

# White Paper on Amending The Adoption and Safe Families Act of 1997

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By A New Way of Life Reentry Project



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## I. Introduction

It is a broadly-accepted principle in the child welfare community that “[w]hen children must be removed from their families to ensure their safety, the first goal is to reunite them with their families as soon as possible.”<sup>1</sup> Of all disruptions in a child’s life, forced separation from a parent is the most significant predictor of a child’s poor mental health and developmental outcomes.<sup>2</sup> Yet, only a small fraction of the billions of federal dollars granted to States to fund child welfare initiatives goes toward funding child removal prevention and family reunification programs.<sup>3</sup> Instead of funding services and programs intended to (i) rehabilitate parents whose children have been removed and (ii) promote family unity and reunification, most federal grant money is spent on foster care and adoption assistance.<sup>4</sup>

This state of affairs continues because, under The Adoption and Safe Families Act of 1997<sup>5</sup> (“ASFA”), “States receive financial incentives for finalized adoptions but not for reuniting a child and parent.”<sup>6</sup> Instead of promoting family reunification, ASFA promotes the involuntary termination of parental rights and adoptions through court proceedings when a child has been in foster care for 15 out of the past 22 months (the “15/22 Rule”). While ASFA—and the resulting

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<sup>1</sup> *Reunifying Families*, CHILD WELFARE INFORMATION GATEWAY (May 26, 2021), <http://www.childwelfare.gov/topics/permanency/reunification>.

<sup>2</sup> *Child Welfare and Domestic Violence: The Report on Intersection and Action*, UCLA PRITZKER CENTER FOR STRENGTHENING CHILDREN AND FAMILIES, 6-7 (May 12, 2021).

<sup>3</sup> Kathi L.H. Harp & Carrie B. Oser, *A Longitudinal Analysis on the Impact of Child Custody Loss on Drug Use and Crime Among a Sample of African American Mothers*, 77 CHILD ABUSE NEGL. 1-12 (MAR. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5857224/#R66> (“[O]nly 11% of the 7.2 billion dollars of federal child welfare funds given to states in 2007 funded preventative and reunification purposes; the majority funded foster care and adoption assistance.” (citing Press release, Pew Charitable Trusts, Child abuse and neglect cost nation over \$100 billion per year (Jan. 29, 2008), [http://www.pewtrusts.org/news\\_room\\_detail.aspx?id=34676](http://www.pewtrusts.org/news_room_detail.aspx?id=34676))).

<sup>4</sup> *Id.*

<sup>5</sup> Pub. L. No. 105–89, 111 Stat. 2115; 42 U.S.C. § 675.

<sup>6</sup> Harp, *supra* note 3 (emphasis added) (citing multiple sources).

lack of funding aimed at reunification—is devastating for all families that have experienced child removal, families of color suffer a disproportionately high impact from the practice.<sup>7</sup>

For decades, research and scholarship has affirmed that children of color are removed more often, spend more time in out-of-home care, receive fewer family preservation services, and are less likely to be reunified with their parents.<sup>8</sup> These systemic shortcomings are compounded by the fact that removals and termination proceedings for families of color are often initiated for inadequate reasons—*i.e.*, “not because [parents of color] abuse or neglect their children at higher rates, but in part because being poor . . . and [a person of color] increase one’s risk of being reported for child maltreatment when holding all other factors constant.”<sup>9</sup> To put an end to these injustices, ASFA, and analogous State statutes adopting ASFA, must be reformed.

This is the mission of A New Way of Life (“ANWOL”), a nonprofit organization that provides support and advocacy to women reentering society from prison. ANWOL has extensive experience with how the current state of the law and the American justice system generally prevent family unity in a way that is unfairly biased against racial minorities, particularly women. ANWOL and other organizations ANWOL has partnered with have prepared this report to (i) shed light on the problems ASFA has created for families that have experienced having a child removed

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<sup>7</sup> Child Welfare Information Gateway, *Racial Disproportionality and Disparity in Child Welfare* (2016), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf) (According to 2014 estimates, although Black children made up only 14% of the general child population, they comprised 24% of the foster care population. White children made up 52% of the general child population and 43% of the foster care population.).

