ESSAYS

CHALLENGING THE DISPARATE IMPACT OF PENNSYLVANIA'S CHILD ABUSE REPORTING AND INVESTIGATION STATUTES UNDER THE PENNSYLVANIA CONSTITUTION'S ANTIDISCRIMINATION PROVISIONS

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INTRODUCTION

Under contemporary Fourteenth Amendment jurisprudence, legal challenges to the disparate racial impact of state child abuse reporting systems will fail if the litigants are unable to prove actual intent to discriminate by state actors.[1] However, while such federal constitutional remedies are largely unavailable to redress the racially disparate impact of state laws and systems, state constitutional antidiscrimination provisions can fill this gap. This Essay explores the contours of a challenge to Pennsylvania's child abuse reporting and investigation system under Pennsylvania's recently adopted anti-race discrimination constitutional amendment as well as other antidiscrimination provisions of the Commonwealth's Constitution. Section I of this Essay provides a historical overview of child abuse laws in the United States, the evolution of child protection laws in Pennsylvania, and the disproportionate rates at which Black, Hispanic, and other families of color are surveilled, reported, and separated from one another under these laws. Section II of this Essay explains why traditional disparate impact claims have been insufficient to address issues within the child welfare system and how the antidiscrimination provisions of Pennsylvania's Constitution—which were intended to go further than federal constitutional protections and were specifically enacted to address racial inequities—might be more effective. Section II also provides a framework for advancing claims under Article 1, Section 29 of the Pennsylvania Constitution.

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1. Washington v. Davis, 426 U.S. 229, 239–41 (1976).

I. HISTORICAL BACKGROUND OF CHILD ABUSE LAWS AND THEIR RACIAL IMPACT

Public and private child welfare services established to provide care and protection to children and families have existed in the United States in some form for centuries. As early as the 1640s, colonial laws authorized public authorities to remove children from their families and place them with other families who could raise the children in a manner deemed more appropriate.[2] These laws allowed private intervention into the parent-child relationship to assure that such child-rearing properly raised employable, moral children.[3] Tightly woven religious communities provided moral guidance and often acted with public authorities to provide supervision of family life.[4]

In the 1800s, orphaned children, as well as children whose families simply could not care for them, were sent to work as indentured servants for other families.[5] By the 1830s, churches and other religious organizations, as well as private agencies, began to "rehome" children who were orphaned, abandoned, or otherwise deemed endangered without conducting initial screening of the adoptive families, follow-up visits to determine the appropriateness of the placements, or verifications of the well-being of the children.[6] In 1912 the first federal child welfare agency, the Children's Bureau, was established.[7] Notably, both public and private child welfare services formally excluded Black children and families until the 1940s.[8]

In 1963 the Children's Bureau issued model legislation to encourage states to develop legal requirements for reporting child maltreatment.[9] The model legislation required doctors to report all suspected maltreatment and made failure to report a

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2. *See* CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, VOL. I: 1600–1865, at 27–29 (Robert H. Bremner, John Barnard, Temara K. Hareven & Robert M. Mennel eds., 1970).

3. *Id.*

4. *Id.*

5. Tim Hacsi, *From Indenture to Family Foster Care: A Brief History of Child Placing*, CHILD WELFARE, Jan./Feb. 1995, at 162, 163–66.

6. *Id.* at 165–69.

7. DOROTHY E. BRADBURY & MARTHA M. ELIOT, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, FOUR DECADES OF ACTION FOR CHILDREN: A SHORT HISTORY OF THE CHILDREN'S BUREAU 1 (1956), https://www.ssa.gov/history/pdf/child1.pdf [https://perma.cc/98TV-FPJY].

8. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 7–8 (2002) [hereinafter ROBERTS, SHATTERED BONDS] (explaining that between 1945 and 1961, the proportion of nonwhite children on public child welfare caseloads steadily increased). By 1961, 24% of the children served by public agencies were Black. *Id.* Even after the child welfare system began to include Black children, however, religious charities continued to practice blatant racial discrimination. *Id.* at 7. Through the 1990s, these charities used religious preferences, gradations of skin shade, and hair texture to justify the exclusion of Black children. *Id.*

9. Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 39 (2014) (explaining that Dr. C. Henry Kempe's call for physicians to be required to report suspicions of child abuse to police or child welfare at a meeting of the Children's Bureau influenced the creation of the model legislation and ultimately the Child Abuse Prevention and Treatment Act (CAPTA)). *See generally* C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller & Henry K. Silver, *The Battered-Child Syndrome*, 251 JAMA 3288 (1962) (identifying battered-child syndrome as a frequent cause of serious injury or death and emphasizing physicians' duty to prevent repeated trauma).

misdemeanor offense.[10] By 1967 all states had enacted mandatory reporting legislation that closely mirrored the model legislation issued by the Children's Bureau.[11] In 1974 Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), which provided financial support to states for the prevention, assessment, and prosecution of child abuse and introduced "neglect" as a basis for maltreatment reporting.[12] Notably, in the hearing leading up to the passage of CAPTA, led by then-Senator Walter Mondale, the focus of the legislation was limited to examining instances of "deviant, severe physical abuse within families."[13] The addition of neglect had highly detrimental consequences—even if some were unintended.

First, CAPTA abandoned a supportive approach to families: "Instead of adopting a model for government involvement which sought to help children and their mothers . . . the law focused on the politically acceptable mechanisms of reporting incidents and investigating them, thereby mandating a police-like response which focused on state investigations of 'private' families."[14] Second, CAPTA federalized and expanded mandatory reporting by requiring states to designate categories of professionals obligated to report suspected maltreatment which, over time, have expanded to include teachers, social service providers, lawyers, and police officers, among others.[15] Additionally, with the inclusion of neglect as a category of child abuse, reported cases of maltreatment skyrocketed from 60,000 in 1974 to 1,000,000 in 1980 and 2,000,000 in 1990.[16] Most recent available data show there were nearly 4.4 million cases of suspected child abuse nationwide in 2023[17] with nearly two-thirds (64.1%) involving reports for neglect only.[18] Finally, and perhaps inevitably, Black families suffered most under the weight of these intensified investigations and the police-like

10. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD 11–13 (1963); Brown III & Gallagher, *supra* note 9, at 40.

11. Brown III &Gallagher, *supra* note 9, at 37, 40–42.

12. CHILD WELFARE INFO. GATEWAY, ABOUT CAPTA: A LEGISLATIVE HISTORY (2019), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/about-capta-legislative-history.pdf [https://perma.cc/BXX9-KW3J].

13. Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1430–32 (1999).

14. *Id.* at 1432–33.

15. CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTING OF CHILD ABUSE AND NEGLECT 2–3 (2023), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/mandatory-reporting-abuse-neglect.pdf [https://perma.cc/W299-Z76A].

16. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 456 (2008).

17. U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD.'S BUREAU, CHILD MALTREATMENT 2023, at ix (2025), https://acf.gov/sites/default/files/documents/cb/cm2023.pdf [https://perma.cc/9GR9-FP8D].

18. *Id.* at 49 tbl. 3–8; *see also* 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, 260 (2020) ("Enduring consequences of racism, including residential segregation, discrimination in labor markets, unequal access to quality education, and implicit and explicit biases perpetuate the disproportionate concentration of Black families among the poor."); DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 39 (2022) [hereinafter ROBERTS, TORN APART] ("Federal data plainly show that Black children are more likely than white children to be reported for maltreatment, to have allegations of their maltreatment investigated, and to be placed in foster care.").

responses which flowed naturally from the adoption of CAPTA. "Neglect" is a subjective, vague term which too often serves as a proxy for poverty[19] or race;[20] and in America poverty is inextricably intertwined with race.[21] As such, surveillance of families experiencing poverty leads to more system contact for Black families and the research bears this out; for example, Black children and adolescents are the subject of suspected child abuse at higher rates than children and adolescents of other racial and ethnic backgrounds.[22] Black children are also separated from their families at disproportionate rates; in 2020, while over 70% of all child removals were based on neglect claims, 63% of Black children removed from their families were separated for reasons related to neglect.[23]

A. Pennsylvania Child Abuse Statutes

To consider a possible challenge to the disparate impact of Pennsylvania's child abuse reporting system it is important to understand how that system works. Unlike charges of juvenile delinquency against children, which are governed by Pennsylvania's Juvenile Act,[24] child abuse in Pennsylvania is addressed through a combination of state and federal statutes. While child abuse itself is defined by Pennsylvania law,[25] significant federal funding to support child protective services flows to the Commonwealth through federal statutes that tie federal funds to various federal mandates.[26]

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19. *See* Jill Yordy, *Poverty and Child Neglect: How Did We Get It Wrong?*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 21, 2023), https://www.ncsl.org/state-legislatures-news/details/category/children-and-families/poverty-and-child-neglect-how-did-we-get-it-wrong [https://perma.cc/KGG6-TSN5].

