

M.O.,

Plaintiff-Appellant,

v.

DEPARTMENT OF CHILDREN  
AND FAMILIES,

Defendant-Respondent.

**Superior Court of New Jersey,  
Appellate Division**

Docket No.: A-000393-25

Civil Action

On Appeal of a Final Agency  
Decision of the Department of  
Children and Families

Case ID No.: 17118892

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**BRIEF OF AMICUS CURIAE  
THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY  
IN SUPPORT OF PLAINTIFF-APPELLANT**

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## PRELIMINARY STATEMENT

Even when there is insufficient credible evidence for the New Jersey Department of Children and Families (the “Department”) to find that a parent has abused their child, the Department leaves more than one-third of those investigated in a reputational purgatory by virtue of a finding of “not established.” This is so even though the New Jersey Supreme Court has voiced serious doubts about the fairness of the Department’s reliance on that category and has further acknowledged the significant and adverse ramifications for any parent whose administrative record is not expunged as a result of a “not established” finding.

The adverse reputational effects of a “not established” finding are of constitutional moment and bear more heavily on people of color than on others. This Court can avoid the need to address the constitutional issue by adopting Justice Albin’s sound statutory construction, set forth in his separate opinion in *S.C. v. N.J. Dep’t of Child. & Fams.*, 242 N.J. 201, 241 (2020) (Albin, J., concurring in part and dissenting in part), which is not contrary to the holding of the majority, and which cogently explains why the Department’s adoption of the “not established” category exceeded its statutory authority.

If this Court declines to do so, the continued impact of the Department’s “not established” findings still call for a remedy. The Supreme Court’s order in

*S.C.* that the finding be based on “credible” evidence to support the allegation of harm was a huge step in the right direction, apparently contributing to a substantial reduction of “not established” findings. But there are serious problems in the Department’s investigation process, most prominently the inherent weakness in reliance on the uncorroborated accusations of children and inconsistency in the application of the standard, as seen in Appellant’s case here. These problems are exacerbated for people of color who are disproportionately represented in the population of parents subject to abuse and neglect accusations. Amicus requests therefore that, if the Court does not rule that the “not established” category is invalid on statutory grounds, it directs the Department to promulgate regulations that further define the parameters of “credible” evidence sufficient to support a finding of “not established” so as to diminish the chances of reputational injury.

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Amicus accepts the statement of facts and procedural history laid out in Appellant M.O.’s brief filed with the Appellate Division.

### **ARGUMENT**

Without clear statutory authority, and, indeed, contrary to strong indications of legislative intent, the Department has created a free-standing, no-man’s-land category of “not established” as to findings of alleged child

abuse by parents and guardians. N.J.A.C. 3A:10-7.3(c). A “not established” finding falls somewhere between “unfounded” and “established,” and indicates that the Department could not generate evidence of abuse or neglect. Yet parents in this category are saddled with some of the same burdens that apply to parents with findings requiring a higher burden of proof. As relevant here, the Department keeps these parents on a permanent list and may disclose information about the investigation to a host of government agencies, private entities, and individuals. The reputational injury suffered by parents whose records are not expunged is significant and of constitutional dimension. *S.C.*, 242 N.J. at 238. For this reason, the Court in *S.C.* imposed additional procedural safeguards before a “not established” finding can be made—specifically, requiring that the finding be based on “credible” evidence of harm and adequate notice and an opportunity for an informal hearing before the finding is final. *Id.* at 212.

These changes have had a salutary effect, reducing the “not established” findings by more than fifty percent. However, more than a third of all investigated parents, a population consisting disproportionately of persons of color, are still placed in the “not established” category. This means that the Department retains and shares information concerning the allegations of more

than a third of all parents subject to an investigation with other government agencies and private employers performing background checks.

Amicus also recognizes that there is language in *S.C.* that would appear to rule out the constitutional argument for complete elimination of the “not established” category. Not so, however, on statutory grounds. In his separate opinion in *S.C.*, Justice Albin explained how and why the “not established” category is contrary to the Department’s statutory authority. The Court in *S.C.* did not address that issue directly because the parties had not raised it below. It is raised here, however, and amicus urges this Court to adopt Justice Albin’s reasoning and rule that the creation of the “not established” category was beyond the Department’s authority.

