24-3042

In the United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

AMICUS CURIAE BRIEF OF CHILDREN'S RIGHTS, CHILDREN'S DEFENSE FUND, JUVENILE LAW CENTER, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AND NATIONAL CENTER FOR YOUTH LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

EUGÉNIE ISEMAN
ELEANOR F. ROBERTS*
IRA P. LUSTBADER
CHILDREN'S RIGHTS
88 Pine Street, Suite 800
New York, NY 10005
(212) 683-2210
* *admitted pro hac vice*

CORPORATE DISCLOSURE STATEMENT

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

Dated: April 16, 2025

By: */s/ Eugénie Iseman*
EUGÉNIE ISEMAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are non-profit legal organizations that represent children in and at risk of entering the foster system, and other advocates for the rights of children writing in support of Plaintiffs-Appellants.

Children's Rights is a national advocacy organization committed to improving the lives of children who are in or impacted by government systems. Through advocacy and legal action, Children's Rights investigates, exposes, and combats violations of the rights of children, and holds governments accountable for keeping kids safe, healthy, and supported. For 30 years, Children's Rights has achieved lasting, systemic change for hundreds of thousands of children across more than 20 jurisdictions throughout the United States.

The Children's Defense Fund ("CDF") is a national advocacy organization working at the intersection of well-being and racial justice for children and youth through advocacy, community organizing, direct service, and public policy. CDF includes a New York State office, which conducts advocacy related to child welfare policy.

[1] All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2). No counsel for any party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential amicus briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

Founded in 1977, the National Association of Counsel for Children ("NACC"), is a 501(c)(3) non-profit child advocacy and professional membership association that advances children's and parent's rights by supporting a diverse, inclusive community of child welfare lawyers to provide zealous legal representation and by advocating for equitable, anti-racist solutions co-designed by people with lived experience. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. NACC's work includes federal and state level policy advocacy, the national Child Welfare Law

Specialist attorney certification program, a robust training and technical assistance arm, and an *amicus curiae* program. Through the *amicus curiae* program, NACC has filed numerous briefs promoting the legal interests of children in state and federal appellate courts, as well as the Supreme Court of the United States. More information about NACC can be found at www.naccchildlaw.org.

The National Center for Youth Law ("NCYL") is a private, non-profit law firm that uses the law to help children achieve their potential by transforming the public agencies that serve them. NCYL's priorities include ensuring that children and youth have the resources, support, and opportunities they need to live safely with their families in their communities and that public agencies promote their safety and well-being. NCYL represents youth in cases that have broad impact and has extensive experience using litigation to enforce the rights of young people in foster care.

Collectively, *amici* have a substantial interest in ensuring that children are not harmed by unjust separation from their families.

SUMMARY OF ARGUMENT

Amici submit this brief to assist the Court in understanding the enormous harm children suffer when separated from their parents. *Amici* respectfully argue that courts must recognize and specifically weigh this harm in upholding a child's

Fourteenth Amendment right to family integrity and Fourth Amendment right to be free of unreasonable seizures.

Defendants unlawfully removed a newborn child, K.A., from his father, K.W., shortly after birth and kept them separated for nearly three years, without ever naming his father as a respondent or alleging that he was unfit to care for K.A.

The district court erred in concluding that K.A.'s separation from his father for the crucial first three years of his life was justified. As discussed in Plaintiffs-Appellants' brief, Defendants violated both K.A. and K.W.'s due process rights to family integrity, a liberty interest which is reciprocal between parent and child. Br. for Pls.-Appellants 15, 45, Dkt. 64. *Amici* write to further detail the child's rights and urge this Court to reverse the district court's analysis of Defendants' broad and years-long infringement on K.A.'s liberty interest in his relationship with his father. This prolonged, unnecessary separation resulted in tremendous harm to K.A. and violated his fundamental right to live with his family under the Fourteenth Amendment. The district court should have applied "strict scrutiny" instead of the "shocks the conscience" standard to separation policies that infringe on a child's Fourteenth Amendment substantive due process right to family integrity.

In addition, Defendants' removal of K.A. violated his rights under the Fourth Amendment. The district court applied the standard requiring an imminent risk of

harm to support emergency extra-judicial removals under the Fourth Amendment incorrectly. If allowed to stand on appeal, the decision below sets a bad precedent, creating the risk of serious harm for many children who may be unnecessarily separated from their families in similarly unjustified circumstances.[2]

ARGUMENT

I. Children Suffer Lifelong Trauma and Harm When They Are Separated from Their Families

Extensive research demonstrates that children experience long-lasting trauma and harm when separated from their families and placed into the foster system. Even infants suffer trauma when they are deprived of physical contact with their parents, adversely affecting their ability to form attachments.[3] Pre-verbal children in particular experience distress from parental separation, leading to

[2] This amicus brief addresses a child's rights to family integrity and to be free of unreasonable seizures, and the harms children suffer when these rights are not upheld. *Amici* endorse Plaintiffs-Appellants' other arguments set forth in their appeal, *see* Br. for Pls.-Appellants, but do not address those issues here.