20. *See* Shereen White & Stephanie Marie Persson, *Racial Discrimination in Child Welfare Is a Human Rights Violation—Let's Talk About It That Way*, A.B.A. (Oct. 13, 2022), https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/racial-discrimination-child-welfare-human-rights-violation-lets-talk-about-it-way/ [https://perma.cc/F2WB-B9PT].

21. *See* Diana Elliott, *Two American Experiences: The Racial Divide of Poverty*, URB. INST. (July 22, 2016), https://www.mobilitypartnership.org/node/236.html [https://perma.cc/89CD-3TEK].

22. *See Disproportionality and Race Equity in Child Welfare*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 26, 2021), https://www.ncsl.org/human-services/disproportionality-and-race-equity-in-child-welfare [https://perma.cc/N3XX-CMB8]; Frank Edwards, Sara Wakefield, Kieran Healy & Christopher Wildeman, *Contact with Child Protective Services Is Pervasive but Unequally Distributed by Race and Ethnicity in Large U.S. Counties*, PROC. NAT'L ACAD. SCI., July 19, 2021, at 1, 1.

23. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CIVIL LEGAL ADVOCACY TO PROMOTE CHILD AND FAMILY WELL-BEING, ADDRESS THE SOCIAL DETERMINANTS OF HEALTH, AND ENHANCE COMMUNITY RESILIENCE 5 (2021), https://acf.gov/sites/default/files/documents/cb/im2102.pdf [https://perma.cc/D6R2-TLUP].

24. 42 PA. STAT. AND CONS. STAT. ANN. §§ 6301–6375 (West 2026).

25. 23 PA. STAT. AND CONS. STAT. ANN. § 6303(b.1) (West 2026) ("The term 'child abuse' shall mean intentionally, knowingly or recklessly doing any of the following: (1) Causing bodily injury to a child through any recent act or failure to act. (2) Fabricating, feigning or intentionally exaggerating or inducing a medical symptom or disease which results in a potentially harmful medical evaluation or treatment to the child through any recent act. (3) Causing or substantially contributing to serious mental injury to a child through any act or failure to act or a series of such acts or failures to act. (4) Causing sexual abuse or exploitation of a child through any act or failure to act. (5) Creating a reasonable likelihood of bodily injury to a child through any recent act or failure to act. (6) Creating a likelihood of sexual abuse or exploitation of a child through any recent act or failure to act. (7) Causing serious physical neglect of a child; (8) Engaging in any of the following recent acts . . . .").

26. Mangold, *supra* note 13, at 1433–34.

Pennsylvania's Child Protective Services Law (CPSL) was enacted in 1975 in response to the national effort to increase reporting of child abuse.[27] The CPSL integrates the reporting, investigating, and recording of child abuse and also provides for the delivery of protective services.[28] The CPSL aims to protect children from serious physical or mental injury, sexual abuse or sexual exploitation, and serious physical neglect.[29] The CPSL also requires counties to provide General Protective Services (GPS) designed to address conduct that falls outside the definition of child abuse, such as less severe forms of neglect and parenting deficiencies.[30] As set forth in the statute, serious physical neglect means:

> Any of the following when committed by a perpetrator that endangers a child's life or health, threatens a child's well-being, causes bodily injury or impairs a child's health, development or functioning:
>
> (1) A repeated, prolonged or egregious failure to supervise a child in a manner that is appropriate considering the child's developmental age and abilities.
>
> (2) The failure to provide a child with adequate essentials of life, including food, shelter or medical care.[31]

