To be argued by:
EMILY S. WALL (10 minutes)

New York County Family Court Docket Nos.: [redacted]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of

LUCIANO P., NATALIE S., AVA P., and JUSTINA S.,

Children Under Eighteen Years of Age Alleged to Be Neglected By

LOUIS P.,

Respondent-Appellant,

ADMINISTRATION FOR CHILDREN'S SERVICES,

Petitioner-Respondent.

BRIEF FOR RESPONDENT-APPELLANT LOUIS P.

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PRELIMINARY STATEMENT

While white adults use marijuana at a rate equal to that of people of color, the overwhelming majority of parents who are accused of neglect as a result of their marijuana use are low-income people of color. Appellant Louis P. and the mother of the subject children, Sabrina G., were unfortunate victims of this disparity and, as a result, despite no evidence that their marijuana use harmed or presented a risk of harm to their children, they were subject to years of surveillance and disruption of their family and Louis P. was burdened with the stigma of a neglect finding.

The surveillance of Louis's family began when the public hospital in which Sabrina gave birth tested her urine for drugs, something that rarely happens to white middle-class mothers. When the test indicated the presence of marijuana, the hospital called the Statewide Central Register of Abuse and Maltreatment, triggering an investigation by the Administration for Children's Services ("ACS"). After its investigation, ACS filed neglect petitions against both Louis and Sabrina in violation of its own policy that "parental rights should not be impaired on the basis of cannabis use or cultivation unless it is endangering a child."

The family court then placed the parents under supervision and imposed conditions and restrictions on their custody of and contact with their children.

While Sabrina was able to shorten this process by consenting to a finding of neglect and agreeing to monitoring, Louis did not consent and instead challenged the allegations of neglect in a trial. In its decision after the trial, however, the family court misinterpreted and misapplied the law, making a finding of neglect despite explicitly stating that "at no time was evidence presented that the four subject children were harmed or at risk of harm." This finding was not only wrong on the law but it was contrary to the intent of the family court act, which is designed to limit state intervention into family life to those cases where intervention is necessary to protect a child from serious harm.

The court's finding was based on a misinterpretation of a provision in the family court act that creates an inference that children are at risk of harm when a parent repeatedly misuses a substance to the point that they experience or would normally experience substantial intoxication or a substantial impairment of judgment. The family court misread this Court's case law to eliminate the requirement in that

provision that the petitioner show that Louis's use caused the level of impairment specified in the statute and made a finding based on repeated use alone.

Even if the family court's interpretation had been correct, however, and the inference created by the statute had applied, the family court should have found that the inference of risk was rebutted by the evidence that Louis only used marijuana outside the presence of the children, who were healthy and well cared for.

Finally, even if a finding of neglect was required under the statute, the family court should have granted Louis's motion to dismiss the petitions, as the aid of the court was not required to protect the children when they had never been exposed to any risk of harm as a result of Louis's actions.

QUESTION PRESENTED

Is a family court required to make a finding of neglect when a parent engages in regular marijuana use even when the use occurs outside the presence of the children, does not result in intoxication or substantial impairment of judgment, and the children are not harmed or at imminent risk of harm as a result of that use?

The court below answered yes.

STATEMENT OF THE CASE

Louis P. and Sabrina G. are Latino parents. They have two children together, Luciano P. and Ava P.; Sabrina also has two daughters, Justina S. and Natalie S., who are not related to Louis, but who he considers his own (8/15/18 Tr. 14, 33; 4/25/18 Tr. 9). Sabrina and the four children live together in a three bedroom apartment in Manhattan (8/15/18 Tr. 15; 11/21/17 Tr. 19–20). Louis lives in his own apartment in the Bronx, but visits the children two to three times a week (8/15/18 Tr. 15). The family also goes on vacations together, to places like Cancún, Mexico and Puerto Rico (8/15/18 Tr. 17; 11/21/17 Tr. 9).

Louis supports the children financially by paying for necessities, like food, clothing, and school supplies, as well as for extras, like trips to the hair or nail salon (8/15/18 Tr. 15–16). At the time of the family court proceedings, Louis had been working at a Jewish Community Center for approximately three years (id.). There he supervised about 300 children who attended classes and a nursery school (id. at 24). Before that, he owned a state-licensed liquor store (id. at 16, 24).

The ACS investigation

ACS became involved with Louis's family on Friday, January 20, 2017, when a report was called in to the Statewide Central Register by Harlem Hospital, a member of New York City's Health and Hospitals (11/21/17 Tr. 8, 17). Sabrina had just given birth to Ava there the day before and, like many women who give birth in public hospitals,[1] Sabrina was tested for drugs. She tested positive for marijuana and, as a result, the hospital called in a report against her (id. at 18). The report did not contain any allegations as to Louis (id.).