<sup>8</sup> See generally Marian S. Harris & Mark E. Courtney, *The Interaction of Race, Ethnicity, and Family Structure with Respect to the Timing of Family Reunification*, 25 CHILD. & YOUTH SERV. REV. 5/6, 409-29 (2003) [https://www.researchgate.net/publication/4823852\\_The\\_interaction\\_of\\_race\\_ethnicity\\_and\\_family\\_Structure\\_with\\_respect\\_to\\_the\\_timing\\_of\\_family\\_reunification](https://www.researchgate.net/publication/4823852_The_interaction_of_race_ethnicity_and_family_Structure_with_respect_to_the_timing_of_family_reunification); Ann F. Garland ET AL, *Racial/Ethnic Disparities in Mental Health Service Use Among Children in Foster Care*, 25 CHILD. & YOUTH SERV. REV. 5/6, 491-507 (2003) [https://www.researchgate.net/publication/4823857\\_Raciaethnic\\_disparities\\_in\\_mental\\_health\\_service\\_use\\_among\\_children\\_in\\_foster\\_care](https://www.researchgate.net/publication/4823857_Raciaethnic_disparities_in_mental_health_service_use_among_children_in_foster_care).

<sup>9</sup> Harp, *supra* note 3 (citing multiple sources).

from the home and (ii) propose specific changes to ASFA to promote family reunification and ensure the child welfare system begins to produce more equitable outcomes for all families.

## **II. The Problem: ASFA Incentivizes Parental Termination and Adoption at the Expense of Parental Rights and the Best Interests of Removed Children**

### *A. The History of ASFA*

The stated purpose of the Adoption and Safe Families Act of 1997 signed into law on November 19, 1997 was to “promote the adoption of children in foster care.”<sup>10</sup> Although family law is traditionally a subject covered by State law, ASFA amended a portion of the Social Security Act that covers foster care and adoption, and was the first major federal legislation addressing adoptions since the federal Adoption Assistance and Child Welfare Act of 1980.<sup>11</sup> ASFA’s legislative history makes clear that the original focus of ASFA was to increase adoptions<sup>12</sup> and to reduce protections for birth parents. With respect to birth parent rights, the concern at the time was that “[f]ederal statutes . . . sometimes err on the side of protecting the rights of the parents. As a result, too many children are subjected to long spells of foster care . . . .”<sup>13</sup> In other words, ASFA was designed to weigh in favor of adoption at the expense of the rights of birth parents.

One way that ASFA accomplishes that objective is by requiring States to initiate proceedings for the termination of parental rights based on the 15/22 Rule, subject to certain limited exceptions.<sup>14</sup> Prior to ASFA, federal law did not prescribe a time frame for States to initiate

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<sup>10</sup> H.R. Rep. No. 105-77, at 1 (1997).

<sup>11</sup> 42 U.S.C. § 1305 (1980), available at <https://www.congress.gov/96/statute/STATUTE-94/STATUTE-94-Pg500.pdf>.

<sup>12</sup> H.R. Rep. No. 105-77, at 8 (1997) (“There seems to be almost universal agreement that adoption is preferable to foster care and that the nation’s children would be well served by a policy that increases adoption rates.”).

<sup>13</sup> *Id.*

<sup>14</sup> The following circumstances provide the only exceptions to this rule: “(i) ‘at the option of the State, the child is being cared for by a relative; (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child’s home . . . .” 42 U.S.C. § 675(5)(E).

termination proceedings. The intent of this portion of the legislation was to decrease the time children spend in foster care, and to allow States to “move more efficiently toward terminating parental rights and placing children up for adoption.”<sup>15</sup> When ASFA was originally introduced as a bill, the triggering timeline was initially proposed to be 24 months, though various other timelines were considered before Congress adopted the 15/22 Rule.<sup>16</sup>

But the U.S. Supreme Court has a long history of recognizing the right to parent as fundamental.<sup>17</sup> In fact, the Supreme Court has held that this fundamental right “does not evaporate simply because [the birth parents] have not been model parents or have lost temporary custody of their child to the State.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In recognizing this fundamental parental right, the *Santosky* court required a standard higher than a preponderance of the evidence to terminate parental rights.