If this Court declines to do so, it must confront the constitutional issue, and specifically, that the continued reliance by the Department on the “not established” category is constitutionally suspect without further safeguards as to what constitutes “credible” evidence. This problem comes to light in the facts of this case, where the “not established” finding is inherently inconsistent, as well as in substantial social science research demonstrating the weakness of reliance on uncorroborated accusations by children to support abuse and neglect charges. And the burden of these problems is borne more heavily by persons of color, because of their disproportionate presence in the

system. If the “not established” category survives, then the Department should be directed to promulgate regulations that set forth reasonable parameters as to what constitutes “credible” evidence to safeguard against the inherent weakness in the evidence typically relied upon.

**I. The “Not Established” Category Was Created in Contravention of the Department’s Statutory Mandate.**

The Department is statutorily charged with determining whether allegations of abuse and neglect are substantiated or unfounded. *See* N.J.S.A. 9:6-8.10a; N.J.S.A. 9:6-8.40a; N.J.S.A. 9:6-8.11. To that end, the Legislature directed the Department to define and expunge “unfounded” records as well as establish a process for making that determination. N.J.S.A. 9:6-8.40. Pursuant to this statutory mandate, the Department implemented a two-tier system—“substantiated” or “unfounded”—that operated from 2004 to 2013. *S.C.*, 242 N.J. at 247 (Albin, J., concurring in part and dissenting in part).

In 2011, while the Department still operated under the two-tier system, the New Jersey Legislature introduced a bill establishing a third, intermediate category for “not substantiated” which would require “some indication of a finding that the child has been harmed or placed at substantial risk of harm.” *A. 4109/S. 1570* (2011). That bill would not have provided for expungement of records related to the intermediate category. *Id.* Governor Christie vetoed the

bill.<sup>1</sup> This legislative action was significant: by passing a bill that would have added the very category the Department later created by regulation, the Legislature expressed its understanding that creating any category between “substantiated” and “unfounded” is a legislative prerogative. *S.C.*, 242 N.J. at 250 (Albin, J.).

Only two years later, in 2013, however, the Department promulgated a regulation through rulemaking, departing from that statutorily-authorized framework by creating a four-tier system: “substantiated”; “established”; “not established”; or “unfounded,” with expungement permitted only for “unfounded” findings. N.J.A.C. 3A:10-7.3(c). While “substantiated” and “established” findings must be based on a preponderance of the evidence, “not established” does not even require that level of proof, only requiring “evidence indicat[ing]” that a child was harmed or placed at risk of harm. *Id.*

The Department’s action was driven by the fact that under the two-tier system, approximately 90% of investigated allegations were deemed “unfounded” and required expungement. *S.C.*, 242 N.J. at 249 (Albin, J.). By creating the “not established” category, the Department reduced the proportion of allegations subject to expungement to just over 20%, thereby retaining all

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<sup>1</sup> *1570 - Relating to Child Abuse - New Jersey Key Vote*, Vote Smart, [justfacts.votesmart.org/bill/14788/38641/111064/relating-to-child-abuse%2338641](https://justfacts.votesmart.org/bill/14788/38641/111064/relating-to-child-abuse%2338641) (last visited May 19, 2026).

remaining records. *Id.* As Justice Albin observed, the Department “transformed the term ‘not established’— in Orwellian double-speak fashion — to actually establish a basis for not granting expungement relief to a parent . . . when allegations cannot be proven by the lowest evidential standard — a preponderance of the evidence.” *Id.*

The Department’s creation of the “not established” category by rulemaking circumvented both the legislative process and the expungement statute, N.J.S.A. 9:6-8.40a, which requires the Department to expunge all unfounded reports of abuse or neglect under the original two-tier system, effectively requiring expungement of anything short of a substantiated record. Where the enabling legislation “cannot fairly be said to authorize the agency action in question, the power is denied.” *A.A. Mastrangelo, Inc. v. Comm’r of Dep’t. of Env’t Prot.*, 90 N.J. 666, 684 (1982).

