

**IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

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IN RE: Y.W.-B. : 1 EAP 2021  
Consolidated Appeals of: J.B., : 1642 EDA 2019  
Mother, and G. W., Father : CP-51-DP-00002108-2013  
:  
IN RE: N.W.-B., : 2 EAP 2021  
Consolidated Appeals of: J.B., : 1643 EDA 2019  
Mother, and G.W., Father : CP-51-DP-004204-2016

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**AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF  
PENNSYLVANIA AND COMMUNITY LEGAL SERVICES OF  
PHILADELPHIA**

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## **STATEMENT OF INTEREST OF AMICI CURIAE**

### **American Civil Liberties Union of Pennsylvania**

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization of over 1.75 million members. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty and equality embodied in the Pennsylvania Constitution, the United States Constitution and civil rights laws. The ACLU of Pennsylvania is one of its state affiliates.

The ACLU and ACLU of Pennsylvania have appeared many times as *amicus curiae* in federal and state courts at all levels, including both civil and criminal proceedings, in cases involving the rights of people to be free from unreasonable searches. The proper resolution of this case is thus a matter of substantial importance to the ACLU and its members.

### **Community Legal Services of Philadelphia**

*Amicus curiae* Community Legal Services of Philadelphia (“CLS”) is a nonprofit organization that provides free legal assistance to low-income individuals on a broad range of civil matters, including public benefits, landlord/tenant, utilities, mortgage foreclosure, employment and other areas of great need in Philadelphia. For more than 30 years, the Family Advocacy Unit (FAU) has provided high quality, interdisciplinary representation to hundreds of parents each



year in Philadelphia dependency and termination of parental rights proceedings. As part of its mission, the FAU works to ensure that low-income vulnerable families involved with the child welfare system receive the due process to which they are entitled and have meaningful access to justice in these extremely important proceedings. In addition to individual client representation, the FAU engages in policy advocacy and continuing legal education at both a statewide and local level to improve outcomes for children and families.

*Amici* fully incorporate the legal and constitutional arguments articulated by appellant Mother and Father in this case and write separately to highlight the importance of the constitutional protections at stake. Specifically, *amici* are concerned that adopting the Superior Court’s analysis of what constitutes probable cause to compel a parent’s cooperation with a home investigation in the context of a county agency’s investigation of alleged abuse or neglect will undermine the constitutional right to privacy, and ultimately will do so in a way that will disproportionately impact communities of color and low-income communities.

No one other than *amici* or its counsel paid for the preparation of this brief or authored it, in whole or in part.

### **STATEMENT OF JURISDICTION**

*Amici* incorporate the statement of jurisdiction in Appellant’s brief.

**ORDER OR OTHER DETERMINATION IN QUESTION**

*Amici* incorporate the statement of the order or other determination in question in Appellant’s brief.

**STATEMENT OF THE SCOPE AND STANDARD OF REVIEW**

*Amici* incorporate the statement of the scope and standard of review in Appellant’s brief.

**STATEMENT OF THE CASE**

*Amici* incorporate the statement of the case in Appellant’s brief.

**SUMMARY OF ARGUMENT**

This case involves a government agency’s authority to search a parent’s home based on an anonymous allegation of child neglect, which allegedly occurred in public places; the allegation at issue in this case was not related to any conditions within the family home. In accordance with its own longstanding precedent, the Superior Court recognized correctly that home searches in this setting are subject to the protections of the Fourth Amendment of the Constitution of the United States and Article 1, Section 8 of the Constitution of the Commonwealth of Pennsylvania. The Superior Court erred, however, in holding that an allegation of neglect occurring outside of the home, and unrelated to conditions within the home, provided the necessary probable cause to permit governmental authorities to enter the parents’ home against the parents’ wishes. Absent any connection between the allegation

being investigated and the conditions within the home, the home search in this case violated the parents' Federal and Pennsylvania Constitutional rights.

