadth. It "placed no limitations on the scope of the search, leaving it entirely in DHS's discretion as to the thoroughness of the search, including, if it so chose, a general

rummaging of all of the home's rooms and the family belongings." *Id.* at 624. Similarly, the Sixth Circuit in *Clark* held that the family court's order requiring the parents to "'cooperate' with [the agency] and to allow [the agency] into their home" "fell well below the requirements" of the Fourth Amendment because, among other deficiencies, the order did not "describe with any particularity the area of the home to be searched." 998 F.3d at 292, 301.

The deficiencies of the order in this case are even more extreme. The order compelling Ms. W. to allow ACS into her home simply states, "Ms. W. shall cooperate with ACS and Court supervision, including maintaining contact with ACS, permitting ACS to make announced and unannounced visits to the home, and accepting any reasonable referrals for services." A23. It does not limit or specify the number of searches, the date of the searches, the times of the searches, the number of agents permitted to conduct the search, the areas to be searched, or the purpose of the search. A23. To the contrary, the order gives ACS extraordinarily broad authority within the home. A23.

The order also fails to provide any nexus between the need for the search and any safety concern in Ms. W.'s home. *Interest of Y.W.-B.*, 265 A.3d at 632 ("no nexus existed between the allegations in the Petitions to Compel and [the] [m]other's home"). By its plain terms, the family court's order gives ACS carte blanche to surveil a non-respondent parent's home as it sees fit—*i.e.*, the exact

type of "wide-ranging exploratory search[] the Framers intended to prohibit." *Garrison*, 480 U.S. at 84.

For all these reasons, the order lacks sufficient particularity and must be vacated.

III. THE ORDER VIOLATES MS. W.'S SUBSTANTIVE DUE PROCESS RIGHTS.

The court allowed government agents to enter Ms. W.'s home at any time of their choosing, with no belief that she had done anything wrong, to inspect how she is raising her child. This despite the court's acknowledgement that Ms. W. is "able to care for Sapphire." A15. The court issued the order without any findings of necessity. It is hard to imagine an order more fundamentally at odds with Ms. W.'s substantive due process rights. The order is *designed* to allow government agents to intrude upon Ms. W.'s care and management of her child, in her home, where nobody suspects – let alone alleges – that Ms. W. is harming her child. This is one of the broadest possible intrusions imaginable into the sanctity of family life. The order must be vacated.

The Fourteenth Amendment's Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. Like its Fifth Amendment counterpart, the Clause "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702,

719 (1997). It also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* at 720.[11]

A "parent's interest 'in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests.'" *Matter of F.W.*, 183 A.D.3d 276, 280 (1st Dept. 2020) (quoting *Troxel*, 530 U.S. at 65). This "is an interest far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982). It "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *see also Duchesne v. Sugarman*, 566 F.2d 817, 824 (2d Cir. 1977) ("It is beyond peradventure that 'freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974))).

[11] New York courts have recognized that many due process rights are broader under the New York Constitution than under the United States Constitution. *See Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 159-60 (1978). This is particularly true with regard to the liberty interest in the care and control of a child. *See Matter of St. Luke's Roosevelt Hosp. Ctr.*, 159 Misc.2d 932, 936 n.5 (Sup. Ct. 1993), *modifying*, 215 A.D.2d 337 (1995); *see also Matter of Ella B.*, 30 N.Y.2d 352 (1972) (counsel must be appointed for neglect proceedings under state constitution). For simplicity, this brief will focus on the federal due process clause. Because the state constitution provides for greater protections, any federal due process clause violation would also violate the state constitution.

This "right of the individual to … establish a home and bring up children … may not be interfered with, under the guise of protecting the public interest." *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). Rather, this is a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S.158, 166 (1944). It "has its source … in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'" *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977). Further, children have a reciprocal right to "basic aspect[s] of familial privacy," which preserve the "'emotional attachments that derive from the intimacy of daily association[]'" with the parent, free from the "coercive interference of the awesome power of the state." *Duchesne*, 566 F.2d at 825 (quoting *Organization of Foster Families for Equality and Reform*, 431 U.S. at 844).

Because such fundamental liberty interests are at play, the government restraint must satisfy strict scrutiny: the state must establish that the infringement of the "fundamental liberty interest" is "narrowly tailored to serve a compelling state interest." *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187, 198-99 (2020). This standard protects "rights and interests that are 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if

they were sacrificed.'" *Id*.; *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) (The Fourteenth Amendment "forbids the government to infringe [a fundamental liberty interest] *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."); *Golden v. Clark*, 76 N.Y.2d 618, 623 (1990) (applying strict scrutiny to a fundamental liberty interest). The order issued here cannot possibly satisfy this standard.