The statute further provides that "[n]o child shall be deemed to be physically or mentally abused based on injuries that result solely from environmental factors, such as inadequate housing, furnishings, income, clothing and medical care, that are beyond the control of the parent."[32] While this provision suggests that Pennsylvania lawmakers sought to preclude child abuse allegations or findings based on precisely the types of socioeconomic factors associated with race and poverty that are "beyond the control of the parent," there is scant case law applying or interpreting this provision.[33] In the two reported cases, despite each parent's assertion that the alleged abuse fit within this exception, Pennsylvania courts rejected these claims and found other sufficient evidence of physical abuse or serious physical neglect.[34]

Pennsylvania law also requires that a mandated reporter make a report of suspected child abuse if they have reasonable cause to suspect that a child is a victim of child abuse.[35] The list of mandated reporters is extensive, including any school employee, any "person licensed or certified to practice in any health-related field under the jurisdiction of the Department of State," any "clergyman, priest, rabbi, minister, Christian Science practitioner, religious healer or spiritual leader of any regularly established church or

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27. 23 Pa. STAT. AND CONS. STAT. ANN. § 6301(b) (West 2026).

28. *Id.* § 6302.

29. *See id.* §§ 6303–6304.

30. *See id.* § 6304(b).

31. *Id.* § 6303(a).

32. *Id.* § 6304(a).

33. *Id.*

34. *See In re* J.H., No. 960 WDA 2022, 2023 WL 2021254, at *7 (Pa. Super. Ct. Feb. 15, 2023) (rejecting the mother's claim that COVID-19 pandemic and lockdowns prevented her from seeking medical care for her child); *In re* M.B., No. 585 MDA 2021, 2021 WL 6010867, at *1, *4 (Pa. Super. Ct. Dec. 20, 2021) (rejecting the father's claim that the child's drug overdose could have been caused by environmental exposure from a dirty motel room).

35. 49 PA. CODE § 49.52(a)(1) (2026).

other religious organization," as well as generally any "individual paid or unpaid, who, on the basis of the individual's role as an integral part of a regularly scheduled program, activity or service, is a person responsible for the child's welfare or has direct contact with children."[36]

In addition to addressing delinquency, Pennsylvania's Juvenile Act also allows the Commonwealth to intervene into the lives of children and families when a child is alleged to be "dependent."[37] The Juvenile Act recognizes ten categories of a dependent child.[38] Most commonly, when an allegation of child abuse is the basis for a dependency petition, dependency is found pursuant to the first definition of a dependent child: a child who "is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals."[39] If the Commonwealth proves dependency by clear and convincing evidence, the court may enter an adjudication of dependency.[40] Following such adjudications, children may be separated from their parents only if there is "clear necessity" for such action.[41]

Many examples of dependency under the Juvenile Act do not fall within the reporting requirements of the CPSL.[42] A mandated reporter under the CPSL is required to report only the more serious instances of abuse, neglect, or endangerment.[43] As noted above, the Juvenile Act requires mandated reporters to report child abuse when they have "reasonable cause to suspect" that such abuse has occurred.[44] As Juvenile Law Center reports:

> The Juvenile Act does not require that reporters call the child abuse hotline to report dependency cases, such as those concerning an ungovernable child. Similarly, even if a court finds what may be an [sic] "founded" instance of child abuse under the CPSL, the court does not have to enter an adjudication of dependency. For example, although an isolated incident of abuse has occurred, its isolated nature may lead a court to find that a child nevertheless has adequate parental care. In practice, however, most courts will adjudicate as dependent the victim of even a single incident of abuse, even if they allow the birth parents to maintain physical or legal custody of the child.[45]

B. The Racial Impact of Pennsylvania's Child Abuse Laws

Pennsylvania's child abuse laws disproportionately surveil and report on families of color. In 2019 Pennsylvania had 42,252 total referrals for child abuse and neglect that

36. 23 PA. STAT. AND CONS. STAT. ANN. § 6311(a) (West 2026).

37. 42 PA. STAT. AND CONS. STAT. ANN. § 6351 (West 2026).

38. *Id.* § 6302.

39. *Id.*

40. *In re* S.M., 614 A.2d 312, 313 (Pa. Super. Ct. 1992).

41. *In re* Miller, 552 A.2d 261, 264 (Pa. Super. Ct. 1988); 42 PA. STAT. AND CONS. STAT. ANN. § 6351 (West 2026).