[3] *See, e.g.*, Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 528-30 (2019) (physical contact has crucial health benefits for infants; removed newborns suffer attachment stress and worse outcomes); Shefaly Shorey et al., *Skin-to-Skin Contact by Fathers and the Impact on Infant and Paternal Outcomes: An Integrative Review*, 40 Midwifery 207, 215 (2016) (multiple scientific studies found skin-to-skin contact between fathers and newborns regulates infants' breathing and stress).

The Supreme Court has recognized infants separated at three days old suffer loss. *Santosky v. Kramer*, 455 U.S. 745, 760 n. 11 (1982). The Second Circuit credited expert testimony that young children "are especially vulnerable to these [separation] stresses." *Nicholson v. Scoppetta*, 344 F.3d 154, 163 (2d Cir. 2003); *see also id.* at 174.

negativity and aggression.[4] Separation into the foster system often propels a child into a mental health crisis causing "toxic stress,"[5] interfering with the child's health and well-being, and resulting in negative behaviors and decreased abilities to regulate stress.[6] Research confirms that the toxic stress caused by separating children from their parents, particularly when the children are placed in the foster system, irreparably disrupts children's brain architecture and has substantial adverse effects on the trajectory of their lives, even if they are later reunified with their parents.[7]

---

[4] Kimberly Howard et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 Attachment & Hum. Dev. 5, 5-8, 20-21 (2011).

[5] *See* Colleen Kraft, *AAP Statement Opposing Separation of Children and Parents at the Borde*r, American Academy of Pediatrics (May 8, 2018), https://perma.cc/25QX-B2ZA (family separation causes toxic stress, which "can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health"); *Toxic Stress*, Harvard University Center on the Developing Child, https://developingchild.harvard.edu/key-concept/toxic-stress/ ("[R]esearch has demonstrated that supportive, responsive relationships with caring adults as early in life as possible can help prevent or reverse the damaging effects of toxic stress response.").

[6] William Wan, *What Separation from Parents Does to Children: 'The Effect Is Catastrophic,'* Wash. Post, June 18, 2018, https://perma.cc/7N85-CLEP; Andrew Garner et al., *Preventing Childhood Toxic Stress: Partnering with Families and Communities to Promote Relational Health*, Pediatrics, Aug. 2021; Jack P. Shonkoff et al., *Early Childhood Adversity, Toxic Stress, and the Impacts of Racism on the Foundations of Health*, 42 Ann. Rev. Pub. Health 115, 115-17 (2021) (toxic stress permanently impairs infants' learning, physical health, behavioral health, and mental health).

[7] Johayra Bouza et al., Soc'y Rsch. Child Dev., *The Science Is Clear: Separating Families Has Long-Term Damaging Psychological and Health Consequences for Children, Families, and Communities* (2018), https://www.srcd.org/briefs-fact-sheets/the-science-is-clear; *see* Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 Fam. Ct. Rev. 457, 457-59 (2003).

Separation from one's family, and the resulting interference with a child's ability to form attachments, adversely affects a child's emotional and social maturity. The trauma harms children's academic performance, behavior, confidence and self-esteem, social adjustment, and coping skills.[8] Even children who experience short-term stays in foster placement suffer trauma that negatively impacts development.[9] Young children who undergo removal into the foster system suffer "feelings of abandonment, rejection, worthlessness, guilt, and helplessness."[10] These children have worse lifelong behavioral and mental health outcomes, lower earnings, and greater likelihood of arrest and addiction than even maltreated children who remain at home.[11]

---

[8] Vivek Sankaran et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 Marq. L. Rev. 1161, 1166-69 (2019); Dolores Seijo et al., *Estimating the Epidemiology and Quantifying the Damages of Parental Separation in Children and Adolescents*, Frontiers Psych., Oct. 2016, at 1-2, 6; Hector Colon-Rivera et al., Am. Psych. Ass'n, *Separation of Immigrant Children and Families* (2018), https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-Separation-of-Immigrant-Children-and-Families.pdf; Jane Brennan, *Emergency Removals Without a Court Order: Using the Language of Emergency to Duck Due Process*, 29 J.L. & Pol'y 121, 147-49 (2020).

[9] Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. Pa. J.L. & Soc. Change 207, 211-12 (2016); Brennan, *supra* note 8, at 147-49; *see also* Sankaran et al., *supra* note 8, at 1165.