Upon receiving the report, ACS conducted an investigation into the family (11/21/17 Tr. 8, 19). As part of that investigation, the following Monday, ACS Child Protective Specialist ("CPS") [redacted]

1 See Oren Yaniv, WEED OUT: More than a dozen city maternity wards regularly test new moms for marijuana and other drugs, Daily News (Dec. 29, 2012), available at https://www.nydailynews.com/new-york/weed-dozen-city-maternity-wards-regularly-test-new-mothers-marijuana-drugs-article-1.1227292; Hearing on the Impact of Marijuana Policies on Child Welfare Before the Committees on Hospitals and General Welfare, New York City Council 2–4 (Apr. 10, 2019) (Testimony of Nahal Zamani, Advocacy Program Manager, Center for Constitutional Rights), available at https://ccrjustice.org/sites/default/files/attach/2019/04/CCR_Testimony_ChildWelfare_MarijuanaUse-NZamani-20190410.pdf (discussing "the discriminatory targeting of drug testing for new mothers and their newborns"); see also Yasmeen Khan, City Council Asks Why NYC Is 'Tearing Families Apart' For Marijuana Use, Gothamist (Apr. 11, 2019), https://gothamist.com/news/city-council-asks-why-nyc-is-tearing-families-apart-for-marijuana-use (describing practice of drug testing women who give birth in public hospitals, often without their consent).

P made an unannounced home visit to the home in which Sabrina and the children lived (id. at 9, 19).

When Ms. P conducted her visit, Ava had already been discharged from the hospital (id. at 19) and Ms. P observed Sabrina, Louis, Ava, and Justina in the home (id. at 23). Although it was a school day, Justina was home because she was receiving home instruction while she recovered from a hip surgery (4/25/18 Tr. 9–10). Natalie and Luciano were in school (11/21/17 Tr. 23).

Ms. P observed Sabrina and Louis smiling and interacting appropriately with Ava and noted that Ava appeared to be developing normally (11/21/17 Tr. 23; 4/25/18 Tr. 8). In addition, Ms. P was able to observe the entire apartment and found nothing to be concerned about (4/25/18 Tr. 18). The home was clean, the kitchen was stocked with food, and the children had plenty of toys and clothing (11/21/17 Tr. 20–21).

During the home visit, Ms. P had a conversation with Louis (11/21/17 Tr. 8). He told her about his relationship with the children and his employment (11/21/17 Tr. 9–10; 4/25/18 Tr. 9). Ms. P then asked Louis about his drug use (11/21/17 Tr. 10). He disclosed that he

smokes marijuana (id.). He did so in his own apartment after work (8/15/18 Tr. 19, 28). Typically he smoked one joint a day in the shower as a way to wind down before going to sleep (id. at 19, 30, 40). During his conversation with Ms. P[redacted], Louis told her that, at the time, he was smoking two blunts a day (11/21/17 Tr. 10; 8/15/18 Tr. 25–26). He initially told her one joint a day, but when she asked him the question again he got a little upset and said "look, two/three, whatever you want to put" (8/15/18 Tr. 18). Ms. P[redacted] asked Louis if he would be willing to take a drug test, but he declined noting that he had already acknowledged that he used marijuana (11/21/17 Tr. 10).

Louis had never smoked marijuana in the children's presence or been under the influence of marijuana in the children's presence (8/15/18 Tr. 20). Furthermore, he had never used marijuana to the extent that he lost control of his actions, became disoriented, experienced hallucinations, became irrational, or experienced a substantial impairment of judgment (id. at 27–30).

When Ms. P[redacted] interviewed the three older children, she learned that all of them had a positive relationship with Sabrina and Louis and none of them had ever seen either adult using drugs (4/25/18 Tr. 13, 14–

15). Justina, in fact, first learned of Louis's marijuana use when she overheard part of his conversation with Ms. P[redacted] (8/15/18 Tr. 36).

As part of her investigation, Ms. P[redacted] learned that there had been a previous ACS investigation into the family in 2010 after Justina, who was being bullied at school, told her guidance counselor that she wanted to kill herself (11/21/17 Tr. 11; Respondent's Ex. A). During that investigation both parents had been upfront with the caseworker about their marijuana use, but had declined to take a drug test or participate in drug treatment. While that report had been indicated, meaning that ACS found some credible evidence of maltreatment,[2] ACS had not filed a petition in family court (11/21/17 Tr. 11).