Congress should reconsider the bright-line 15/22 Rule in light of this fundamental right and higher standard of review; the legislative intent underlying ASFA—which prioritizes adoption of children out of foster care over the fundamental rights of parents to reunification—is clearly at odds with the *Santosky* decision. While the legislative history of ASFA appears to recognize that termination of parental rights is “such a serious intervention that it should not be undertaken without some effort to offer services to the family,” the statute is clear that “none of these exceptions should be interpreted to preclude States from pursuing termination of parental rights within the 18-month time frame or earlier.”<sup>18</sup>

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<sup>15</sup> “States often move slowly in moving children toward permanent setting.” H.R. Rep. No. 105-77, at 8 (1997).

<sup>16</sup> H.R. Rep. No. 105-77, at 7 (1997); 143 CONG. REC. H2012 (daily ed. Apr. 30, 1997) (18 of 24 mos.), available at <https://www.congress.gov/congressional-record/1997/04/30/house-section/article/H2012-6>; Katherine A. Hort, *Is Twenty-two Months Beyond the Best Interest of the Child? ASFA’s Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879 (2001), available at <https://ir.lawnet.fordham.edu/ulj/vol28/iss6/6/>.

<sup>17</sup> See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

<sup>18</sup> H.R. Rep. No. 105-77, at 12 (1997).

ASFA’s departure from established law recognizing the fundamental rights of parents is particularly troubling in light of the inequitable impact of ASFA on racial minorities. Although ASFA is racially-neutral on its face, the impacts of the foster care system and termination of parental rights is felt disproportionately by families of color.<sup>19</sup> This point is bolstered by studies showing that “African American mothers with substance abuse problems engaging in crime are at significant risk for child custody loss, arrest, and incarceration”<sup>20</sup> and that “African American mothers are more likely than other mothers to be reported to child welfare authorities by all reporters, including obstetricians suspecting prenatal drug use, pediatricians, school systems, and neighbors.”<sup>21</sup> While the majority of white children involved in child welfare investigations “receive supportive services to remain in their homes, most African American children are placed in foster care.”<sup>22</sup> That race has an impact on a person’s fundamental right to parent is cause for alarm, and amending ASFA would be an important step toward remedying this problem and establishing greater racial equity in the American child welfare system.

The State’s interest in quickly resolving custodial arrangements of children should be balanced with a birth parent’s fundamental right of parenting and consideration of the disparate impacts of the current law on vulnerable communities. The timeline of the 15/22 Rule should be eliminated—or, at the very least, significantly lengthened—to create a more reasonable time frame for birth parents to become rehabilitated and reunite with their children. Moreover, the limited exceptions to the 15/22 Rule are inadequate and that leave too much discretion in the hands of the

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<sup>19</sup> See Stephanie L. Rivaux ET AL., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 *Child Welfare* 2, 151-68 (2008), [https://www.researchgate.net/publication/23440538\\_The\\_Intersection\\_of\\_Race\\_Poverty\\_and\\_Risk\\_Understanding\\_the\\_Decision\\_to\\_Provide\\_Services\\_to\\_Clients\\_and\\_to\\_Remove\\_Children](https://www.researchgate.net/publication/23440538_The_Intersection_of_Race_Poverty_and_Risk_Understanding_the_Decision_to_Provide_Services_to_Clients_and_to_Remove_Children); see also Song, Minkyong,, UNIV. OF PENN. *Termination of parental rights and adoption in foster care* (2006), <https://repository.upenn.edu/dissertations/AAI3225547/>.

<sup>20</sup> Harp, *supra* note 3 (citing multiple sources).

<sup>21</sup> *Id.* (citing multiple sources) (citations omitted).

<sup>22</sup> *Id.* (citing multiple sources).

State. The exceptions should be expanded to ensure that the fundamental right to parent is protected.