[10] Rosalind D. Folman, *"I Was Tooken": How Children Experience Removal from Their Parents Preliminary to Placement into Foster Care*, 2 Adoption Q. 7, 11 (1998).

[11] Brennan, *supra* note 8, at 149; Catherine Lawrence et al., *The Impact of Foster Care on Development*, 18 Dev. & Psychopathology 57, 59-60 (2006); Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583, 1607 (2007); Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. Pol. Econ. 746, 747, 766-67

The longer a child remains separated from their family, the greater the potential for harm. Separated children's prolonged exposure to toxic stress harms the immune system, decreases learning and memory, and leads children to act out and struggle with school, relationships, unemployment, low earnings, and health issues.[12]

Children exposed to placement changes, instability, and separation from their families—harms inherent to the foster system—typically suffer continued toxic stress, over and above the trauma caused by the initial separation, with severe consequences to their mental health and development.[13] Separation from family while in the foster system exacerbates attachment issues and causes behavioral problems that perpetuate placement instability.[14] Children who endure placement instability face a higher risk of low self-esteem, poor school performance, distrust

(2008); William Nielsen & Timothy Roman, Ecotone Analytics, *The Unseen Costs of Foster Care: A Social Return on Investment Study* 5, 12, 19 (2019).

[12] Nielsen & Roman, *supra* note 11, at 7, 14; Johan Vanderfaeillie et al., *Children Placed in Long-Term Family Foster Care: A Longitudinal Study into the Development of Problem Behavior and Associated Factors*, 35 Child. & Youth Servs. Rev. 587, 587-88, 591 (2013).

[13] Carolien Konijn et al., *Foster Care Placement Instability: A Meta-Analytic Review*, 96 Child. & Youth Servs. Rev. 483, 484 (2019); Trivedi *supra* note 3, at 545; Yvonne A. Unrau et al., *Former Foster Youth Remember Multiple Placement Moves: A Journey of Loss and Hope*, 30 Child. & Youth Servs. Rev. 1256, 1263-64 (2008); Chill, *supra* note 7, at 462.

[14] Konijn et al., *supra* note 13, at 484; Marc A. Winokur et al., *Systematic Review of Kinship Care Effects on Safety, Permanency, and Well-Being Outcomes*, 28 Rsch. on Soc. Work Prac. 19 (2015); Sankaran & Church, *supra* note 9, at 237.

in guardians and adults, and suicidal thoughts.[15] Studies also show that these long-term harms caused by removal can result in child welfare involvement and removals for future generations.[16]

Accordingly, removing a child from their home and family should only happen in the most compelling and relatively rare circumstances, where the harm of removal is outweighed by the greater harm that is likely to result if the child is not removed.[17] To minimize prolonged trauma, any separation should be as short as possible.

II. Children Have a Fundamental Constitutional Right to Remain with Their Families

A child has a fundamental constitutional right to live with their family and remain free from the trauma and harm that would result from unnecessary separation imposed by the state. A child's constitutional right to family integrity is grounded in the Fourteenth Amendment's Substantive Due Process Clause.[18] The

[15] Unrau et al., *supra* note 13, at 1263-64; Konijn et al., *supra* note 13, at 484; Daniel J. Pilowsky & Li-Tzy Wu, *Psychiatric Symptoms and Substance Use Disorders in a Nationally Representative Sample of American Adolescents Involved with Foster Care*, 38 J. Adolescent Health 351 (2006).

[16] *See* Jane Marie Marshall et al., *Intergenerational Families in Child Welfare: Assessing Needs and Estimating Permanency*, 33 Child. & Youth Servs. Rev. 1024 (2011).

[17] Mical Raz & Vivek Sankaran, *Opposing Family Separation Policies for the Welfare of Children*, 109 Am. J. Pub. Health 1529 (2019) ("[A]part from extreme cases of imminent physical harm to children, the family unit is the preferable place for children to grow and thrive."); *see* Trivedi, *supra* note 3, at 526.

[18] A child's right to family integrity is reciprocal to their parent's right to family integrity. *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977); Br. for Pls.-Appellants 15, 45.