Initial Proceedings in Family Court

ACS policy recognizes that a "parent's use of a substance . . . is not in and of itself a basis for a finding of neglect" and that "parental rights should not be impaired on the basis of cannabis use or cultivation unless it is endangering a child."[3] Despite the lack of any indication

2 See Soc. Servs. L. § 412(7).

3 Hearing on the Impact of Marijuana Policies on Child Welfare Before the Committees on Hospitals and General Welfare, New York City Council 1,2 (Apr. 10, 2019) (Testimony of David A. Hansell, Commissioner New York City Administration for Children's Services) available at

that Louis's or Sabrina's substance use had an impact on the children, however, on February 16, 2017, ACS filed neglect petitions against Louis and Sabrina alleging only that they use marijuana and refuse to enroll in a drug treatment program (Neglect Petition).

Although ACS did not seek the removal of the children, they requested that the temporary release of the children to both parents be conditioned on the parents' willingness to comply with preventive services and random drug screens, to participate in an evaluation by a certified alcohol and substance abuse counselor ("CASAC") and to attend any drug treatment program recommended by that evaluation (2/16/2017 Tr. 6). While Sabrina consented to these terms (2/16/2017 Tr. 7), Louis did not (2/22/2017 Tr. 7). As a result, the court ordered that the children be temporarily released to Sabrina only, effectively depriving Louis of custody of his children, and that Louis not be permitted to have overnight visits with the children outside their home or to visit with them if he is under the influence (3/7/17 Tr. 4; Order Mar. 7, 2017).

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https://legistar.council.nyc.gov/View.ashx?M=F&ID=7167434&GUID=E2C14D9E-F5D4-4F2C-9CE5-318DC5D44063.

The case against Sabrina was resolved through her consent to entry of a finding of neglect without her admission and to judgment being suspended for four months under certain conditions (7/21/17 Tr. 4–5; Order of Disposition for Sabrina G[redacted] Only, July 24, 2017). This order expired on October 15, 2017, and the finding against Sabrina was vacated by order dated November 21, 2017 (Order Vacating the July 24, 2017 Orders of Fact-Finding and Disposition, Nov. 21, 2017).

The Fact Finding Hearing and Decision

Louis refused to consent to a finding of neglect and instead challenged the allegations of neglect in a fact-finding hearing. That hearing began on the same day that the finding against Sabrina was vacated and concluded almost nine months later. At the hearing, ACS presented the testimony of CPS [redacted] P[redacted]. In addition, ACS entered into evidence portions of the progress notes from the 2010 investigation into Louis and Sabrina (Petitioner's Ex. 1; 4/25/18 Tr. 29) and Ava's birth certificate, on which Louis is identified as Ava's father (Petitioner's Ex. 2; 4/25/18 Tr. 24–25). Louis testified on his own behalf and entered into evidence additional portions of the progress notes from the 2010 investigation (Respondent's Ex. A; 8/15/18 Tr. 41–46).

At summation, counsel for Louis argued that ACS had not met its burden of showing that the children were impaired or at risk of impairment as required by Family Court Act § 1012, nor had it demonstrated that Louis used marijuana to the extent that he lost control of his actions or experienced a substantial impairment in his judgment, as required to trigger the inference in Family Court Act § 1046(a)(iii) (8/15/18 Tr. 8–11, 47–49).

Counsel for ACS, in her summation, argued that ACS need not prove that the children were impaired or at risk of impairment nor need they prove the effect that his marijuana use had on Louis (8/15/18 50–55). Instead, ACS argued that regular use of marijuana by a person who acts as a caretaker for the children is sufficient to prove neglect and can only be rebutted by evidence that the respondent is voluntarily engaged in a drug treatment program (id. at 51–55). To support its argument, ACS provided the family court with three cases from this Court: In re Shaun H., 161 A.D.3d 559 (1st Dep't 2018); In re Elijah J., 105 A.D.3d 449 (1st Dep't 2013); and In re Keoni Daquan A., 91 A.D.3d 414 (1st Dep't 2012).

The attorney for the children argued against a finding of neglect, noting that the children were "extremely well cared for" and that Louis did not live in the home with the children and was not their primary caretaker (8/15/18 Tr. 56–59).

At the conclusion of the hearing the court noted that it found both Ms. P[redacted] and Louis to be credible and that it had not seen evidence that the children were harmed (8/15/18 Tr. 59–60). The court reserved decision to review the case law submitted by the parties (id.).