*B. Illustrating ASFA's Devastating Impact in California*

To receive funding under ASFA, California (like any other State) must comply with ASFA's requirement that "a State shall file a petition to terminate the parental rights of the child's parents" if the length of a child's foster care stay satisfies the 15/22 Rule.<sup>23</sup> For this reason, under California's Welfare and Institution Code ("WIC"), services provided to promote family reunification are statutorily limited to a maximum period not to exceed 12 months, which, under certain circumstances, may be extended to 18 months.<sup>24</sup> For a child under the age of three at the time of removal, the time for which services must be provided to encourage family reunification can be shortened to only six months if the court finds by clear and convincing evidence<sup>25</sup> that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan.<sup>26</sup>

When allegations of child abuse or neglect arise in California, the case is referred to "dependency court," a special court system created under California law that has superior and sole jurisdiction for all issues involving a child's custody from the date a petition is filed until the case

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<sup>23</sup> 42 U.S.C. § 675(5)(E).

<sup>24</sup> WIC § 361.5(a).

<sup>25</sup> Another potential change to ASFA can be found in the greater protections afforded parents in termination proceedings under the Indian Child Welfare Act ("ICWA"). See 25 U.S.C. §§ 1901-63 (1978). Under the ICWA, "[n]o termination of parental rights may be ordered in such proceedings in the absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *Id.* at § 1912(f). Therefore, while under ASFA the determination to terminate parental rights is a "clear and convincing" standard, the ICWA utilizes the higher evidentiary standard of "beyond a reasonable doubt." This illustrates the greater protections afforded to Native American parents. While the *Santosky* court set the floor for the standard for termination of parental rights, there is compelling justification to raise this standard for all parents, not simply Native American parents. This adjustment would serve to further protect the fundamental civil rights of parents.

<sup>26</sup> WIC §§ 361.5(a)(1)(B), 366.21(e).

is dismissed or terminated.<sup>27</sup> While allegations of abuse or neglect are required before initiating dependency court proceedings, what constitutes abuse or neglect is largely within the discretion of the social workers assigned to a case. Unfortunately, this unfettered discretion leads to a higher number of removals from families of color compared to white families, given that people of color are disproportionately labeled as “neglectful” in situations where the issue is not truly neglect, but rather, poverty.<sup>28</sup> Similarly, women of color who are victims of domestic violence are more likely to have their children removed for failing to “take care of the problem by getting her abuser out of the home, going to a shelter, getting a restraining order, or attending a support group.”<sup>29</sup>

The dangers ASFA presents and the real-life impact they have on individuals is apparent in many of ANWOL’s clients’ stories recounting their struggles to reunify their families. These stories, one of which is shared below, illustrate how ASFA, through WIC, enables dependency courts prematurely to terminate parental rights for improper reasons—most egregiously, when a parent is poor or has been a victim of domestic violence.

### **Stephanie Jeffcoat**

Stephanie’s case provides a stark example of how ASFA promotes parental termination and adoption at the expense of parents’ civil rights. A black woman from Southern California, Stephanie gave birth to her fourth child, Harmony, in June 2016. Because of ASFA and WIC,

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<sup>27</sup> WIC § 304.

<sup>28</sup> KYNDRA C. CLEVELAND & JODI A. QUAS, JUVENILE DEPENDENCY COURT: THE ROLE OF RACE IN DECISIONS, OUTCOMES, AND PARTICIPANT EXPERIENCES Ch. 5 (2020), [https://www.researchgate.net/publication/342409537\\_Juvenile\\_Dependency\\_Court\\_The\\_Role\\_of\\_Race\\_in\\_Decisions\\_Outcomes\\_and\\_Participant\\_Experiences](https://www.researchgate.net/publication/342409537_Juvenile_Dependency_Court_The_Role_of_Race_in_Decisions_Outcomes_and_Participant_Experiences) (“Given the large body of evidence demonstrating that Black, compared to White, families are systematically denied access to societal benefits such as quality education, jobs, credit, and housing that could reduce poverty, it is not surprising that Black families are disproportionately likely to live in poverty. This alone increases Black parents’ risk of being labeled neglectful.” (citations omitted)).