Supreme Court has described the right to family integrity as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Santosky*, 455 U.S. at 753 (holding that parents and children share an interest in preventing termination of their relationship); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) ("the sanctity of the family . . . is deeply rooted in this Nation's history and tradition"); *Duchesne*, 566 F.2d at 825 ("[T]he most essential and basic aspect of familial privacy [is] the right of the family to remain together without the coercive interference of the awesome power of the state."); *Kia P. v. McIntyre*, 235 F.3d 749, 759 (2d Cir. 2000) ("[C]hildren have a parallel constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association.").[19]

As with other fundamental rights, government interference with a child's right to remain with their family is subject to strict scrutiny. This means government agencies cannot separate a child from his family in the absence of "compelling circumstances." And even then, the intrusion must be "narrowly tailored" to serve the state's interest in protecting the child's health and well-being. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (Due process "forbids the government to infringe . . . 'fundamental' liberty interests at all, no

[19] Except where noted, all internal quotation marks and citations have been omitted.

matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Kia P.*, 235 F.3d at 758; *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (concluding it would be unconstitutional "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."); *Moore*, 431 U.S. at 499.

Courts in this Circuit regularly apply strict scrutiny when evaluating whether agency policies have deprived plaintiffs of their substantive due process right to family integrity under the Fourteenth Amendment. "In considering the constitutionality of the policy or practice of a state agency rather than the specific acts of individual officers, it is appropriate to apply the higher standard and stricter analysis that is applied to legislation." *Nicholson v. Williams*, 203 F. Supp. 2d 153, 243-45 (E.D.N.Y. 2002) (applying strict scrutiny to New York's Administration for Children's Services' ("ACS") practice of removing children because their mothers had suffered domestic violence, and finding this violated mothers' and children's substantive due process rights); *see also United States v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005) (applying strict scrutiny to a supervised release condition that required a father to obtain authorization before spending time alone

with his child); *J.S.R. by & through J.S.G. v. Sessions*, 330 F. Supp. 3d 731, 741 (D. Conn. 2018) (applying strict scrutiny to federal policy causing family separation); *Joyner by Lowry v. Dumpson*, 712 F.2d 770, 777-78 (2d Cir. 1983) (stating the Second Circuit applies strict scrutiny to state actions that intrude on family integrity); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (when considering a law's constitutionality, courts must evaluate whether the law "advance[s] a compelling state interest by the least restrictive means").

The City's policies caused K.A.'s unnecessary, harmful, and prolonged separation, and these policies require strict scrutiny. Policies include widespread informal "governmental 'custom[s].'" *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *see, e.g.*, *Russo v. City of Bridgeport*, 479 F.3d 196, 212 n.15 (2d Cir. 2007); *Braxton/Obed-Edom v. City of New York*, 368 F. Supp. 3d 729, 739 (S.D.N.Y. 2019); *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 130 n.10 (2d Cir. 2004). ACS's customs of making emergency removals when imminent danger does not exist,[20] and failing to make any reasonable efforts to reunify after removal, caused K.A.'s years-long separation from his father. Validating the district court's errors would condone the removal and separation policies ACS employed in this case.

[20] The imminent danger standard applies to emergency removals under the Fourth Amendment, as discussed in Section III.

This Circuit has found ACS policies exist when workers remove many children per year on the same basis and without imminent risk of harm. *Nicholson*, 344 F.3d at 165-66. Over the past 15 months, ACS engaged in pre-filing emergency removals for about half of all children separated each month.[21] These practices have persisted for years: in 2018, ACS sought emergency removals in "nearly half" of all separations, often without imminent danger, which comprised almost exclusively of non-white children.[22] An internal audit found ACS "staff are not incentivized or supported to develop sufficient evidence to meet" the "imminent risk of harm" standard.[23] Additionally, this practice "targets Black and brown parents" with a "different level of scrutiny" and treats them "as if they are not competent."[24] These policies especially harm Black children, who face over half of all emergency removals but comprise less than a quarter of the child

[21] N.Y.C. Admin. for Child.'s Servs., *Flash Report: March 2025* (2025), https://www.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2025/03.pdf (showing between 42.2% and 61.2% of removals were pre-filing emergency removals).

[22] Yasmeen Khan, *Family Separation in Our Midst*, W.N.Y.C., Apr. 17, 2019, https://www.wnyc.org/story/child-removals-emergency-powers/; *see* Ctr. for N.Y.C. Affairs, *Watching the Numbers: COVID-19's Continued Effects on the Child Welfare System* 3-5 (2023), https://bit.ly/3R2OPGI (finding that in 2018 and in 2022, about half of ACS foster care admissions involved emergency removals).

[23] N.Y.C. Admin. for Child.'s Servs., *Draft Racial Equity Participatory Research & System Audit: Findings and Opportunities*, 27 (2020), available at https://www.bronxdefenders.org/wp-content/uploads/2022/11/DRAFT_NIS_ACS_Final_Report_12.28.20.pdf (hereinafter *Draft ACS Audit*).

[24] *Id*. at 14-15; Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes*, N.Y. Times, Nov. 22, 2022, https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html.

population.[25] Nothing in the complaint here indicates that imminent danger existed here. JA17-47. As in *Nicholson*, 344 F.3d 154, the emergency removal practices ACS used to remove K.A. followed a policy of subjecting children—and disproportionately subjecting Black children—to emergency removals without showing imminent danger.