## **II. The “Not Established” Category Injures Constitutionally Protected Reputational Interests.**

Placing a parent in the “not established” category has serious consequences. Under the Department’s regulations, it maintains “each record which contains a substantiated, established, or not established report.” N.J.A.C. 3A:10-8.1(b). Under N.J.S.A. 9:6-8.10a(b)(13), the Department may disclose “information obtained by the [Department] in investigating” reports of abuse or neglect to myriad government agencies, private and governmental

entities, individuals, and employers, including “any person or entity mandated by statute to consider child abuse or neglect information when conducting a background check or employment-related screening of an individual employed by or seeking employment with an agency or organization providing services to children.”

Nothing in the definition of “not established” requires the Division of Child Protection & Permanency (“DCPP” or “Division”) caseworker to make a determination as to the accuracy of the evidence supporting the allegations. Although it signifies the Division's conclusion that there “is not a preponderance of the evidence that a child is an abused or neglected child,” it nonetheless conveys the Division’s parallel determination that “evidence indicates that the child was harmed or was placed at risk of harm.” N.J.A.C. 3A:10-7.3(c)(3). Significantly, when it promulgated the regulation that created the “not established” category, the Division made it clear that it viewed a “not established” finding as conclusory evidence that a child was harmed or placed at risk of harm and intended to rely on that finding in subsequent investigations. 44 N.J.R. 357(a) (Feb. 21, 2012) (“[T]he inclusion of the ‘not established’ finding will allow the Division to retain records where a child *is found to have been* harmed or placed at risk of harm. This will allow the Division to have a better and more comprehensive understanding of a family

should additional referrals be received by the Division in the future.”)  
(emphasis added).

The finding of “not established” and the related investigatory file may be disseminated to a long list of designated persons and entities, including institutions, law enforcement agencies, physicians, courts, and employers, and may impact the accused’s employability, among other things. N.J.S.A. 9:6-8.10a(b)(13). The reputational harms from the finding of “not established” and the permanent investigatory record that comes with it, flowing from a single investigatory determination made by a caseworker, are serious and irreversible. As Justice Albin observed, “the disclosure of ‘not established’ allegations to some service providers under the Department’s ‘some evidence’ standard has the capacity to permanently and unfairly tar a parent’s reputation and deny that parent meaningful opportunities.” *S.C.*, 242 N.J. at 249 (Albin, J., concurring in part and dissenting in part).

The majority in *S.C.* recognized that the reputational injury implicates constitutionally-protected rights, and ruled that providing the parent with notice of the Department’s planned “not established” finding and an informal opportunity to be heard by the agency before the finding is finalized would satisfy due process concerns. *Id.* at 238-39. Characterizing the “not established” category as “vague, amorphous, and incapable of any objective

calibration,” the Court also required that “*at the very least*, the ‘some evidence’ description advanced by the Department [as the standard that supported a “not established” finding] must be understood to be ‘credible evidence.’” *Id.*

Significantly, the Court noted that “[b]eyond that one cannot know what the Department intends by its standard and how it is to be evaluated,” leaving to the Department “the responsibility to reexamine and clarify its standard.” *Id.* at 239-40. The Court declined to address the issue as a facial challenge because it did not view the issue as having been properly placed before it. *Id.*

### **III. There Are Inherent Systemic Weaknesses in the Department’s Standard for Determining “Not Established.”**

The changes required under *S.C.* have produced improvements in how the finding is applied, with the total proportion of “not established” findings declining steadily from over 70% in 2017 to 35% in 2025. 242 N.J. at 249.<sup>2</sup> The category is no longer the catch-all default for the majority of investigated parents. Still, however, more than a third of all of these parents continue to experience the reputational impact of a finding that need not even be supported by a mere preponderance of the evidence.

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<sup>2</sup> *New Jersey Child Welfare Data Hub*, Rutgers Univ. Sch. of Soc. Work, Inst. for Fams., njchilddata.rutgers.edu (last visited Mar. 17, 2026). (All data in this section is from this source unless otherwise noted).