<sup>29</sup> See Chic Dabby & Angela Autry, *Activist Dialogues: How Domestic Violence and Child Welfare Systems Impact Women of Color and Their Communities*, GREENBOOK, 12 (2005), [http://www.thegreenbook.info/documents/Activist\\_Dialogues.pdf](http://www.thegreenbook.info/documents/Activist_Dialogues.pdf) (citing Fernando Mederos, *Accountability and Connection with Abusive Men in the Child Welfare System*, SAN FRANCISCO: FAMILY VIOLENCE PREVENTION FUND (2004)).

Stephanie has lost the right not only to be Harmony's mother, but also to play any part in Harmony's life, despite Stephanie's longstanding rehabilitation and extraordinary efforts to reunite with Harmony.

Like many mothers who find themselves in dependency court, Stephanie has struggled with addiction at various points in her life. When Harmony was born, the Department of Children and Family Services ("DCFS") removed her from Stephanie's care upon discovering Harmony had been exposed to narcotics *in utero*.

Stephanie's struggles with addiction aside, her commitment to being Harmony's mother was unwavering. After Harmony was removed, Stephanie worked closely with her social worker to regain custody of her newborn, showing commitment to her dependency case plan and visitation schedule, through which she would visit Harmony in various informal settings with the support of Harmony's first foster mother. When Harmony was three months old, she was moved to a new foster home with a foster mother who refused to allow Stephanie to visit Harmony anywhere other than a DCFS office, sometimes even requiring that a social worker bring Harmony to the visit rather than attend herself. Despite the disruption to the visitation procedures Stephanie and Harmony had become accustomed to during the first three months of Harmony's life, Stephanie continued to follow her dependency case plan and attended all visits.

Soon, however, California's correctional system interrupted Stephanie's progress. In November 2016, when Harmony was five months old, Stephanie was homeless and living in Orange County. While the fact of her homelessness alone would not have otherwise impacted her ability to continue her rehabilitation and visitations, Stephanie was on probation in San Bernardino County. Because she could not provide an address in Orange County, she was unable to transfer her probation to Orange County, and ultimately was arrested for violating a term of her probation

mandating that she remain in San Bernardino County. When her phone was confiscated upon her arrest, she lost her social worker's contact information and was unable to update DCFS or the court with her whereabouts.

Stephanie was released from jail in January 2017 and immediately began attempting to contact her social worker and resume visitation with Harmony. She began calling the DCFS main line in order to regain the contact information she lost, leaving voice messages when her calls went unanswered. All of her calls were ignored and none of her messages were returned. Left with no other options, Stephanie began going to the DCFS location in person. She would leave messages with reception and was informed her social worker would contact her if her case was still open. Having received no return calls, Stephanie believed Harmony's case had been closed, which caused Stephanie to become depressed and fall deeper into her addiction. To make matters worse, because Stephanie was still homeless, she received none of the paperwork for Harmony's ongoing dependency court proceedings. Indeed, Stephanie had no idea that the proceedings were still ongoing. Stephanie's Termination of Parental Rights Hearing occurred in August 2017. Stephanie never received notice of it, and failed to appear.

In September 2017, Stephanie was again arrested for violating the same term of her probation, and spent the following seven months in jail. Stephanie's mother informed her social workers of her incarceration and provided them with Stephanie's booking number, which they never used to contact Stephanie. Stephanie sought help from the jail's social worker to connect with DCFS, also to no avail. In October 2017, Harmony's adoption proceeding was initiated, and the adoption was finalized in January 2018. All of these proceedings occurred while Stephanie was in jail and without notice.

When Stephanie became ANWOL's client in January 2021, the statute of limitations for appealing the adoption had passed. Despite ANWOL's best efforts and numerous requests to multiple government agencies to try to reunite Stephanie with Harmony, to this day neither ANWOL nor Stephanie has received any information about Harmony's well-being or whereabouts.