42. JUV. L. CTR., CHILD ABUSE AND THE LAW 8 (7th ed. 2007), https://jlc.org/sites/default/files/publication_pdfs/child-abuse-and-the-law-7th.pdf [https://perma.cc/Q9ZX-6HWF].

43. *Compare* 42 PA. STAT. AND CONS. STAT. ANN. § 6302 (West 2026) (defining dependency), *with* 23 PA. STAT. AND CONS. STAT. ANN. § 6303 (West 2026) (defining child abuse).

44. 23 PA. STAT. AND CONS. STAT. ANN. § 6311(b)(1) (West 2026).

45. JUV. L. CTR., *supra* note 42, at 8.

required subsequent investigation.[46] In 2020 there were 35,865.[47] In 2023 one source reports that there were 38,721 referrals that needed investigation or assessment;[48] another reports 39,138 referrals.[49] In 2024 that number rose to 41,070.[50] An investigation at this stage of the process involves Child Protective Services (CPS) gathering information to determine if a child was, or is, at risk of maltreatment and to establish if an intervention is needed.[51]

Racial demographics of CPS referrals show that Black and Hispanic youth (of any race) are overrepresented compared to their portion of the youth population.[52] Specifically, in 2022, non-Hispanic white youth made up 63% of the population age zero to seventeen yet comprised 56.6% of total CPS referrals and 54.6% of valid referrals.[53] In contrast, non-Hispanic Black youth made up 12.4% of the population yet were 22.1% of CPS referrals and 21.7% of valid CPS referrals.[54] Hispanic or Latino youth comprised 13% of the general population, 13.8% of all CPS referrals, and 16.1% of valid CPS referrals.[55] The Pennsylvania Partnerships for Children's State of the Child 2025 Report highlights that youth who are Hispanic and "some other race" are referred to CPS at a disproportionately higher rate.[56]

The 2023 State of Child Welfare in Pennsylvania Report measured "disproportionality" as the level at which "groups of children" are found in the child welfare system at "higher or lower rates than in the general population."[57] "Disparity,"

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46. PA. DEP'T OF HUM. SERVS., CHILD PROTECTIVE SERVS., 2019 ANNUAL REPORT 4 (2020).

47. CHILD WELFARE LEAGUE OF AM., PENNSYLVANIA'S CHILDREN 2022, at 1 (2022), https://www.cwla.org/wp-content/uploads/2022/04/Pennsylvania-Fact-Sheet-2022.pdf [https://perma.cc/8K4P-VTRX].

48. Sarah Catherine Williams, Rachel Rosenberg & Valerie Martinez, *State-level Data for Understanding Child Welfare in the United States*, CHILD TRENDS (Mar. 13, 2026), https://www.childtrends.org/publications/state-level-data-for-understanding-child-welfare-in-the-united-states (on file with the Temple Law Review) (choose "PA" on the map then choose "2023" under "Viewing data for" under the heading "Child Maltreatment" before scrolling down to the heading "Investigations of maltreatment reports").

49. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 17, at 13.

50. PA. DEP'T OF HUM. SERVS., CHILD PROTECTIVE SERVS., 2024 ANNUAL REPORT 5 (2025) [hereinafter 2024 ANNUAL CHILD PROTECTIVE SERVICES REPORT], https://www.pa.gov/content/dam/copapwp-pagov/en/dhs/documents/docs/ocyf/documents/2024-annual-child-abuse-report-final.pdf [https://perma.cc/AN3S-X5EE].

51. *See DHS Releases 2024 Child Protective Services Report*, PA. ASS'N OF PUPIL SERVS. ADM'RS (Aug. 28, 2025), https://papsa-web.org/dhs-releases-2024-child-protective-services-report-august-28-2025/ [https://perma.cc/RQ2W-MJL4].

52. *See* PA. P'SHIPS FOR CHILD., STATE OF CHILD WELFARE 2023: PENNSYLVANIA 9 (2023) [hereinafter 2023 STATE OF CHILD WELFARE IN PENNSYLVANIA], https://www.papartnerships.org/wp-content/uploads/2024/01/2023-SOCW-Pennsylvania.pdf [https://perma.cc/P9VH-NR3K].