For removal policies to respect family integrity, before separating a child, a foster agency must consider all potential alternatives and resources that can be provided to keep the family together. *See, e.g.*, *Nicholson*, 344 F.3d at 163; *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999). Removals are permitted *only* when they are the least restrictive means of safety. *See Nicholson v. Scoppetta*, 116 F. App'x 313, 1-2 (2d Cir. 2004) (The trauma of removal weighs against emergency removals except in "rare circumstance[s] in which the time would be so fleeting and the danger so great" that it cannot "be mitigated by reasonable efforts to avoid removal.").

ACS also has a policy of not making reasonable efforts to reunite families. Foster agencies have a statutory obligation under federal and New York law to use "reasonable efforts" to avoid a child's separation from each parent, and to promote

[25] NYCLU, *Racism at Every Stage: Data Shows How NYC's Administration for Children's Services Discriminates Against Black and Brown Families* (2023), https://www.nyclu.org/report/racism-every-stage-data-shows-how-nycs-administration-childrens-services-discriminates.

family reunification promptly where separation has occurred. 42 U.S.C. § 671(a)(15)(B); N.Y. Soc. Serv. Law §§ 358-a(1)(a), (3)(a); *see also* N.Y. Soc. Serv. Law §§ 384-b(1)(a)(i)-(iii), 131(3) (forbidding poverty-based separation and requiring services). Even when an agency has a compelling reason to intervene, if it does not make required reasonable efforts prior to and after separating a child from a presumptively fit parent, it does not engage in a narrowly tailored intervention. Therefore, prior to removal, the agency must attempt to address any risk without removal and articulate its efforts to avoid separation to the court. N.Y. Fam. Ct. Act §§ 1022(a)(iii), 1027(b)(ii); 42 U.S.C. § 672(a)(2)(A)(ii); *see also Nicholson*, 116 F. App'x 313 at 2. After removal, the agency must make reasonable efforts to reunify the family, to ameliorate the problems that caused removal, and to encourage the parent-child relationship. N.Y. Soc. Serv. Law § 384-b(7)(f). This obligation to make reasonable efforts requires the relevant agencies to *proactively* address the underlying cause of a child's dependency case.[26]

However, ACS has a policy of making conclusory representations of "reasonable efforts" without actually providing resources to support family

[26] *See, e.g.*, Emma Monahan et al., Chapin Hall, *Economic and Concrete Supports: An Evidence-Based Service for Child Welfare Prevention* (2023); Yasmin Grewal-Kök, Chapin Hall, *Flexible Funds for Concrete Supports to Families as a Child Welfare Prevention Strategy* 1 (2024); Susan P. Kemp et al., *Engaging Parents in Child Welfare Services: Bridging Family Needs and Child Welfare Mandates*, 88 Child Welfare 101, 118-20 (2009); *see also* N.Y. Fam. Ct. Act § 1017(a).

reunification. For instance, ACS's internal report found the agency has not developed systems to ensure that the agency makes reasonable efforts to reunify.[27] There is no indication that the agency complied with its statutory obligations to use reasonable efforts to avoid separation from K.W. and to speedily reunite K.A. with his father. Indeed, the district court did not identify a single agency effort to avoid separating K.A. from his father. Yet, the district court pointed to at least one boilerplate representation to the family court that reasonable efforts supposedly had been made, without specifying what those efforts were or how they supported the father or son. SPA6. ACS's harmful policies encourage workers to present boilerplate representations that they made reasonable efforts without specifying what those efforts were or providing any evidence of narrowly tailored efforts to the court. Accepting the district court's evaluation of reasonable efforts would reinforce ACS's policy of presenting boilerplate, conclusory statements that efforts had been made without actually making reasonable efforts to reunite families. This ACS policy further indicates that the ACS worker's removal practices were not narrowly tailored here.

[27] *Draft ACS Audit*, *supra* note 23, at 27. In New York, even though courts rubberstamp agencies' boilerplate reasonable efforts claims, ACS follows policies that do not meet its statutory and constitutional responsibilities in the first place. Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases*, 10 Conn. Pub. Int. L.J. 13, 27 (2010); Annie E. Casey Foundation, *Advisory Report on Front Line and Supervisory Practice* 47-48 (2000) (finding reasonable efforts rarely addressed in New York City).

Moreover, ACS's policies allowed the caseworkers here to file for removal without naming the non-respondent parent and to continue not naming that parent for years. These policies block non-respondent parents like K.W. from legal recourse to vindicate their right to family integrity. In affirming this behavior, the district court condoned ACS's broad policies allowing the City to take a child from any fit parent whenever allegations exist against the other parent.