Today, Stephanie is a rehabilitated mother who has been sober since February 3, 2019. She rents her own apartment in Anaheim and attends church at the Second Baptist Church in Santa Ana, where she serves in the Women's Ministry and Kitchen Ministry. She is employed as a Community Organizer at ANWOL, where she has worked for one year. Her role is in policy advocacy and teaching other previously-incarcerated women about leadership skills and political activism. She also writes articles, including for the Orange County Register, regarding racial justice. She is a full-time student at Fullerton College pursuing an Associate's degree in political science—she has been on the Dean's Honors List for two semesters and has received leadership honors for her role as Co-President of a club for formerly incarcerated students. She has ambitions to apply to law school in the future. There can be no doubt that Harmony would benefit from having her mother in her life.

Were it not for ASFA's unreasonable time restrictions and financial incentives for States to prioritize allocating funds to adoptions rather than reunification services, Stephanie would almost certainly still be Harmony's mother. Like so many other Americans, Stephanie struggled with addiction and was a victim of the poverty that led to her homelessness, subsequent arrests, and, ultimately, the loss of her child. But Stephanie is also tenacious—she proved early on that she could follow her case plan and visitation schedule, and she has never stopped trying to reconnect with her daughter. Stephanie needed tools to help her overcome her battle with addiction

and resources to help her find employment and a place to live. Instead, Stephanie was arrested, ignored, and forgotten by the system. Because of ASFA, the dependency court was able to complete the termination of Stephanie's parental rights and complete Harmony's adoption unacceptably expeditiously and without notice to Stephanie, thus robbing Stephanie of her of dignity, due process, and her civil right to parenthood.

### **III. The Solution: Amend ASFA to Incentivize Reunification Instead of Termination**

Under both ASFA and State laws like WIC, it is extremely difficult—if not impossible—for parents to demonstrate that they are sufficiently rehabilitated such that they are allowed to resume a relationship with their child. Courts are quick to terminate parental rights whenever a parent is unable to meet demanding treatment and visitation plans, despite the parent's best efforts. The short timeline imposed by these statutes is even more unreasonable in cases where, like many of ANWOL's clients, the parent is incarcerated.

Further, as discussed above, the current statutory framework disproportionately impacts people of color, and particularly women of color, who are much more likely to become involved in dependency court (or similar) proceedings because they are impoverished or victims of domestic abuse rather than because their children are actually being abused or neglected.<sup>30</sup> That people of color are also more likely to become incarcerated, which sometimes itself results in dependency court proceedings, further exacerbates this problem.<sup>31</sup>

#### *A. Proposed Amendments to ASFA*

Recent efforts have been made during the COVID-19 pandemic to amend ASFA in recognition of the potential for inequitable results for birth parents. In August 2020, Representative Gwen Moore of Wisconsin introduced a bill to suspend the timeline that triggers

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<sup>30</sup> See Cleveland, *supra* note 28.

<sup>31</sup> Harp, *supra* note 3.

the proceedings for parental termination during the pendency of the COVID-19 pandemic.<sup>32</sup> Although Representative Moore’s bill was not acted upon in Congress, it raises an important consideration of the additional inequity imposed in light of the COVID-19 pandemic and the risk of terminating parental rights when the pandemic introduced yet another obstacle for parents to comply with State requirements to restore those parental rights. The obstacle of COVID-19 certainly is a basis for suspending family reunification timelines, but so, too, are the perpetual endemics of poverty, domestic violence, and systemic racism in the criminal justice system.

ASFA should be amended (1) to remove the 15/22 Rule, or at the very least to extend the timeline to allow parents sufficient time to ameliorate the conditions that inhibit family reunification and (2) to remove the discretion granted to the State agency to determine if a “compelling reason” exists to allow the State to decline to file a petition for termination of parental rights, or at the very least to lessen the “compelling reason” standard to “reasonable cause.”

Below is a redline of ANWOL’s proposed revisions to ASFA—specifically, 42 U.S.C. Sections 675(1)(B) and 675(5)(E):

### **Section 675(1)(B)**

**(1)** The term “case plan” means a written document which meets the requirements of [section 675a](#) of this title and includes at least the following:

...