In defining the appropriate legal standard, the Superior Court first relied upon its own 2005 precedent and restated the existing test as to when a home visit may take place in connection with an allegation of child abuse or neglect:

An agency 'must file a verified petition alleging facts amounting to probable cause to believe that an act of child abuse or neglect has occurred and evidence relating to such abuse will be found in the home'.

In the very next paragraph of its opinion, however, the Superior Court pivoted to an amorphous, watered-down standard, the application of which depends largely upon the reader's interpretation of undefined terms:

An agency may obtain a court order compelling a parent's cooperation with a home visit upon a showing of a fair probability that a child is in need of services, and that evidence relating to that need will be found inside the home.

Besides deleting the term "probable cause" from its new test, the Superior Court substituted the undefined term "in need of services" in place of the statutorily defined and commonly understood terms "abuse" and "neglect". Further compounding the lack of clarity in its new standard, the Superior Court made reference to at least three different statutes in the context of the phrase "in need of services", none of which

defines the term “services”, and all of which would lead to an overbroad application of a governmental agency’s ability to enter a parent’s home.

In the matter *sub judice*, there was no basis for a probable cause belief that any evidence of abuse or neglect would have been found within the parents’ home. Rather, the anonymous allegations of neglect involved Mother engaging in a political protest in a public place accompanied by one of her children under circumstances where it was “unknown” whether the child was fed during the course of the protest. The lack of connection between the anonymous allegations and the conditions within the parents’ home is highlighted by the Superior Court’s reliance in its probable cause analysis upon years-old, extraneous allegations of criminal acts involving both parents that were completely unrelated to the matters alleged in the anonymous allegation that was being investigated. In addition, the Superior Court applied an unduly expansive “totality of the circumstances” standard and held that the trial court’s “prior experience with this family” as well as “Mother’s demeanor at the hearing” were relevant circumstances when determining whether a governmental entity can enter a family’s home.

It should go without saying that the fundamental liberties of all Pennsylvanians, and in fact all Americans, are grounded in our ability to remain secure in our own homes. Accordingly, under the existing Pennsylvania precedent,

the probable cause necessary to compel a governmental intrusion into one's home when investigating allegations of child neglect must be based on concrete assertions of abuse or neglect of which there must be a fair probability of evidence within the home; probable cause to search one's home should not be predicated upon a fair probability of finding something in the home based upon the resident's "demeanor" or the trial court's "prior experiences". Requiring child welfare agencies to meet this standard will not only safeguard important privacy interests but will also reduce the likelihood that Black families and families of color will be disproportionately subject to inspections of their homes. The order of the Superior Court should, therefore, be reversed.

## **ARGUMENT**

### **I. Constitutional Privacy Protections Apply to Home Visits Related to Allegations of Child Abuse or Neglect.**

Although this Court has yet to address directly whether home searches incident to allegations of child neglect are subject to Constitutional protections, existing Pennsylvania precedents plainly support the application of Constitutional protections under these circumstances. *Amici* urge the court to affirmatively extend those protections in this case.

Over 15 years ago the Superior Court resolved as a matter of first impression in Pennsylvania the question of whether Constitutional privacy protections apply in

the context of home searches related to allegations of child abuse or neglect. *In re Petition to Compel Cooperation*, 875 A.2d 365 (Pa. Super. 2005). Like the matter *sub judice*, *Petition to Compel* involved an anonymous allegation of child neglect, which, in that case, related to a lack of medical care. *Id.* at 378. In a further similarity to this case, in furtherance of its investigative obligations under the Child Protective Services Law (“CPSL”), 23 Pa. C.S.A. §§6301, *et seq.*, a representative of the county agency tasked with investigating the anonymous allegations visited the home and made contact with the parents, but the representative was denied entry into the home. *Id.* In both instances, before the appeals could be heard, the home inspections took place over the parents’ objections, and no evidence of child neglect was reported from either visit. *Id.* at 369; Superior Ct. Opinion at 5, n. 4.