The family court issued its decision on August 31, 2018. The court found that "at no time was evidence presented that the four subject children were harmed or at risk of harm due to Respondent's marijuana use" (Order of Fact-Finding, Aug. 31, 2018). While such a finding would typically preclude a finding of neglect, the court, citing to the cases provided by ACS, explained that it was "constrained by the statute and applicable case law" to make a finding under Family Court Act § 1046(a)(iii) based on the evidence that Louis regularly used marijuana and was not participating in a drug treatment program (Order of Fact-Finding, Aug. 31, 2018). The court did not make a finding, or even address the requirement in section 1046(a)(iii), that Louis's use of

marijuana had or ordinarily would have the effect of producing a substantial state of intoxication or a substantial impairment of judgment. Nor did the court consider whether the inference created by section 1046(a)(iii) had been rebutted by the evidence that the children were well cared for and that Louis's marijuana use always occurred outside of their presence.

Louis's Motion to Dismiss and Disposition

On March 1, 2019, Louis moved the family court to dismiss the petitions against him pursuant to Family Court Act § 1051(c) because the aid of the court was not required. Louis argued that, as the court had found that the children were not harmed or at risk of harm as a result of his marijuana use, and as he had had liberal unsupervised contact with the children for the duration of the proceedings, there was no need for court to make orders to protect the children (Aff. in Support of Motion, Mar. 1, 2019). The attorney for the child supported the application (3/11/19 Tr. 5). ACS opposed (Aff. in Opp. to Respondent's Motion for 1051(c) Dismissal).

The court denied the motion, noting that, although Louis had had liberal unsupervised contact with the children for two years without

any issues, Louis had not participated in any services to address his marijuana use (3/11/19 Tr. 8–9; Order on Motion #2, Mar. 11, 2019).

The court held a dispositional hearing on April 29, 2019. Louis did not appear and his attorney did not participate in the hearing (4/29/19 Tr. 4). At the hearing, the attorney for the child stated that her clients wanted the case to be over and did not feel that Louis needed any services (4/29/19 Tr. 5). She noted that she had never had any concerns about the care of the children during the pendency of the case and she asked the court to order the shortest possible period of supervision (4/29/19 Tr. 5–6).

The court ordered that Louis comply with four months of ACS supervision, that he participate in a CASAC assessment and comply with any recommendations, that he submit to random drug tests with decreasing levels until he is negative, and that he cooperate with any other reasonable referrals by ACS (4/29/19 Tr. 10; Order of Disposition Regarding Louis [P.], Apr. 29, 2019). This order expired on August 28, 2019, ending two and a half years of supervision over Louis's family but leaving him with the permanent stigma of a finding of neglect.

ARGUMENT

Like many families of color, Louis and his family suffered an intrusive investigation and disruption of their family life for conduct that white middle-class parents openly engage in without fear that ACS will come knocking. Ultimately, despite no evidence that the children were harmed or placed at risk of harm by his actions, Louis was burdened with the permanent stigma of a neglect finding. In re Joseph Benjamin P., 81 A.D.3d 415, 416 (1st Dep't 2011).

This finding should be reversed and the petitions against Louis dismissed for four reasons. First, the family court's finding of neglect legitimized the unwarranted intrusions into Louis's family life and subverted the purposes of the Family Court Act. Second, the family court committed an error of law in reading this Court's case law to eliminate Family Court Act § 1046(a)(iii)'s requirement that the petitioner show that the respondent used marijuana to the extent that it caused or would ordinarily cause a substantial state of intoxication or a substantial impairment of judgment in order to make out a prima facie case of neglect under that section. Third, even if the family court properly found that ACS made out a prima facie case of neglect, the

court erred in making a finding of neglect where any inference that the children were at risk of harm was rebutted by the undisputed evidence that Louis never used or was under the influence of marijuana in the children's presence and that the children were well cared for. Finally, even if a finding of neglect was required by the statute, the family court erred in denying Louis's motion to dismiss the petitions where the aid of the court was not required to protect the children from harm.

I. The family court failed to hold ACS to the standard required for state intervention in family life, legitimizing the unwarranted intrusions into Louis's family life and into the family life of other parents of color, who are disproportionately targeted by the child welfare system for marijuana use.

Parents of color like Louis and Sabrina are disproportionately targeted by the child welfare system for their marijuana use, despite the recognition in ACS policy and New York law that such use is an insufficient basis for a finding of neglect. In making a finding in this case, despite no evidence that the children were impacted by Louis's marijuana use, the family court legitimizing the unwarranted intrusions into this family's life as well as those of other families of color.