Because Defendants acted pursuant to policies, the district court should have applied the "strict scrutiny" standard to K.A.'s family integrity claim, rather than the "shocks the conscience" standard. Indeed, the Second Circuit has only used the "shocks the conscience" standard to evaluate whether the "specific act of individual officers" violates substantive due process. *Nicholson*, 203 F. Supp. 2d at 243; *see, e.g.*, *Southerland v. City of New York*, 680 F.3d 127, 151-2 (2d Cir. 2012); *Tenenbaum*, 193 F.3d at 600. In contrast, the challenged conduct here was pursuant to agency policies and practices which the government officer followed. These practices are governed by strict scrutiny. Even if the "shocks the conscience" standard applies, the facts recited by the district court reflect an unjustified, harmful separation that should be considered "shocking, arbitrary, and egregious" to any reasonable person. SPA17 (quoting *Southerland*, 680 F.3d at

127, 152).[28] K.A.'s case and claims meet and should be allowed to proceed under either standard.

III. Children Have a Fourth Amendment Right to Be Free from Unreasonable Government Seizures

The harm of separation and the right to family integrity inform the narrow and strict standard for removals under the Fourth Amendment. Just as the government's actions must be narrowly tailored before interfering with the child's right to family integrity, the government must meet a similarly high bar for removing the child without a court order. It is well-established that in order to conduct an emergency removal, the Fourth Amendment requires that there be "exigent circumstances." *Tenenbaum*, 193 F.3d at 602; *Southerland*, 680 F.3d at 150; *Schweitzer v. Crofton*, 560 F. App'x 6, 10 (2d Cir. 2014). The Circuit has defined "exigent circumstances" narrowly, requiring the government to show that the child is at immediate risk of harm in the time it would take to get a court order. *See Southerland v. Woo*, 44 F. Supp. 3d 264, 276 (E.D.N.Y. 2014), *aff'd*, 661 F. App'x 94 (2d Cir. 2016) (affirming the district court's holding that under the

[28] Defendants' unjustified rupture of K.A.'s relationship with his father at such a vulnerable age—undermining the parent-child bond during K.A.'s formative early years without concern for the lifelong impact on K.A.—shocks the conscience. First, ACS removed newborn K.A. from his caring non-respondent father based on previous allegations against his mother (regarding different children), without any allegations against the father or indication of harm to K.A. Then, despite the known harm of early and prolonged separations, ACS continued to separate K.A. from his father for three years and made his father navigate numerous hurdles to prove his parental fitness—still without ever making formal allegations against him or finding him unfit.

Fourth Amendment, an emergency removal is unconstitutional unless the child faces "immediate danger"); *Tenenbaum*, 193 F.3d at 604-605; *see, e.g.*, *Schweitzer*, 560 F. App'x at 11 (requiring the child face an "immediate threat to safety" for the emergency removal to comply with the Fourth Amendment); *Doe ex rel. Doe v. Whelan*, 732 F.3d 151, 156 (2d Cir. 2013) (same). This high and strict standard must necessarily reflect and incorporate the well-established harms of a child's separation from a parent. *See supra* Section I.

IV. The Separation of K.A. from His Father Did Not Come Close to Meeting Constitutional Standards

Finally, the district court order reflects no legitimate basis for separating K.A. from his father, even if the statements that the district court improperly cherry-picked and relied on from the family court record could be accepted as true.[29] As established above, the Fourteenth Amendment requires the state engage

[29] The district court credited statements from the family court record that cannot be accepted as true to rebut the complaint's allegations. A court may take judicial notice of a document filed in another court "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006). The district court's erroneous use of family court materials for the truth of their contents is particularly concerning given the relaxation of hearsay rules in family court proceedings such as K.A.'s. *See* N.Y. Fam. Ct. Act § 1046; 10 Law and the Family New York § 77:85 (2024 ed.) ("[A]n exception to the hearsay rule has been created in cases involving allegations of abuse and neglect of a child."). The fact that the complaint "allege[d] facts related to or gathered during a separate litigation [did] not open the door to consideration, on a motion to dismiss, of any and all documents filed in connection with that litigation." *Goel v. Bunge, Ltd.*, 820 F.3d 554, 560 (2d Cir. 2016) (relying on materials not "integral" to the complaint improperly transforms the Rule 12(b)(6) inquiry into a "summary-judgment proceeding . . . featuring a bespoke factual record, tailor-made to suit the needs of defendants").