After concluding that the parents’ appeal in that case was not moot and that the Court had jurisdiction over the county agency’s investigation, the *Petition to Compel* court addressed the substantive issue of whether Constitutional protections against unreasonable searches and seizures applied in the context of county agency investigations of alleged child neglect. *Id.* at 373. The *Petition to Compel* court began its analysis by highlighting the fundamental importance of Constitutional privacy protections under both Pennsylvania and federal precedents, which led the court to observe that “the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of [Pennsylvania]”.

875 A.2d at 374 (citation omitted) (quoting *Commonwealth v. Edmunds*, 526 Pa. 374, 394, 586 A.2d 887, 897 (1991)). Citing the precedents of this Court, the *Petition to Compel* court observed further that “[t]he protection against unreasonable searches and services afforded by the Pennsylvania Constitution is broader than that under the Federal Constitution”.<sup>1</sup> *Petition to Compel*, 875 A.2d at 374 (quoting *Commonwealth v. Jackson*, 548 Pa. 484, 488, 698 A.2d 571, 573 (1997) (citation omitted)). Accord see *Theodore v. Delaware Valley Sch. Dist.*, 575 Pa. 321, 341, 836 A.2d 76, 88 (2003); *Commonwealth v. Glass*, 562 Pa. 187, 754 A.2d 655, 662 (2000).

Against this backdrop, the *Petition to Compel* court balanced the needs of a county investigative agency to review anonymous allegations of parental child neglect against the right of an individual to be secure in her home. Remaining “sympathetic” to the county agency’s legislative mandate, the *Petition to Compel* court, nevertheless, determined that the legislative mandate to investigate anonymous allegations of child neglect does not override an individual’s

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<sup>1</sup> Social workers are governmental actors who are subject to the requirements of the Fourth Amendment to the Federal Constitution. 3A Wright, Miller, *Fed. Prac. & Proc. Crim.* §662 (4<sup>th</sup> Ed.) (citing *Andrews v. Hickerman County, Tenn.*, 700 F.3d 845, 859 (6<sup>th</sup> Cir. 2012)). See also *Schulers v. Kammer*, 955 F.3d 520, 533 (6<sup>th</sup> Cir. 2020); *Gates v. Texas Dep’t of Protective & Regulatory Servs.*, 537 F.3d 404, 420-24 (5<sup>th</sup> Cir. 2000); *Roska v. Peterson*, 328 F.3d 1230, 1242, 1249-50 (10<sup>th</sup> Cir. 2003); *Wildauer v. Frederick C’nty*, 993 F.2d 369, 372 (4<sup>th</sup> Cir. 1993). Searches conducted by social workers must necessarily, then, fall within the broader protections provided by the Pennsylvania Constitution.

Constitutional rights to privacy within her own home. *Id.* at 378-79. Accordingly, the court found that any assertion that Constitutional privacy protections do not apply in the context of child neglect investigations is “fatally flawed and unsupportable”. *Id.* at 374.

At the outset, to preserve individual liberties and to maintain consistency in this important area of the law, this Honorable Court should adopt the *Petition to Compel* court’s Constitutional analysis. Otherwise, Pennsylvania courts risk giving child welfare workers a “free pass” to enter any home based on anonymous report of “poor housekeeping” and similar minor alleged transgressions. *Id.* at 378 (quoting *Walsh v. Erie County Dept. of Job and Family Services*, 240 F.Supp.2d 731, 751-52 (N.D. Ohio 2003)).