Over the last decade many largely white and middle-class parents have become increasingly open about their marijuana use. See, e.g., Lindsay Hunter Lopez, Marijuana for Moms, The Atlantic (Mar. 2, 2018);[4] Mark Adams, How marijuana can actually make you an even better parent, New York Daily News (Mar. 6, 2018);[5] Mark Wolfe, Pot for Parents, The New York Times (Sep. 7, 2012).[6] There is even a newsletter targeting "families whose lives have been enhanced by cannabis." See SPLIMM, https://splimm.com/about/ (last visited July 9, 2020).

As those involved with the child welfare system know, however, parents of color face a double standard when it comes to marijuana. David Kelly, Special Assistant to the Associate Commissioner of the Children's Bureau, Family is Essential, Children's Bureau Express (June 2020) (noting that while many parents joke about using substances to cope with parenting during the pandemic, the same

4 Available at https://www.theatlantic.com/health/archive/2018/03/marijuana-for-moms/554648/.

5 Available at https://www.nydailynews.com/life-style/marijuana-better-parent-article-1.3858657.

6 Available at https://www.nytimes.com/2012/09/08/opinion/how-pot-helps-parenting.html.

statements made by poor parents and parents of color would "heighten scrutiny and the risk of separation in very real ways").[7] Research suggests that white adults use marijuana at rates equal to or greater than that of adults of color. Substance Abuse Mental Health Services Administration, Results from the 2017 National Survey on Drug Use and Health: Detailed Tables.[8] And yet the overwhelming majority of parents who are accused of neglect based on drug use are people of color. Lisa Sangoi, Movement for Family Power, How the Foster System has Become Ground Zero for the U.S. Drug War 55 (June 2020);[9] Emma Ketteringham, Families torn apart over pot: As N.Y. moves to legalize marijuana, it must fix agonizing disparities that take

7 Available at https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=217&sectionid=2&articleid=5593.

8 Available at https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2017/NSDUHDetailedTabs2017.htm. In particular, Table 1.32B – Marijuana Use in Lifetime among Persons Aged 12 or Older, by Age Group and Demographic Characteristics: Percentages, 2016 and 2017 shows that, as of 2017, 53.8% of white adults surveyed had used marijuana in their lifetime, compared with 45.5% of black adults and 36% of Hispanic adults. Table 1.33B – Marijuana Use in Past Year among Persons Aged 12 or Older, by Age Group and Demographic Characteristics: Percentages, 2016 and 2017 shows that that, as of 2017, 15.8% of white adults surveyed had used marijuana in the last year, compared with 17.9% of Black adults and 13.1% of Hispanic adults.

9 Available at https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf.

children away from black and brown mothers and fathers, New York Daily News (May 8, 2019).[10]

This disparity in the treatment of marijuana use by parents of color mirrors the disparity in the enforcement of criminal laws regarding marijuana. See Press Release, Governor Andrew Cuomo, Governor Cuomo Signs Legislation Decriminalizing Marijuana Use (July 29, 2019) ("New York's existing marijuana laws disproportionately affect African American and Latino communities").[11] For example, studies have found that, "[a]lthough blacks and whites use marijuana at approximately the same rate, blacks are over 3 and a half times more likely to get arrested for marijuana possession." Dayna Bowen Matthew and Richard V. Reeves, Trump won white voters, but serious inequities remain for black Americans, Brookings: Social Mobility Memos (Jan. 13, 2017).[12]

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10 Available at https://www.nydailynews.com/opinion/ny-oped-families-ripped-apart-over-pot-20190508-qtrnmuyztzfr7let4vxjxga7zm-story.html.

11 Available at https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-decriminalizing-marijuana-use.

12 Available at https://www.brookings.edu/blog/social-mobility-memos/2017/01/13/trump-won-white-voters-but-serious-inequities-remain-for-black-americans/.

The disparity in the child welfare system's treatment of marijuana use occurs despite the widespread recognition that marijuana use alone is an insufficient basis on which to intervene in the private realm of family life. The petitioner in this case has publicly acknowledged that a "parent's use of a substance . . . is not in and of itself a basis for a finding of neglect" and that "parental rights should not be impaired on the basis of cannabis use or cultivation unless it is endangering a child." Hearing on the Impact of Marijuana Policies on Child Welfare Before the Committees on Hospitals and General Welfare, New York City Council 1,2 (Apr. 10, 2019) (Testimony of David A. Hansell, Commissioner New York City Administration for Children's Services).[13]

Similarly, the Family Court Act recognizes that drug use alone is insufficient for a finding of neglect. There must be either a causal connection between the drug use and harm or risk of harm to the children, see Fam. Ct. Act § 1012(f); Nicholson v. Scoppetta, 3 N.Y.3d 357, 369 (2004), or the drug use must be repeated use to the extent that it results or ordinarily would result in a substantial impairment of

13 Available at https://legistar.council.nyc.gov/View.ashx?M=F&ID=7167434&GUID=E2C14D9E-F5D4-4F2C-9CE5-318DC5D44063.

judgment or loss of control, Fam. Ct. Act § 1046(a)(iii). These requirements serve to limit state intervention to cases where there is "serious harm or potential harm to the child," rather than "what might be deemed undesirable parental behavior." Nicholson at 369.