in narrowly tailored intervention, which would at a minimum involve ACS instituting policies that follow its legal mandate to make reasonable efforts both before separating a parent and child and to reunify after separation. The Fourth Amendment requires the state to find an imminent risk of danger in the time it would take to get a court order before conducting an emergency removal. Here, ACS failed to identify an imminent risk of harm, let alone a risk that reasonable efforts could not have mitigated. Nothing indicated that K.A. had been abused or otherwise harmed prior to removal, or that he would have been at risk of harm had he remained with his father instead of being separated for three years. Although the court discussed at length K.A.'s mother's alleged inability to care for her children (apparently related to her mental illness), this has no bearing on the ability of K.A.'s *father* to act as a responsible parent. *E.g.*, *In re Telsa Z.*, 71 A.D.3d 1246, 1250-51 (3d Dep't 2010) (family court violated due process by removing children from their mother when only their father was accused of abuse); *see also In re Sapphire W.*, 2025 N.Y. Slip Op. 00662, 9 (2d Dep't 2025) (recognizing that family court violated due process by subjecting non-respondent parent to agency supervision).[30]

[30] Courts across the country have found it improper to subject a non-respondent parent to supervision on the ground that the other parent was the subject of an investigation. *See In re Sanders*, 852 N.W.2d 524, 537 (Mich. 2014) (maltreatment by one parent did not authorize agencies to invade the other parent's rights, because "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship"); *People ex rel. United States*, 121 P.3d 326, 327 (Colo. App. 2005) (maltreatment

K.A.'s father acknowledged paternity at the hospital the moment K.A. was born, and cared for him until ACS took K.A. from his arms. Throughout the separation, K.A.'s father demonstrated his "full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child." *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983).[31]

Indeed, the day prior to removing K.A., Defendant Amar Moody entrusted K.W. to care for him at home overnight. After Moody conducted a home visit, including inspecting K.W. and the home, he chose to leave K.A. in K.W.'s custody without identifying any risks to K.A., and without conducting an emergency

---

findings against one parent could not be used to require the other parent to comply with treatment plan); *In re Parental Rights as to A.G.*, 295 P.3d 589, 596 (Nev. 2013) (court could not require a non-respondent father to comply with a case plan to reunify with child).

[31] The complaint shows K.A.'s father's commitment to being a responsible parent. *See, e.g.*, JA17-47 ¶ 22 (acknowledging paternity at birth and taking K.A. home from hospital); *id.* ¶¶ 23-28 (communicating with ACS regarding K.A.'s wellbeing, allowing them into his home, and carrying K.A. to ACS upon request); *id.* ¶ 68 (clearly and repeatedly objecting to K.A.'s removal, proactively seeking K.A.'s return, and immediately indicating that he would comply with necessary measures for reunification); *id.* ¶¶ 69, 73 (filing for paternity *pro se* twice); *id.* ¶¶ 71, 75-76, 79-81, 108-111 (complying with various "service plans," including completing multiple parenting courses, and submitting to inspections and supervision despite being confirmed K.A.'s father and never being named a respondent); *id.* ¶¶ 117-123 (using every opportunity to expand visitation with K.A., having to prove himself worthy of unsupervised visits with and custody of his child).

Children with involved fathers benefit from improved emotional regulation, academic achievement, and social development, yet many foster agencies fail to engage fathers as caregivers. Michael W. Yogman & Amelia M. Eppel, *The Role of Fathers in Child and Family Health*, *in* Engaged Fatherhood for Men, Families, and Gender Equality: Healthcare, Social Policy, and Work Perspectives 15 (Marc Grau Grau et al. eds., 2022); *Why Should Child Protection Agencies Engage and Involve All Fathers?*, Casey Family Programs (Jan. 3, 2024), https://www.casey.org/father-engagement-strategies/#:~:text=Fathers%20play%20a%20critical%20role,are%20separated%20from%20their%20family.

removal or seeking a removal order. The fact that Moody determined that K.A. could safely remain in his father's custody for a full night shows that he could not have believed K.A. faced imminent danger. It also shows that if Moody had any reservations about K.A.'s safety, he had ample time to seek a court order. Further, when K.W. brought K.A. to the office the following day, there is no indication (from either the complaint or the additional facts recited by the district court) that ACS identified *any* risk—much less imminent danger—that had developed since the previous day when K.A. was allowed to remain at home. But ACS nonetheless removed K.A., without seeking a court order and despite the lack of imminent danger, in keeping with its policy of regularly conducting such warrantless "emergency removals."