## **II. The Superior Court Improperly Expanded the Concept of Probable Cause in this Instance.**

Had the Superior Court applied the test articulated in *Petition to Compel* - - namely that the investigating agency must allege “facts amounting to probable cause to believe that an act of child abuse or neglect has occurred and evidence relating to such abuse will be found in the home” (Superior Ct. Op. at 16, (citing *Petition to Compel*, 875 A.2d at 377-78)) - - there would have been no basis to compel a home search in this case. The petition at issue in this case alleged only that “the family slept outside a Philadelphia Housing State Office” and that “Mother was outside the



PHA office from 12:00 a.m. to 8:00 p.m. with a child”. Superior Court Op. at 2, 20. And while the petition added an extraneous, speculative statement that it was “unknown” if Mother had fed the children during the protest outside of the home, it is abundantly clear that none of these allegations had anything to do with conditions within the family home. Indeed, the implied notion underlying the anonymous allegations is that the children *should* have been at the family home as opposed to being with Mother during her protests. There was no reason (much less a probable cause basis) to believe that any of the complained-of acts bore any relation to any condition within the family home.

Nevertheless, the Superior Court did not apply the longstanding test articulated by *Petition to Compel*. Instead, it articulated a standard by which a governmental agency may freely enter an individual’s home so long as there is a “fair probability that a child is in need of services, and that evidence relating to that need will be found in the home.” Superior Court Op. at 16-17. The Superior Court compounded its improper watering-down of the parents’ constitutional protections by applying a “totality of the circumstances” test that invited the Court to consider other disparate facts and subjective observations that had nothing to do with the present anonymous allegations of neglect. Superior Ct. Op. at 24. This new test comes nowhere close to protecting the Constitutional liberties that the *Petition to Compel* decision so highly valued.

**A. The Term “In Need of Services” is Far Too Broad to Provide Meaningful Protection Against Unconstitutional Searches.**

While making it the lynchpin of its new test, the Superior Court offered no definition of the term “in need of services”. Instead, in the context of the phrase “in need of services” it cited two different statutes, 23 Pa. C.S. §§6303(a) and 6375(c)(1), and one administrative regulation, 55 Pa. Code §3490.223. But none of those provisions defines the term “in need of services” in the context of a county agency’s investigation of alleged abuse or neglect. For example, Section 6303(a) contains five distinct definitions of “service” or “services”; the definition of the term “service” includes things like youth camps, athletic programs, and clubs, while the term “child-care services” includes things like foster homes and day care. Section 6375(c)(i) makes vague reference to “services necessary to protect the child during the assessment period” but does not identify what those services may be, while the Pa. Code section defines the term “general protective services” to include services to address truancy, disobedience, and delinquency.

Taken together, these provisions provide no clear guidance as to the nature of the services that would prompt a governmental agency’s need to enter a parent’s home against the parent’s wishes. To the contrary, the standard appears to invite a home intrusion on any occasion upon which a social service worker is called upon to perform a task within a vast array of statutorily defined “services”, so long as and

the social services worker deems it useful to inspect conditions within a home. This standard provides nowhere near the level of protection mandated by the United States and Pennsylvania Constitutions, as articulated in *Petition to Compel*.

**B. The “Totality of the Circumstances” Test Must Be Limited to Include Relevant Circumstances.**

The Superior Court compounded its restriction of the Constitutional protections afforded under *Petition to Compel* by expanding the breadth of the circumstances it can consider in deciding whether an investigating agency can enter a parent’s home. The Superior Court in this case relied upon *Commonwealth v. Torres*, 564 Pa. 86, 784 A.2d 532, 537 (2001) to provide the appropriate scope of the totality of circumstances test. But the Superior Court, then, considered circumstances extending well beyond *Torres’s* definition of the relevant circumstances. Superior Court Op. at 19-22. In so doing, the Superior Court broadened the “totality of the circumstances” test in a manner that permitted the court to consider extraneous, largely irrelevant matters that were in no way connected to the anonymous report that precipitated the agency’s investigation.

As articulated in the cases cited by the Superior Court, in the criminal law setting, the “totality of the circumstances” test has its roots in the Supreme Court of the United States opinion in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983). The *Torres* decision upon which the Superior Court relied upon

to support its “totality of the circumstances” analysis, quotes *Gates* as confining the relevant “circumstances” that a court may consider under the “totality of the circumstances” test to those circumstances “attending an informant’s tip . . .”. *Torres*, 564 Pa. at 96, 784 A.2d at 537, (quoting *Gates*, 462 U.S. at 234). *Torres* does not hold that a court is free to consider any circumstance of any kind to find probable cause for a search. Rather, it requires a link between the “circumstance” and the informant’s tip.