A. The State Lacks A Compelling Interest In Monitoring Ms. W. In Her Home.

The state lacks any compelling interest in random surveillance of Ms. W.'s parenting in her own home. To be sure, the government has a "compelling … interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Southerland*, 680 F.3d at 152; *see also Nicholson*, 3 N.Y.3d at 375. However, the "the state d[oes] not have any interest in preventing child abuse" when it has "no reason to suspect [the mother] of child abuse at the time that the supervision restrictions were imposed." *Schulkers v. Kammer*, 955 F.3d 520, 540 (6th Cir. 2020). That is exactly the situation here—not only is Ms. W. presumed to be a fit parent, but the family court has affirmatively acknowledged that Ms. W. is a fit parent. A15.

The father's neglect does not give the state a compelling interest in intruding on the mother's constitutional right to the care, custody, and control of her child by

surveilling her parenting in her home. The family court has already satisfied concerns about the child's safety by issuing the temporary order of protection. A24-25. It excluded the father from the family residence and required him to stay away from the child and the child's mother, against whom he has committed the domestic violence that undergirds the neglect petition. A24-25. No one at any point articulated any reason to believe that Ms. W. in particular (as opposed to some stereotype generally) would allow her abuser around her child. A7-22.

If ACS's position changed and it believed Ms. W. was somehow unfit, it would be required to file an Article 10 Petition against Ms. W. *See* Josh Gupta-Kagan, *In Re Sanders and the Resurrection of Stanley v. Illinois*, 5 Cal. L. Rev. Cir. 383, 383-84 (2014) ("If the State thinks a parent is unfit, the State should file a petition so alleging and prove its allegations at a trial."). Surveilling a fit parent on the remote, theoretical, and unsupported possibility that she would act in a way that would endanger her child is not a legal alternative.

The Michigan Supreme Court has examined the authority of "a court to interfere with a parent's right to direct the care, custody, and control of the children solely because the other parent is unfit, without any determination that he or she is also unfit." *Sanders*, 495 Mich. at 400. It held that such interference "essentially imposes joint and several liability on both parents," and noted that "[m]erely describing" such an exercise of government power "foreshadow[ed] its

constitutional weakness." *Sanders*, 495 Mich. at 401; *see also Matter of Telsa Z.*, 71 A.D.3d 1246, 1251 (3d Dept. 2010) (using the Family Court Act as "a back-door vehicle to dispense with formally charging a non-respondent parent" would "violate[] the non-respondent parent's basic right to due process"); *Williams*, 203 F. Supp. 2d at 163, 250-51 (noting the "double abuse" of mothers who have been victims of domestic violence and that it "harm[s] children" when the government "holds both the abuser and the abusee liable as a unit").

In sum, the state has no interest in surveilling Ms. W. The law recognizes that "natural bonds of affection lead parents to act in the best interests of their children." *Troxel*, 530 U.S. at 68 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)). Thus, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id*. Ms. W. falls within that category: the court explicitly acknowledged that she is "able to care for Sapphire" and no one has even alleged otherwise. A15. As a result, the state has no interest in entering her home.

B. The Family Court's Order Was Not Narrowly Tailored.

Even putting aside the lack of any compelling government interest in this search, the order was not narrowly tailored to achieve any such interest. Random searches of homes where children do not live with suspected abusers do not meaningfully further the state's interest in preventing child abuse. To the contrary, the order here is so overbroad that it affirmatively harms the child the court is trying to protect. These home searches instill fear in parents, undermine their authority, and destroy the possibility of a "normal family life." *Michael B.*, 80 N.Y.2d at 309.

Thus, the order affirmatively harms Sapphire and Ms. W.—ACS "spites its own articulated goals when it needlessly" interferes in this protected realm of the home. *See Stanley*, 405 U.S. at 652-53. By unnecessarily injecting itself into Ms. W.'s private family life, the government subverts the legislature's declared goal that children "grow up with a normal family life in a permanent home," which "offers the best opportunity for children to develop and thrive." Soc. Servs. Law § 384-b (McKinney). There is nothing normal about government agents entering a family home whenever they desire. And Sapphire should not grow up believing otherwise.

The family court's order treads heavily on Ms. W.'s constitutional rights without advancing any legitimate state interest, let alone a compelling one. The order must be vacated.

CONCLUSION

For all the reasons stated above, the family court's order as it relates to Ms. W. should be vacated.

Respectfully Submitted,

/s/ David Shalleck-Klein

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AFFIDAVIT OF E-MAIL SERVICE

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On March 21, 2024

deponent served the within: **Motion for Leave to File an Amici Brief**

upon:

See Attached Service

the e-mail address(es) designated by said attorney(s) for that purpose by e-mailing a true copy(ies) of same to the e-mail address(es) listed above.

Sworn to before me on March 21, 2024

Mariana Braylovskiy

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

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