Further, while the distribution of “not established” by race is proportional to the total number of investigations by race, the finding has particular impact on communities of color, particularly Black parents, who are overrepresented in DCPD investigations. The persistence of this harm, even with *S.C.*’s improved procedural framework, raises concerns when the substantive standard underlying the framework remains, in the Supreme Court’s own words, “vague, amorphous, and incapable of any objective calibration.” 242 N.J. at 239.

**A. There are systemic deficiencies in the lack of clear parameters to guide the exercise of the Department’s discretion in making “not established” findings.**

The “some evidence” standard, even as narrowed by the Supreme Court to require “credible evidence,” imposes no meaningful requirements on the quality, source, or corroboration of evidence underlying the finding. When the definition is not sufficiently concrete, the decisionmakers—here, the caseworkers—will fill the gaps with available information and apply it without limitations. This includes unreliable testimony, subjective impressions, and unconscious or implicit assumptions.

The facts of this case illustrate the arbitrariness of the Department’s application of the “not established” standard. Here, the findings letter sent to appellant M.O. stated that his “action or inaction did not constitute

abuse/neglect.” (Aa1).<sup>3</sup> It also stated that “both children were harmed or placed at risk of harm as they consistently disclosed being touched in the vaginal area by [M.O.]” (Aa2). By stating that there was no abuse or neglect, the Division is admitting that the conduct did not occur, or they would have returned a “substantiated” finding, as required by the statute for sexual conduct involving children. N.J.A.C. 3A:10-7.4(a)(2). As the Appellant aptly noted in their brief, there is no in-between circumstance for this conduct. When there has been no evidence of the alleged conduct having occurred, it is not possible for the children to have been put at risk of harm. Either the conduct happened, and the children were abused or neglected, or the conduct did not happen, and the children were not abused, neglected, or harmed, unless there exists separate harmful conduct. The finding cannot rely solely on the unproven allegation.

This is particularly so when the primary source of evidence in a huge proportion of these matters is the uncorroborated accusations of children. In pre-trial investigations, a caseworker may rely on evidence that might otherwise be disregarded or dismissed in a trial context. In practice, this means that the “not established” determination may frequently rest on a single factor—a child’s statement made to the caseworker during a private interview. DCF’s own policies require that a caseworker “interview the alleged child

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<sup>3</sup> “Aa” refers to Appellant’s Appendix.

victim in person and individually, during the investigation of a report containing any allegation,” and that the caseworker also “observe each non-verbal alleged child victim.”<sup>4</sup>

This would be less troubling if child testimony was inherently reliable. But empirical evidence shows that child testimony is far from reliable. For example, children’s responses to interview questions are shaped by the expectations and assumptions of the interviewer. Researchers have found that children’s cooperative nature and their desire to “make their answers consistent with what they see as the intent of the questioner rather than consistent with their knowledge of the event.”<sup>5</sup> In one study involving preschoolers, a trained social worker was given a one-page report about a game with both accurate and erroneous information.<sup>6</sup> When later interviewing children about the game, the social worker’s misinformation was corroborated by 34% of the three- to four-year olds and 18% of the five- to six-year-olds. *Id.* Later in the interview, some children who initially contradicted the interviewer even “abandoned their contradictions and hesitancy and endorsed the

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<sup>4</sup> N.J. Dep’t of Child. & Fams., *New Jersey Department of Children and Families Policy Manual* 1 (Feb. 6, 2012), [policy.dcf.nj.gov/app/file/ CPP-II-C-5-1000.pdf](http://policy.dcf.nj.gov/app/file/_CPP-II-C-5-1000.pdf).

<sup>5</sup> Maggie Bruck & Stephen J. Ceci, *The Suggestibility of Children’s Memory*, 50 *Ann. Rev. Psych.* 419, 425 (1999).