**(B)** A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and

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<sup>32</sup> See Suspend the Timeline Not Parental Rights During a Public Health Crisis Act, H.R. 7976, 116th Cong. (2020). Representative Moore recognized the potential harms to children of “permanently and irrevocably losing their family ties—including ties to siblings and grandparents” that are imposed by the parental right termination requirements imposed by the current law. Gwen Moore, *Background Information on the Suspend the Timeline Not Parental Rights During a Public Health Crisis Act*, [https://gwenmoore.house.gov/uploadedfiles/background\\_information\\_on\\_the\\_suspend\\_the\\_timeline\\_not\\_parental\\_rights\\_during\\_a\\_public\\_health\\_crisis\\_act.pdf](https://gwenmoore.house.gov/uploadedfiles/background_information_on_the_suspend_the_timeline_not_parental_rights_during_a_public_health_crisis_act.pdf).

address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan. **In order to avoid removing children from homes when no clear evidence of abuse or neglect exists and to promote successful family reunification, if providing additional services or reasonable accommodations to a parent or relative would allow a child to be placed at home, whereas not providing the additional services or reasonable accommodations would result in removal from the home or continued placement outside the home, such additional services or reasonable accommodations shall be provided.** With respect to a child who has attained 14 years of age, the plan developed for the child in accordance with this paragraph, and any revision or addition to the plan, shall be developed in consultation with the child and, at the option of the child, with up to 2 members of the case planning team who are chosen by the child and who are not a foster parent of, or caseworker for, the child. A State may reject an individual selected by a child to be a member of the case planning team at any time if the State has good cause to believe that the individual would not act in the best interests of the child. One individual selected by a child to be a member of the child's case planning team may be designated to be the child's advisor and, as necessary, advocate, with respect to the application of the reasonable and prudent parent standard to the child.

### **Section 675(5)(E)**

**(5)** The term “case review system” means a procedure for assuring that--

...

**(E)** if a parent is incarcerated or detained, whether in a County, State, or Federal jail, prison, or detention facility, or private or public rehabilitation center, mental health facility, medical facility, or otherwise, measures are taken to safeguard parental rights and promote successful family reunification, including, but not limited to (i) permitting a parent or a parent’s legal counsel to be present and heard, telephonically, in-person, or otherwise, at any hearing, whether in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, that could impact the continuation of that parent’s parental rights, (ii) establishing procedures to ensure proper notice is given of proceedings that could impact the continuation of a parent’s parental rights, (iii) establishing procedures to ensure proper notice is given of visitations or any court-imposed obligations for which failing to timely comply could impact the continuation of a parent’s parental rights, and (iv) providing services to the parent to promote rehabilitation, notwithstanding if the parent is presently incarcerated or detained. ~~in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be~~

~~joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless—~~

~~(I) at the option of the State, the child is being cared for by a relative;~~

~~(II) — a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or~~

~~(III) — the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child;~~

### *C. A New Way of Funding*

If ASFA were amended to incentivize family reunification federally, there are many services supportive of family reunification to which States could allocate this money. Such services include family reunification legal services for parents, kinship care legal services for relative caregivers, social work and legal services connecting families with government aid, family reunification legal clinics, family reunification mental health counseling, and legal guardianship for incarcerated parents.

One possibility to support these same services is to use American Rescue Plan Act<sup>33</sup> funds, including Kinship Care funds administered by the Administration for Community Living at the Department of Health and Human Services. Kinship care is foster care provided by relative caregivers who commit to care permanently for a foster child, often a grandchild. Kinship care is beneficial to rehabilitating parents because it allows parents a chance to reenter their children's lives once they are rehabilitated, regardless if rehabilitation occurs during the strict timelines

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<sup>33</sup> American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021).

imposed by ASFA. There is greater benefit under such a scheme because kinship care, compared to foster care by strangers, is less likely to result in the permanent termination of a parent's rights.