Here, however, the family court failed to abide by these limitations when it made a finding of neglect despite its explicit statement that "at no time was evidence presented that the four subject children were harmed or at risk of harm due to Respondent's marijuana use" (Order of Fact-Finding, Aug. 31, 2018). This decision subverted the purposes of the family court act, legitimized the actions of the hospital staff and ACS, extended the unwarranted supervision of Louis's family, and marked him with the stigma of a finding of neglect.

II. The family court erred in finding that ACS made out a prima facie case of neglect under Family Court Act § 1046(a)(iii) where no evidence was presented of the effect that Louis's marijuana use had on him.

As defined in the Family Court Act, a parent's use of drugs can only be the basis for a finding of neglect where the child's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of" that drug use. Fam. Ct. Act

§ 1012(f)(i)(B). Family Court Act § 1046(a)(iii), however, allows the petitioner to make out a prima facie case of neglect without proving that the child was impaired or at risk of impairment by showing that respondent's drug use meets the specified criteria. This effectively creates an inference that a child who is the responsibility of such a respondent is at risk of harm. In re Jones Children, 34 Misc. 3d 1226(A) at *9–*10 (Kings Co. Fam. Ct. 2012).

In order for this inference to apply, Petitioner must prove two things: (1) that the respondent repeatedly misuses drugs or alcohol and (2) that the use "has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality." Fam. Ct. Act § 1046(a)(iii). The family court in this case misinterpreted the law to eliminate the second element. Applying the law correctly, the court should have dismissed the petitions against Louis because the evidence demonstrated that his use never resulted in a substantial state of intoxication or a substantial impairment of

judgment, and ACS presented no evidence that his use ordinarily would have such effect.

A. The family court misinterpreted Family Court Act § 1046(a)(iii) by eliminating the requirement that there be evidence that the respondent's repeated use of drugs or alcohol results in a substantial impairment of judgment.

Family Court Act § 1046(a)(iii) allows the petitioner to make a prima facie case of neglect without proving that the children are impaired or at substantial risk of impairment only where the respondent's drug or alcohol use rises to the level specified in the statute. The family court, however, misinterpreted the plain language of the statute to require only repeated use without any evidence of the effects that such use had on Louis. This was an error of law and, as such, is reviewed de novo. See, e.g., Jones v. Bill, 10 N.Y.3d 550, 553 (2008) (stating that "a question of pure statutory interpretation[] merit[s] de novo review").

The plain language of Family Court Act § 1046(a)(iii) requires proof not only that a respondent repeatedly uses drugs or alcohol, but that they do so to the extent that it produces or would ordinarily produce in the respondent a substantial state of intoxication or a

substantial impairment of judgment. That this proof is a necessary component of a prima facie case under section 1046(a)(iii) is affirmed by this Court's decision in Matter of Kimora D. In that case the Court rejected the appellant's argument that there had been no evidence of the effect of his alcohol use by pointing to the child's statements that Respondent's alcohol use "made him sway from side to side and made him 'crazy' and 'different.'" In re Kimora D., 176 A.D.3d 638, 640 (1st Dep't 2019); see also In re Yumara T., 2020 NY Slip Op 03744 (1st Dep't 2020) (affirming a neglect finding based on alcohol use where respondent told the caseworker "that he routinely drank to the point of passing out").

Section 1046(a)(iii) makes no distinction between drugs and alcohol. Regardless of the substance in question, there must be proof that the use has or ordinarily would have the effect of producing a substantial state of intoxication or a substantial impairment of judgment. When such proof is not provided, a prima facie case is not made out. For example, the Kings County Family Court dismissed a petition involving marijuana use where ACS failed to establish that respondent's marijuana use "would ordinarily have resulted in the level

of impairment outlined in the statute." In re Jones Children, 34 Misc. 3d 1226(A) at *16.