<sup>6</sup> Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children’s Testimony* 89 (Am. Psych. Ass’n, 1st ed. 1995).

interviewer’s erroneous hypothesis.” *Id.* at 90. This presents a significant danger in an investigative context, where a caseworker approaches an interview with a report of alleged abuse or neglect already in hand.

Questioning techniques may also lead to inaccurate statements by children. In order to show cooperativeness, children may answer “forced-choice” questions, which limit a child to a predetermined set of answers, based on sheer speculation rather than memory or fact.<sup>7</sup> “Tag” questions similarly imply that the child knows the answer (“your mother smoked yesterday, didn’t she?”). Answers to “tag” questions have been shown to yield an accuracy rate of only 50% when the event asked about had never occurred (i.e. 50% of children will answer “yes” to the above question, even if their mother did not smoke the day before).<sup>8</sup>

Finally, children also have the capacity and, in certain circumstances, the motivation, to provide inaccurate information. The ability to lie has been shown from age three, and the ability to tell lies to cover other lies is shown to begin around ages seven or eight.<sup>9</sup> The phenomenon of lying is particularly

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<sup>7</sup> See Bruck & Ceci, *The Suggestibility of Children’s Memory*, *supra*, at 425.

<sup>8</sup> Elisa Krackow & Steven Jay Lynn, *Is There Touch in the Game of Twister ®? The Effects of Innocuous Touch and Suggestive Questions on Children’s Eyewitness Memory*, 27 L. & Hum. Behav. 589, 597 (2003).

<sup>9</sup> Victoria Talwar & Kang Lee, *Social and Cognitive Correlates of Children’s Lying Behavior*, 79 Child Dev. 866, 873 (2008).

prevalent in situations where the lie would help the child avoid punishment or achieve autonomy.<sup>10</sup> Of concern are investigations where the allegation stems from a child's misbehavior, leading to the child's incentive to bend the truth to avoid being viewed as a bad child.

Judicial proceedings have protections that address these reliability concerns, including evidentiary rules, cross-examination, and the presence of a judge. Importantly, all parties, including minor children, in a Title 9 or Title 30 action have the right to counsel, ensuring that everyone receives adequate representation against uncorroborated statements or insufficient evidence. N.J.S.A. 9:6-8.43(a); N.J.S.A. 9:17-47. A DCPD pre-trial investigation, on the other hand, lacks all of these protections. A child is interviewed alone without any counsel or other adult present; their statements are evaluated without any standard of reliability or corroboration, and bias may go unchecked. The "credible evidence" standard does not specify what is "credible," so this kind of unvetted testimony may still play a substantial role in the determination of a finding.

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<sup>10</sup> *Id.*; Lene Arnett Jensen et al., *The Right to Do Wrong: Lying to Parents Among Adolescents and Emerging Adults*, 33 *J. Youth & Adolescence* 101, 110 (2004).

**B. The systemic concerns as to the nature of evidence used to support charges of abuse and neglect affect people of color disproportionately.**

The absence of meaningful procedural protections does not affect all New Jersey parents equally. When biases are allowed to systemically fill gaps, as seen here, subjective determinations made by a single decision-maker perpetuate harm in communities already marginalized, needing economic or housing support, or distrusting of critical government-funded services in fear of additional surveillance.

Racial disparities in the New Jersey child welfare system are well documented and begin before any investigative finding is made.<sup>11</sup> In 2023, DCPP received 62,777 reports of alleged abuse and neglect involving a total of 98,655 children.<sup>12</sup> DCPP conducted an investigation for all 98,655 of those children. While most of the investigations were dismissed, by the end of the year, a total of 32,407 children were actively involved with DCPP in some way. Of those 32,407 children, 71% were children of color. *Id.* This is nearly three times the number of white children involved with DCPP. Furthermore,

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<sup>11</sup> P. Kenneth Burns, *Amid Downward Trend, Black and Hispanic Children Account for Majority of Population in New Jersey's Foster Care System*, WHYY News (Dec. 19, 2025), [whyy.org/articles/new-jersey-foster-care-black-hispanic-children](https://whyy.org/articles/new-jersey-foster-care-black-hispanic-children).