ANWOL is one entity poised to offer additional family reunification and kinship care services, and, as an example, has identified an urgent need for several grants in order to provide *existing services* to an ever-expanding caseload of clients in California:

**First**, an annual grant program of \$450,000 for pro bono legal services for previously-incarcerated parents seeking family maintenance or reunification, including representation on issues relating to custody, parental rights, and/or guardianship in California family courts, dependency courts, probate courts, and appellate courts. Currently, ANWOL has two Family Reunification Attorneys, one of which is at ANWOL through a one-year fellowship funded by Orrick, Herrington & Sutcliffe. ANWOL presently requires additional family reunification legal support in the form of hiring two Dependency Attorneys and one Paralegal. In addition, starting in January 2022, ANWOL will require funding for a Program Head.

**Second**, an annual grant program of \$200,000 for social work and pro bono legal services for parents seeking assistance in obtaining California State and federal benefits and aid, including housing, community reintegration, mental health, and childcare benefits. Currently, ANWOL has two Case Managers who provide these services along with ANWOL's two Family Reunification Attorneys. ANWOL requires one additional Parental Benefits Staff Attorney and three additional Case Managers in order to keep up with caseloads.

**Third**, an annual grant program of \$80,000 for pro bono legal services for prospective relative caregivers, including grandparents and other kin, in California dependency court proceedings and resource family approval processes, including appeals of resource family denials. ANWOL's two Family Reunification Attorneys provided these services through May 2021, but

had to cease offering these services due to their family reunification caseload. ANWOL requires one Kinship Care Staff Attorney to be able to offer these services.

Additionally, organizations like ANWOL need funding to begin offering certain *new services* to families in California, including, for example, the following:

*First*, an annual grant program of \$70,000 would allow ANWOL to offer services relating to guardianship with power of attorney for incarcerated parents involved in California dependency court actions. The guardian will ensure that parents are represented at hearings while incarcerated and will serve as an interface between child welfare agency social workers and prison social workers. Currently, ANWOL requires one Incarcerated Parent Guardian in order to begin offering this service.

*Second*, an annual grant program of \$100,000 would allow ANWOL to operate Family Reunification Legal Clinics in California's prisons and community centers in order to make all of the above-described services more accessible to potential clients. Currently, ANWOL requires one Legal Clinic Coordinating Attorney in order to begin offering this service.

*Third*, an annual grant program of \$80,000 would allow ANWOL to make family reunification mental health counseling more widely-available to parents litigating family reunification issues. Currently, ANWOL requires one Licensed Marriage and Family Therapist to begin offering this service.

California Families Rise is a nonprofit organization in Northern California also posed to offer pro bono legal services for previously-incarcerated parents seeking family maintenance or reunification and pro bono legal services for prospective relative caregivers, for the same annual grant amounts requested by ANWOL. California Families Rise also requires an annual operating

grant of \$175,000 for office rent, supplies, and furniture, workshops and trainings, and Executive Director and Executive Assistant salaries.

It is time for the federal government to fund family reunification services, including those provided by ANWOL, in order to support the reunification of families separated by our nation's child welfare systems and to address attendant problems of systemic racism. Furthermore, this funding would begin to address the inequities created by ASFA and serve to refocus the law on reunification rather than on termination of parental rights and adoption.

#### **IV. Conclusion**

ASFA is failing the broadly accepted principle that, when children must be removed from their families to ensure their safety, the first goal is to reunite them with their families as soon as possible. The law should support parents like Stephanie—parents who love their children and are showing they can reform and provide a safe and loving home for their children. Instead, the law imposes nearly-impossible requirements that are designed to tear families apart instead of build stronger families. This is especially true for parents of color who have been incarcerated, often for minor or non-violent offenses, and who represent a significant portion of the parents whose families have been destroyed as a result of ASFA and the financial incentives it creates for States to prioritize adoption over parental rights.

The solution is clear—we must shift the focus back to family reunification and incentivize States to provide more services to parents who desperately wish to be reunited with their children and, with a little help and support, are capable of rehabilitation. These basic goals can be achieved by amending ASFA to remove mandatory timelines and to reward States based on how many families a State successfully reunifies; not how many parental terminations and adoptions a State can achieve.