Notwithstanding the scope of the “totality of the circumstances” test as articulated in *Torres* and *Gates*, the Superior Court, instead, turned to Superior Court Judge Beck’s concurring opinion in *Petition to Compel* to support the notion that a court can consider everything that it knows or suspects about a parent to justify a search of her home in connection with an investigation of an anonymous allegation of child neglect. Such a standard goes well beyond any established protection of individual liberties. Indeed, this case presents a classic example of how a court’s unfettered consideration of any circumstances that it subjectively deems relevant could justify a home search in almost any situation.

In the matter *sub judice*, the complaint on which the search was to be based involved allegations relating to keeping the child outside of the home for an extended period of time. Under its unfettered ‘totality of the circumstances’ analysis,

however, the trial court impermissibly supplemented the anonymous allegations and considered evidence of (1) a flea infestation and structural issues at parents' home that occurred years ago and were addressed to conclusion previously, (2) father's prior criminal convictions from over 20 years ago, (3) mother's undated criminal convictions for theft and trespassing, (4) mother's "demeanor" at the probable cause hearing, and (5) the trial court's "prior experiences with the family." None of these things had anything to do with whether Mother kept her children out of the home for too long. Nevertheless, taken as a whole, this analysis would potentially justify a governmental intrusion into the home of anyone based on irrelevant events that occurred in the distant past,<sup>2</sup> coupled with the court's assessment of a parent's likeability. Such vague and subjective factors simply cannot provide the bases for a deprivation of critical constitutional rights.

### **III. Anonymous Allegations of Child Neglect in a Public Place Do Not Justify an Intrusion into a Parent's Home.**

As noted above, when stripped of all extraneous and irrelevant factors, the request to search the home in this case was based upon an anonymous allegation that Mother had allowed her children to accompany her while protesting in public areas outside of the PHA offices. It is noteworthy that the Superior Court opinion contains

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<sup>2</sup> As applied, the Superior Court's standard in this case would render families that previously faced a social services investigation forever vulnerable to future home inspections by government agents.

no discussion of any efforts made to investigate the allegations of neglect outside of the home before demanding entry into the home. *See Petition to Compel*, 875 A.2d at 379 (discussing the need for further investigation when the facts do not presently justify a home inspection). Indeed, had there been a legitimate concern that the family was homeless<sup>3</sup> (Superior Ct. Op. at 2, 20), that concern was addressed when the investigator interviewed Father in the front yard of the family home. Superior Ct. Op. at 21. There is no reason why the investigating agency's immediate response to the allegation that children were being kept *outside* of the home too long was to demand entry *into* the family home.

It is also concerning that the Superior Court allowed the “demeanor” of an individual accused of child neglect at a hearing where governmental agents raised years’ old allegations of criminal conduct and the family’s entire history with the child welfare agency while demanding unfettered access to that individual’s home. It is perfectly understandable that an individual facing the prospect of a government agent entering her home based upon a recitation of bad acts from the distant past

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<sup>3</sup> The GPS report cited by the Superior Court stated that, three weeks before the report that prompted the attempted search, the family slept outside of the PHA offices in protest. Superior Court Op. at 2. When interviewed at that time, Mother indicated that the family was not homeless, but that a prior home “had burned down”. *Id.* Based on that information, there was no reason to suspect that the family was presently homeless three weeks later, and even if there was, the suspicion was negated when a social service worker appeared at the family home, spoke with Father, and demanded entry into the home which, by all accounts, was standing and not “burned down”.

could feel threatened, frustrated, and hostile toward her adversaries and even the Court. It serves no legitimate purpose, however, to consider such things relevant to a potential governmental intrusion into one's home.