<sup>12</sup> *New Jersey Child Welfare Data Hub*, *supra*. (All data in this section is from this source unless otherwise noted).

Black children were involved in a DCPD investigation at a rate more than two times their proportion in the general population (32% and 13% respectively). White children were involved at a little more than half the rate of their proportion in the general population (24% and 43% respectively). *Id.* These disparities are reflected nationally as well. Across the United States, more than half of Black children will experience a CPS investigation before they turn eighteen, and nearly one in ten will be removed from their parents and placed into foster care.<sup>13</sup> This has been attributed in part to the increased surveillance of Black families and communities by social services and law enforcement.<sup>14</sup>

An investigation by the Division should serve to accurately gauge which families require further services or intervention. The system fails to do this today. Families of color are entering the system at a disproportionately higher

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<sup>13</sup> Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 Am. J. Pub. Health 274, 278 (2017); See Youngmin Yi, Frank R. Edwards & Christopher Wildeman, *Cumulative Prevalence of Confirmed Maltreatment and Foster Care Placement for US Children by Race/Ethnicity, 2011-2016*, 110 Am. J. Pub. Health 704, 708 (2020); Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000-2011*, PLoS One, Mar. 2014, at 5; Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can be Done to Address Them?*, 692 Annals Am. Acad. Pol. & Soc. Sci. 253, 253-54 (2020).

<sup>14</sup> Elizabeth Hlavinka, *Racial Disparity Seen in Child Abuse Reporting*, MedPage Today (Oct. 5, 2020), [medpagetoday.com/meetingcoverage/aap/88958](https://www.medicinenet.com/meetingcoverage/aap/88958).

rate than white families, where they then face harmful investigative findings.<sup>15</sup> Effectively, families of color, reported at higher rates due to bias, symptoms of poverty, or with malicious intent, are not being removed from the system through reliable investigations.

Furthermore, unlike other crimes, alleged abuse or neglect is significantly more contextual and perceived differently from child to child. As one article describes it, a spanking to one child might be perceived as abuse, while to another, it is merely one form of discipline.<sup>16</sup> Similarly, a child who misses meals might experience this as neglect (e.g., a parent failing to feed their child due to substance use), while another may perceive it as abuse (e.g., a parent depriving their child of food as punishment), and others still may see it as simply a socio-economic barrier (e.g., a parent unable to afford consistent meals for their family). *Id.*

Moreover, symptoms of poverty—co-sleeping, an older sibling serving as caregiver for a few hours, improvised winter clothing—can all be easily characterized as placing a child at “risk of harm” under a standard that requires only “some evidence.” The “not established” category makes no distinction between poverty and neglect, resulting in a large proportion of parents simply

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<sup>15</sup> *New Jersey Child Welfare Data Hub, supra.*

<sup>16</sup> Rakesh Beniwal, *Implicit Bias in Child Welfare: Overcoming Intent*, 49 Conn. L. Rev. 1021, 1033 (2017).

needing services and support finding themselves penalized for their poverty.<sup>17</sup> Empirical research confirms that implicit biases shape these determinations. In one study, social workers were shown photographs of a messy house.<sup>18</sup> The photos shown to the social workers were taken from actual case files, with a third of them untouched, a third superimposed with a white baby, and the final third superimposed with a black baby. *Id.* Social workers who viewed the image with the Black infant were significantly more likely to conclude that the home situation met the state “definition of neglect and/or [was] a reportable offense according to state law.” *Id.* at 1489. Another study conducted in King County, Washington, concluded that:

[T]he evidence is clear that racial bias exists in the assessment of risk, sending children and families of color into the child welfare system at a higher rate. The disproportionate number of children of color in the child welfare system is reflective of racism that exists in the larger society.