The family court in this case, however, relied on case law which focused on the requirement of repeated use and did not specifically address the requirement that there be evidence of the effect that such use had or would ordinarily have on the respondent. See In re Keoni Daquan A., 91 A.D.3d at 415 ("Respondent's testimony that he regularly smokes marijuana is prima facie evidence of neglect pursuant to Family Ct Act § 1046(a)(iii)."); In re Elijah J., 105 A.D.3d at 450 ("The Family Court also properly found neglect based on the mother's regular misuse of marijuana."); In re Shaun H., 161 A.D.3d at 559 ("A preponderance of the evidence supports the finding of neglect based upon respondent's marijuana use, because the caseworker testified that respondent told her that she was 'smoking marijuana eight to 10 times per week to deal with her stress.'").

None of these cases, however, directly address the issue of whether proof of repeated marijuana use without any evidence of the effect that such use has on the respondent can be sufficient for a prima facie case of neglect. The court erred in reading these cases to eliminate

the statutory requirement that there be proof that the respondent's use caused or ordinarily would case a substantial state of impairment.

B. Applying the proper standard, ACS did not make out a prima facie case of neglect under 1046(a)(iii) because it did not present any evidence of the effect that Louis's marijuana use had on him.

ACS presented no evidence that Louis's marijuana use had the effect or ordinarily would have the effect of producing "a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality" as is necessary to make out a prima facie case of neglect under Family Court Act § 1046(a)(iii). Ms. P[redacted] did not observe Louis to be under the influence and her conversations with the children revealed that they had also never observed Louis to be under the influence (4/25/18 Tr. 13, 14–15).

Louis himself testified that his use of marijuana never resulted in a substantial impairment of his judgment, a loss of control of his actions, disorientation, or irrationality (8/15/18 Tr. 29–30). Louis used marijuana merely as a way to wind down in the evening after work

(8/15/18 Tr. 30), the way many people use a glass of wine or a beer. His use never impacted his functioning at work or with his children (8/15/18 Tr. 23–24, 28, 30). Under these circumstances, there was insufficient evidence to make out a prima facie case of neglect under Family Court Act § 1046(a)(iii).

Without evidence of repeated use to the point of intoxication, the fact that Louis was not voluntarily participating in a drug treatment program is irrelevant to the analysis under section 1046(a)(iii). That section states that a prima facie case is not established when, despite evidence of repeated misuse to the extent described the statute, the respondent is voluntarily and regularly participating in a recognized rehabilitative program" Fam. Ct. Act § 1046(a)(iii). Here, since ACS had not proven repeated use of the kind described in the statute, Louis's participation, or lack thereof, in a drug treatment program had no impact on the determination of whether ACS had made out a prima facie case of neglect.

III. Even if ACS made a prima facie showing of neglect, the family court should have found that the inference of risk was rebutted by the evidence that the children were not harmed or at imminent risk of harm as a result of Louis's marijuana use.

Even if the family court correctly determined that ACS made out a prima facie case of neglect under Family Court Act § 1046(a)(iii), such a determination does not require a finding of neglect. In re Philip M., 82 N.Y.2d 238, 244 (1993). The inference of harm created by the statute can be rebutted by evidence establishing that the children were never harmed or at risk of harm. In re Jones Children, 34 Misc. 3d 1226(A) at *17. Here the family court erred in not finding that any inference was rebutted where the evidence showed that the Louis's marijuana use never took place in the children's presence and that they were never harmed or at risk of harm as a result of that use.

In the context of a prima facie case of sexual abuse made under Family Court Act § 1046(a)(ii), the Court of Appeals held that, "[w]hile the fact finder may find respondents accountable . . . after a prima facie case is established, it is never required to do so." In re Philip M., 82 N.Y.2d at 244. On the contrary, the Court of Appeals continued, the presumption created by the statute is "evidentiary and rebuttable

whether by [respondent's] own testimony or by any other evidence in the case." Id. (quoting People v. Leyva, 38 N.Y.2d 160, 167 (1975)).

This principle applies not only to prima facie cases of neglect and abuse under Family Court Act § 1046(a)(ii), but also to prima facie cases of neglect under 1046(a)(iii). "There is no substance abuse exception to [the] general rule" that "a prima facie case can . . . be rebutted by evidence establishing that the children were never harmed or placed at imminent risk of harm." In re Jones Children, 34 Misc. 3d 1226(A) at *17.

This Court applied this principle in Matter of Royal P., 172 A.D.3d 533, 533–34 (1st Dep't 2019). In Royal P., this Court assumed that the petitioner had made out a prima facie case of neglect under 1046(a)(iii), but nevertheless found that the inference of neglect was rebutted by the evidence that "that the child was well cared for, healthy, and well fed and clothed, and that his medical needs were addressed," as well as by the evidence that the respondent "never used or was under the influence of drugs or alcohol in the child's presence." 172 A.D.3d at 533–34; cf. In re Jeffrey M., 102 A.D.3d 608, 610 (1st Dep't 2013) (holding that the record "is insufficient to establish a prima facie case of

neglect under Family Court Act § 1046(a)(iii) because . . . the caseworker's investigation disclosed that respondent neither used or was under the influence of drugs in Jeffrey's presence.").