This is not to suggest that those investigating allegations of child abuse and neglect do not serve an important purpose that is worthy of society's and the Court's respect. Nevertheless, the means used to conduct those investigations must comport with the fundamental liberties upon which our Commonwealth and our country were founded. Here, the end did not justify the means. The intrusion in to the home was inconsistent with the parents' fundamental liberties, and unjustified by the proper scope of the investigation.

**IV. Upholding the Mandate of the Fourth Amendment of the United States Constitution and Article I Section 8 of the Pennsylvania Constitution is Essential to Ensuring that the Government does not Improperly Infringe upon the Rights of Marginalized Families.**

The importance of constitutional protections against unwarranted governmental intrusion for families who find themselves in the crosshairs of a children and youth services (CYS) investigation must be contextualized within the reality of racial disproportionality that exists at every stage of child welfare intervention and the tendency for conditions of poverty to be conflated with and reported as neglect. CYS investigations are not benign interventions. Rather, unwarranted investigations cause harm to families and destabilize communities.

Thus, upholding strong constitutional protections for families is essential to working towards achieving racial justice for marginalized communities.

**A. Black Families and Families of Color are Disproportionately Represented at Every Stage of Child Welfare Intervention, and also Experience Disparate Outcomes.**

Nationally, families of color and particularly Black families are disproportionately represented at every level of child welfare intervention. *See* Alan Detlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do they Exist, and What Can be Done to Address Them?* 692(1) ANNALS AM. ACAD. POL. & SOC. SCI. 253 (2020); Richard Wexler, NAT'L COAL. FOR CHILD PROT. REFORM, Issue Paper 7, *Child Welfare and Race* (2018), <https://nccpr.org/issue-papers-family-preservation-foster-care-and-reasonable-efforts/> (summarizing the findings of numerous national studies regarding racial disproportionality in the child welfare system); CHILDREN'S BUREAU, Issue Brief: *Racial Disproportionality and Disparity in Child Welfare* (2016), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf) (summarizing national data regarding racial disproportionality at various decision-making points in child welfare intervention).

Research has estimated that by age 18, more than one third of all American children will have experienced a CYS investigation. Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107(2) AM. J.



OF PUB. HEALTH 274, 278 (2017). However, this probability is not randomly distributed. For Black children in America, it is much higher. More than half of Black children in America will experience a CYS investigation before the age of 18, and Black children are almost twice as likely to experience an investigation as white children. *Id.*

Beginning with the point of initial referral, Black children and families are more likely to be reported for suspected abuse or neglect than white children. *See, e.g.,* Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37(1) CHILD ABUSE & NEGLECT 33 (2013) (finding that Black children are more than twice as likely as white children to be reported to CYS for suspected maltreatment before the age of 5); Wendy Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288(13) J. OF AM. MED. 1603 (2002) (finding that medical professionals were more than twice as likely to evaluate and report children of color presenting with accidental or indeterminate fractures for suspected abuse, and that the racial differences remained significant even after controlling for socioeconomic status).

Reports involving Black children and children of color are also more likely to proceed to an investigation than reports involving white children. *See, e.g.,* John D. Fluke et al., *Disproportionate Representation of Race and Ethnicity in Child*

*Maltreatment: Investigation and Victimization*, 25(5) CHILD. AND YOUTH SERV. REV. 359 (2003) (finding disproportionate representation of Black children and families among reports of suspected maltreatment referred for investigation across data from 5 states).

Finally, reports of maltreatment involving Black children are more likely to be “substantiated” at the conclusion of an investigation than those involving white children. *See, e.g.*, Kathryn Maguire-Jack et al., *Child Protective Services Decision-Making: The Role of Children’s Race and County Factors*, 90(1) AM. J. OF ORTHOPSYCHIATRY 48, 56 (2019) (finding that Black, American Indian/Alaskan Native, Hispanic, and multiracial children all had significantly greater odds of substantiation when compared with non-Hispanic White children, even when controlling for geography); Sheila Ards et al., *Racial Disproportionality in Reported and Substantiated Child Abuse and Neglect: An Examination of Systemic Bias*, 25(5/6) CHILD. AND YOUTH SERV. REV. 375 (2003) (finding that substantiation rates were significantly higher for children of color than for white children, even after controlling for factors such as type of maltreatment, characteristics of the child and the perpetrator, county, and type of reporter).