[Marian S. Harris & Wanda Hackett, *Decision Points in Child Welfare: An Action Research Model to Address*

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<sup>17</sup> See Laura Frame, Ctr. for Soc. Servs. Rsch., U.C. Berkely, *Parent-Child Relationships in Conditions of Urban Poverty: Protection, Care, and Neglect of Infants and Toddlers* 4 (2001), [researchgate.net/publication/34277070\\_Parent-child\\_relationships\\_in\\_conditions\\_of\\_urban\\_poverty\\_protection\\_care\\_and\\_neglect\\_of\\_infants\\_and\\_toddlers](https://www.researchgate.net/publication/34277070_Parent-child_relationships_in_conditions_of_urban_poverty_protection_care_and_neglect_of_infants_and_toddlers); Michele Estrin Gilman, *The Poverty Defense*, 47 U. Rich. L. Rev. 495, 515 (2013).

<sup>18</sup> Sheila D. Ards et al., *Racialized Perceptions and Child Neglect*, 34 Child. & Youth Servs. Rev. 1480, 1483 (2012).

*Disproportionality*, 30 Child. & Youth Servs. Rev. 199, 207 (2008).]

The New Jersey Supreme Court has held that implicit or unconscious bias is no less problematic than intentional bias, and when exercised by a state actor, can result in the violation of an individual’s fundamental rights. *State v. Andujar*, 247 N.J. 275, 303 (2021). The Court further held that it is “important for the New Jersey Judiciary to focus with care” on issues related to implicit bias. *Id.*

Where implicit bias cannot be eliminated given the fundamental structure of the child welfare system, objective standards are necessary to protect the parents who otherwise face the arbitrary and subjective application of the harmful consequences. The vague standard as it stands is discriminatory in effect.

**C. The finding of “not established” deters parents from seeking support from mandated reporters.**

While the State’s *parens patriae* authority is undisputed, it is not a sweeping right, and the exercise of it here has the effect of harming the well-being of children and families in New Jersey. As explained above, the parents most likely to receive a “not established” finding are disproportionately low-income parents and parents of color, many of whom were already navigating unstable housing, food insecurity, inadequate access to healthcare, or untreated

mental health conditions at the time of investigation. These are exactly the families for whom access to social services is most critical, and for whom the barriers to seeking help are already highest.

Families that have been investigated by the Division experience reluctance to engage with the systems that can simultaneously support and surveil them. A growing body of public health scholarship demonstrates that coercive, stigmatizing interventions in family life undermine the State's stated interest in advancing the well-being of children and families. As Professor Josh Gupta-Kagan has documented, the present child welfare system's parental-fault paradigm, in which state involvement is conditioned on findings of individual wrongdoing rather than family need, consistently deters the very help-seeking behavior that would actually reduce risk to children.<sup>19</sup>

Studies show that families who become subjects of child protective investigations are significantly less likely to continue voluntary participation in mental health treatment, substance abuse counseling, and other services—with documented treatment dropout rates as high as 31% following a caseworker report. *Id.* at 932. Fear of punitive state action has similarly been

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<sup>19</sup> Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 Neb. L. Rev. 897, 903-09 (2014).

identified as a primary reason that families in need of prenatal care, housing assistance, and mental health support avoid seeking those services at all.<sup>20</sup>

The “not established” finding amplifies this deterrent effect. Unlike a finding of “unfounded,” which closes the record and permits the family to move forward, a “not established” finding leaves parents in a state of permanent documented suspicion—their records retained indefinitely, subject to disclosure in twenty-two enumerated circumstances, and available to the Department in any future investigation. A parent who has received a “not established” finding has a concrete, rational reason to avoid contact with mandated reporters, social service providers, and any other institution whose involvement might trigger renewed Division scrutiny. The child in that household is not safer because of the finding. The finding has instead constructed a barrier between that family and the supports that would actually reduce risk, which is precisely the outcome a child protection system exists to prevent.

This is what Gupta-Kagan identifies as the central failure of the parental-fault model: by framing state involvement as a response to individual wrongdoing rather than family need, the system excludes from meaningful

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<sup>20</sup> Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers’ Institutional Engagement*, 97 Soc. Forces 1785, 1787 (2018).

assistance the very families it was designed to help.<sup>21</sup> The families most likely to be reported to the Division, and therefore receive a “not established” finding are, as the racial and economic disparities documented above confirm, disproportionately low-income families navigating poverty-related stressors—unstable housing, food insecurity, and untreated mental health conditions. A classification that leaves these families with a permanent record discouraging future engagement with support systems does not serve the State’s child welfare interest, but works against it.