Similarly, in this case, any inference of risk of impairment was rebutted by the evidence that the children were never impaired or at risk of impairment. As in Royal P., the children here were healthy and well cared for, and Louis never used or was under the influence of marijuana in their presence. As a result, the court should have found that any inference of neglect had been rebutted.

IV. Even if the finding of neglect was proper, the family court erred in denying the motion to dismiss as the family did not require the aid of the court.

Even if Louis's use of marijuana triggered an inference of harm and could not be rebutted by the evidence that the children were never harmed or at risk of harm, the family court abused its discretion in denying the motion to dismiss pursuant to Family Court Act § 1051(c) as the aid of the court was not required to protect the children.

Section 1051(c) "permits a dismissal of a neglect petition (but not an abuse petition) that satisfies the formal requirements of neglect where the Family Court has concluded that 'its aid is not required.' The

Family Court's exercise of its authority under this subdivision is discretionary and must be utilized in a manner that emphasizes and promotes the best interests of the child." In re Leenasia C., 154 A.D.3d 1, 8 (1st Dep't 2017) (internal citations omitted). "[T]he dispositive issue in these cases, in part, is whether the facts and circumstances establish that there is a likelihood of present or future neglect." In re Donnisha S., 56 Misc. 3d 991, 998 (Bronx Co. Fam. Ct. 2017).

Here the court found no evidence that Louis's marijuana use presented a safety risk to the children (Order of Fact-Finding, Aug. 31, 2018). In fact throughout the proceedings, Louis had liberal unsupervised contact with the children all while admitting that he continued to use marijuana outside their presence. Under such circumstances, there was no need for the court to order supervision of Louis or for Louis to engage in services where such supervision and services were not needed to ensure the safety of the children.

CONCLUSION

Louis and Sabrina suffered a series of intrusions into their private family life that a white middle-class family would be unlikely ever to experience. The family court's decision in this case not only legitimized these unwarranted intrusions but was contrary to the text and intent of Article 10 of the family court act.

Article 10 is designed to limit state intervention in family life to cases where there is serious harm or potential harm to a child and not just what some might view as undesirable parental behavior. Louis's marijuana use did not warrant state intervention in his family life where it occurred outside the presence of the children and had no impact on them. As a result, the finding against him should be vacated and the petitions dismissed.

EMILY S. WALL
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Certificate of Compliance

Pursuant to 22 NYCRR § 1250.8(j)

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ADDENDUM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of LUCIANO P., NATALIE S., AVA P., and JUSTINA S., Children under 18 years of Age Alleged to be Neglected by LOUIS P., Respondent-Appellant. ADMINISTRATION FOR CHILDREN'S SERVICES, Petitioner- Respondent.	New York County Family Court Docket Nos.: [redacted]

STATEMENT PURSUANT TO C.P.L.R. 5531

1. The New York County Family Court docket numbers are [redacted].

2. The full names of the original parties are subject children [redacted], respondent-appellant Louis P[redacted], respondent-non-appellant

Sabrina G[redacted], and petitioner-respondent Administration for Children's Services.

3. This action was commenced in the Family Court of the City of New York, New York County.
4. This action was commenced on February 16, 2017, by the filing of a petition.
5. The petition sought a finding that the subject children were neglected.
6. The appeal is from the New York County Family Court's Order of Disposition, dated April 29, 2019.
7. The appeal is on the original papers.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of LUCIANO P., NATALIE S., AVA P., and JUSTINA S., Children under 18 years of Age Alleged to be Neglected by LOUIS P., Respondent-Appellant. ADMINISTRATION FOR CHILDREN'S SERVICES, Petitioner- Respondent.	New York County Family Court Docket Nos.: [redacted]

NOTE OF ISSUE

1. The Notice of Appeal was served on October 31, 2019, and filed on November 1, 2019.

2. This is an appeal from a Family Court Act Article 10 proceeding which alleged that the children were neglected. The proceeding commenced in New York County Family Court.

3. The New York County Family Court's docket number is [redacted]

4. The order appealed from is the Order of Disposition made by Hon. Frias-Colon and entered on April 29, 2019.

5. The appeal is noticed for the September 2020 term.

6. The attorneys for the parties to the appeal are as follows:

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