Following an investigation, Black families and families of color also experience disparate outcomes. Children of color, and particularly Black children, are more likely to experience removal from their families than white children, even

when they exhibit the same characteristics. E. Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20(1) CUNY L. REV. 68, 76 (2017) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-816, African American Children in Foster Care: Additional HHS Assistance Needed to Help States Reduce the Proportion in Care 8, 22 (2007)); Theresa Knott & Kirsten Donovan, *Disproportionate Representation of African-American Children in Foster Care: Secondary Analysis of the National Child Abuse and Neglect Data System 2005*, 32 CHILD. AND YOUTH SERV. REV. 679 (2010) (finding that after controlling for child, caregiver, household and abuse characteristics, Black children had 44% higher odds of foster care placement when compared with white children).

Once in foster care, Black children are moved more often and spend more time in foster care than White children. Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare*, at 19 (2002). And, ultimately, Black children are less likely to reunify with their family after removal, and more likely to experience re-entry into foster care if they do reunify. *Id.* at 20-21, 23-25 (internal citations omitted); Detlaff et al., *Racial Disparities and Disproportionality in the Child Welfare System* (2011), *supra*.

These national trends are mirrored in Pennsylvania. Black, Hispanic, and multiracial children are disproportionately represented among reports of suspected maltreatment and experience higher than expected rates of substantiation. PA. P'SHIP

FOR CHILDREN, 2020 *State of Child Welfare* (2020), at 8, <https://www.papartnerships.org/wp-content/uploads/2020/06/2020-State-of-Child-Welfare-PA.pdf>. Although Black children comprise 14 percent of the total child population in Pennsylvania, they represent 21 percent of the reports called in to ChildLine for suspected maltreatment, and nearly 20 percent of substantiated reports. *Id.*; PA. DEPT. OF HUMAN SERV., *Racial Equity Report 2021*, 12-13 (2021), <https://www.dhs.pa.gov/about/Documents/2021%20DHS%20Racial%20Equity%20Report%20final.pdf>.

Further, in Pennsylvania, Black and multiracial children are represented in foster care at more than two times their rate in the general population. PA. P'SHIP FOR CHILDREN, 2020 *State of Child Welfare*, *supra*. Also, Black children represent 35 percent of the foster care population, and 42 percent of children who have been in foster care for two years or more. PA. DEPT. OF HUMAN SERV., *Racial Equity Report 2021*, *supra*.

Because Black families and families of color disproportionately experience contact with the child welfare system, and thus are more likely to become subject to investigation and more likely to experience poor outcomes following investigations, upholding the strength of the critical constitutional protections against unwarranted governmental intrusion into the family is an essential component of working towards achieving racial justice for marginalized communities.

**B. Most Reports to CYS Consist of Allegations of Neglect, which are Intertwined and often Conflated with Conditions of Poverty rather than Maltreatment.**

The vast majority of reports to CYS fall under the broad umbrella of child neglect rather than abuse. In 2018, the number of reports of suspected general neglect received by Pennsylvania’s ChildLine was almost four times the number of reports of suspected abuse. PA. P’SHIP FOR CHILDREN, *2020 State of Child Welfare, supra*.

The families reported to CYS for suspected child neglect are overwhelmingly families living in poverty. *See, e.g.,* Kelly Fong, *Neighborhood Inequality in the Prevalence of Report and Substantiated Maltreatment*, 90 CHILD ABUSE & NEGLECT 13 (2019) (finding that the probability of experiencing a CYS investigation more than doubled for children in moderate-poverty neighborhoods and more than tripled for children in high-poverty neighborhoods as compared to children in low-poverty neighborhoods). Families living in poverty are more likely to have experiences that can be perceived as neglect, including substandard housing conditions, eviction, housing instability and homelessness, interruptions in utility service, inadequate food or clothing, irregular or insufficient medical care, truancy, and inadequate access to childcare. *See* Roberts, *Shattered Bonds, supra* at 33-38; David Pimental, *Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right to Parent While Impoverished*, 71 OKLA. L. REV. 885 (2019) (arguing legal definitions of neglect are skewed to characterize poverty as neglect).