**IV. The Court Can and Should Avoid the Constitutional Question by Adopting Justice Albin’s Statutory Analysis.**

The reputational injury resulting from a finding of “not established,” coupled with the systemic facial problems inherent in the application of the amorphous standard raise constitutional issues not fully addressed by the Court in *S.C.* As set forth below, there is a remedy—admittedly complex and imperfect—for that constitutional injury. However, this Court need not reach that issue. Where a statutory ground exists that would fully dispose of the matter, courts should resolve the case on that ground and avoid reaching the constitutional question. This principle of constitutional avoidance is well established in New Jersey jurisprudence. *See State v. Carter*, 247 N.J. 488, 520

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<sup>21</sup> Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, *supra*, at 947-48.

(2021); *State v. Burkert*, 231 N.J. 257, 276-77 (2017); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (articulating the principle that courts should not pass upon a constitutional question if there is also present some other ground upon which the case may be disposed of). Such a ground exists here. Justice Albin’s partial dissent in *S.C.* identifies a statutory basis for striking down the “not established” category that this Court can and should adopt, and which the Supreme Court declined to reach only because no facial challenge was before it. 242 N.J. at 212-13.

To summarize Justice Albin’s reasoning, an administrative agency possesses only those powers delegated to it by the Legislature, and while their authority is “to be liberally construed in order to enable the agency to accomplish its statutory responsibilities,” an agency cannot exercise powers that contravene the statutory language or the Legislature’s intent. *N.J. Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 561-62 (1978); *A.A. Mastrangelo, Inc.*, 90 N.J. at 684.

The statutory path Justice Albin identified leads directly to abolition of the “not established” category and requires no constitutional ruling. If the Department exceeded its delegated authority in creating the category, the category must be struck down as *ultra vires* and the constitutional questions may be avoided. The three remaining categories, “substantiated,”

“established,” and “unfounded,” provide the framework the Legislature authorized without unduly burdening New Jersey parents. A finding unsupported by a preponderance of the evidence is, by the Department’s own regulatory definition, unfounded. N.J.A.C. 3A:10-7.3(c)(4). This Court should so hold and strike down the “not established” category.

**V. If This Court Reaches the Constitutional Issue, It Should Order the Department to Adopt Regulations Setting Objective Parameters for the Exercise of Its Discretion in Reaching a Finding of “Not Established.”**

If the Court declines to eliminate the “not established” category on statutory grounds, and recognizing that *S.C.* argues against eliminating the category on constitutional grounds altogether because of the Court’s recognition of the important interest the State has in protecting the safety of children, this Court must confront the systemic issues relating to the Department’s application of the standard, most prominently its reliance on uncorroborated statements by children. While child interviews will undoubtedly continue to be a vital component of child welfare investigations and legal proceedings, its potential negative impact can and should be limited by allowing the State to make investigative decisions with lifelong impacts on parents only in situations where the child interview is just one of many pieces of corroborating evidence to support a legal standard such as preponderance of the evidence, rather than some vague, indeterminate description of “credible

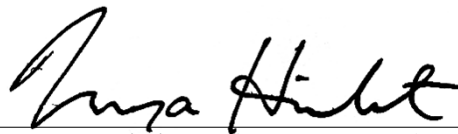
evidence.” This Court should do what the Supreme Court already suggested that the Department do in *S.C.*: promulgate regulations to that effect and any other regulations that the Department believes will safeguard parents accused of abuse and neglect from arbitrary agency conclusions of “not established.”

### CONCLUSION

This Court should adopt Justice Albin’s statutory construction and hold that the “not established” category exceeds the Department’s authority. If it declines to do so, it should at minimum direct the Department to promulgate regulations defining what constitutes “credible” evidence sufficient to support such a finding, and other regulations that will safeguard parents accused of abuse and neglect from arbitrary agency action that will irrevocably injure their reputations.

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Respectfully submitted,



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