Beyond the initial removal, the prolonged separation was also not justified by any reasons given by the district court. There was no reason to keep K.A. away from his father simply because K.W. allegedly had an ongoing relationship with K.A.'s mother at the time of the initial removal, or because the mother was present at some visits between K.A. and K.W. K.A.'s mother was determined to have *neglected* her prior children; nothing in the district court order demonstrates that K.A. or his siblings were subjected to physical abuse or that the mother's mere presence presented a risk of danger. SPA27. Absent actual physical abuse, it is nearly always in a child's best interest to maintain a relationship with their parent,

even when their parent is unable to care for them. *Garmhausen v. Corridan*, No. 07-CV-2565, 2014 WL 12861097, at *7, *10 (E.D.N.Y. Aug. 1, 2014) (noting the "presumption that visitation between the child and the noncustodial parent is in the best interests of the child" and "[p]arents generally have a duty to foster and protect the child's relationship with the other parent"), *R&R adopted*, No. 07-CV-2565, 2014 WL 12861098 (E.D.N.Y. Aug. 20, 2014).[32]

The three-year separation also cannot be justified by the court's observation, based erroneously on family court records, that K.W.'s apartment was small, that K.A. allegedly returned from certain visits with a wet diaper, and that K.W. supposedly tested positive for marijuana use on occasion. SPA11. *E.g.*, *Termination of Parental Rts. Proceeding Lakeside Fam. & Child.'s Servs. v. Conchita J.*, 10 Misc.3d 1060(A), 2005 WL 3454328, at *9 (Fam. Ct. 2005) (parent must have "a home . . . to go to" but "[i]t doesn't have to be a palace [or] . . . a certain size apartment"); *In re Milagros A.W.*, 9 N.Y.S.3d 676, 677 (2d Dep't 2015) (father's delay in changing his newborn's soiled diaper did not establish neglect); *In re Kiana M.-M.*, 997 N.Y.S.2d 723, 724-25 (2d Dep't 2014) (father allowing child to soil herself in a diaper rather than taking her to restroom was "not a sufficient basis to support a finding of neglect"); *In re Gina R.*, 180 N.Y.S.3d

[32] Social science literature finds that children's outcomes improve when families are kept intact whenever safely possible. *E.g.*, Susan L. Brooks & Ya'ir Ronen, *The Notion of Interdependence and Its Implications for Child and Family Policy*, 17 J. Feminist Fam. Therapy 23, 33 (2008).

745, 747 (4th Dep't 2022) (mother's marijuana use could not establish neglect without separate finding that the child was impaired or at imminent risk of impairment); *In re Nassau Cnty. Dep't of Soc. Servs. v. Denise J.*, 87 N.Y.2d 73, 79 (N.Y. 1995) (newborn's positive toxicology report was not enough to find neglect even against birthing parent).

New York courts have repeatedly recognized that removal requires a finding of serious harm or risk of serious harm and cannot be justified merely by "what might be deemed undesirable parental behavior." *In re Kiana M.-M.*, 997 N.Y.S.2d at 724 (quoting *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 369 (2004)); *see also In re Jamie J. (Michelle E.C.)*, 30 N.Y.3d 275, 286-87 (N.Y. 2017) (holding that one of the only "constitutionally permissible" reasons to separate parent and child would be a showing of "persisting neglect") (quoting *In re Marie B.*, 62 N.Y.2d 352, 358 (N.Y. 1984)).

Thus, the district court failed to identify any imminent risk justifying the initial, extra-judicial removal of K.A. under the Fourth Amendment. Based on the facts in the complaint, there were no "compelling circumstances" justifying K.A.'s removal and the long deprivation of his fundamental constitutional right to remain with his family under the Fourteenth Amendment. Further, Defendants' actions were certainly not "narrowly tailored."

CONCLUSION

Children like K.A. suffer tremendous and long-lasting harm when unnecessarily separated from their parents. A child's constitutional right to family integrity provides an important safeguard against this harm, as does the high bar for emergency removals under the Fourth Amendment. The district court's erroneous decision should be reversed, and this case should be allowed to proceed.

Dated: April 16, 2025

Respectfully submitted,

By: */s/ Eugénie Iseman*

EUGÉNIE ISEMAN
ELEANOR F. ROBERTS*
IRA P. LUSTBADER
CHILDREN'S RIGHTS
88 Pine Street, Suite 800
New York, NY 10005
(212) 683-2210

** admitted pro hac vice*

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,494 words and uses a proportionally spaced typeface of 14-point Times New Roman font.

Dated: April 16, 2025

By: */s/ Eugénie Iseman*
EUGÉNIE ISEMAN

CERTIFICATE OF SERVICE

I hereby certify that, on April 16, 2025, I caused the foregoing to be electronically filed with the Clerk of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All counsel in this case are registered CM/ECF users and will be served by the appellate CM/ECF.

Dated: April 16, 2025

By: */s/ Eugénie Iseman*
EUGÉNIE ISEMAN