Research has found that adults often conflate these conditions of poverty with neglect when deciding whether to make a report to CYS, which may lead to over reporting. *See Kelli Dickerson et al., Do Laypersons Conflate Poverty and Neglect?* 44 LAW & HUM. BEHAV. 311, 323 (2020) (finding that poverty itself, and particularly homelessness, led more than half of participants to say that they would report to CYS, even when legal neglect was absent). Because the over reporting of neglect for conditions related to poverty contributes to racial disproportionality in CYS investigations, strong constitutional protections against unwarranted and unnecessary disruption is critical to dismantling the overrepresentation of families of color in the child welfare system.

**C. CYS Investigations are Intrusive and Traumatic, and Cause Harm to Families and Communities.**

The tendency towards the over reporting, especially for families living in poverty, can lead to unnecessary investigations, causing children and families to endure unwarranted trauma, intrusion, and disruption. Dickenson et al., *supra*, at 321. In Pennsylvania, of the nearly 170,000 reports of alleged child neglect received in 2018, only approximately 23 percent were determined to be valid. PA. P'SHIP FOR CHILDREN, *2020 State of Child Welfare, supra*. This number is even lower for reports of suspected child abuse. Of the 44,000 reports received in 2018, less than 12 percent were substantiated. *Id.*

While the vast majority of reports of suspected abuse and neglect are ultimately found to be without merit, countless families must first be subjected to invasive and sometimes traumatic investigations. For families and communities, enduring a CYS investigation is not a benign event, but a source of fear and stress. The course of a CYS investigation largely depends on the nature of the allegations received in the report. However, no matter what the investigation entails, investigations are experienced as “deeply intrusive state action that touch[es] upon aspects of privacy that the culture and law typically have considered fundamental.” Doriane Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 415 (2005).

“The harm of unnecessary child welfare investigations and monitoring cannot be ignored. They add stress to families already carrying the burdens of poverty and racism. And over-reporting also can make children more vulnerable. When parents see teachers and doctors as threats, they hide what they’re going through, and family struggles can turn into crises”. Rachel Blustain & Nora McCarthy, *The Harmful Effects of New York City’s Oversurveillance*, THE IMPRINT (2019) <https://imprintnews.org/child-welfare-2/the-harmful-effects-of-over-surveillance/3844>; see also, Kelley Fong, *Concealment and Constraint: Child*

*Protective Services Fears and Poor Mothers' Engagement*, 97(4) SOCIAL FORCES 1785 (2019).

In this way, the specter of CYS investigation and intervention can destabilize and cause harm to communities as a whole – particularly communities of color and low-income communities, where the fear of CYS intervention is most acute. Constitutional protections for families are a critical safeguard to ensure that families are not unnecessarily subjected to trauma, and to ensure that communities maintain their stability and vitality.

### **CONCLUSION**

Based on the foregoing, *amici* request that the Court reverse the order of the Superior Court.



Respectfully Submitted,

Dated: February 25, 2021

*s/ Sara J. Rose*

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**CERTIFICATE OF WORD COUNT**

I hereby certify that this brief contains 5,617 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this brief.

Dated: February 25, 2021

*s/ Sara J. Rose*  
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Sara J. Rose, Esquire

**CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127**

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the *Case Records Public Access policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: February 25, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused true and correct copies of the foregoing Amici Curiae Brief of American Civil Liberties Union of Pennsylvania and Community Legal Services of Philadelphia to be served upon the persons indicated below by PACFile and First Class Mail, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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