53. *Id.* It is unclear what differentiates referrals and valid referrals, but it is assumed that valid referrals indicate child abuse allegations that require investigation and/or ultimately are substantiated. *See id.* at 1.

54. *Id.* at 9.

55. *Id.*

56. PA. P'SHIPS FOR CHILD., 2025 STATE OF THE CHILD – PENNSYLVANIA (2025) [hereinafter 2025 STATE OF CHILD WELFARE IN PENNSYLVANIA], https://www.papartnerships.org/wp-content/uploads/2025/08/2025-SOTC-Pennsylvania-1.pdf [https://perma.cc/DNL5-XL39].

57. 2023 STATE OF CHILD WELFARE IN PENNSYLVANIA, *supra* note 52, at 9.

in comparison, measures the "lack of equality between two racial groups" in the system.[58] The racial disparity index "is expressed as the ratio of one racial group's disproportionality index by another" group's disproportionality.[59] The resulting value indicates whether youth of different races are represented at the same rate "in the child welfare system."[60] A score near 1.0 indicates an absence of disparity.[61]

The highest racial disparity index among CPS referrals in recent years was in 2022, with a 2.0 disparity index between non-Hispanic Black youth and white youth.[62] For Black youth and non-Hispanic youth of two or more races there was a disparity index of 1.9 for total CPS referrals and 1.8 for valid referrals.[63] These data demonstrate particularly large racial disparities between Black youth and youth of other races, especially white.[64]

While referrals represent the initial allegations of potential abuse or neglect, reports are formalized records of suspected abuse. CPS reports allege that a youth may be experiencing child abuse and can be accepted if the report is made prior to the young person's twentieth birthday.[65] A report is substantiated if there is an indicated or founded report.[66] An indicated report means that a staff member from the regional Office of Children, Youth, and Families (OCYF) or a county child welfare agency finds significant evidence that abuse is occurring based on "medical evidence," CPS investigation, or admission by the "perpetrator."[67] A founded report involves court action, which can come in various forms.[68] For the purposes of this Essay, both indicated and founded reports are referred to as substantiated reports.

Over the last decade, the number of child abuse reports to CPS has fluctuated.[69] For example, in 2017 child abuse reporting peaked with 47,485 reports, and in 2019 reporting decreased to 42,252 reports.[70] In 2020 there was a sharp decrease in reporting, with 32,919 reports.[71] Since 2021, child abuse reporting has steadily increased, reaching 41,070 reports in 2024.[72] While figures still remain below pre-COVID-19 pandemic totals, 2024 was the fourth year of continued increase in reporting.[73] The overall percent change in total reported incidents from 2018 to 2022 was −11.3%.[74]

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58. *Id.* at 10.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *See id.*
65. 2024 ANNUAL CHILD PROTECTIVE SERVICES REPORT, *supra* note 50, at 5.
66. 23 PA. STAT. AND CONS. STAT. ANN. § 6303(a) (West 2026).
67. *Id.*
68. *See id.*
69. *See* ANNIE E. CASEY FOUND., *Child Abuse and Neglect – Number of Reported Cases by Age Group in Pennsylvania*, KIDS COUNT DATA CTR. (Sep. 2025), https://datacenter.aecf.org/data/tables/5184-child-abuse-and-neglect-number-of-reported-cases-by-age-group [https://perma.cc/8G35-CGY3].
70. *Id.*
71. 2024 ANNUAL CHILD PROTECTIVE SERVICES REPORT, *supra* note 50, at 5.
72. *Id.*
73. *Id.*
74. 2023 STATE OF CHILD WELFARE IN PENNSYLVANIA, *supra* note 52, at 1.

GPS reports allege intervention is needed to prevent harm, but "do not rise to the level of [a] suspected child abuse report."[75] GPS reports have also returned to near prepandemic levels, with 176,496 reports in 2024, compared to 152,478 in 2020.[76] Among GPS reports in 2024, 39,561 of 176,496 were validated.[77] In other words, 21.6 per 1,000 children who were evaluated were deemed to be in need of services.[78]

Of CPS reports in 2024, 4,756 were substantiated, a validation rate of approximately 1.8 reports per 1,000 children.[79] This figure has remained fairly stable since 2019 when there were 4,865 substantiated reports and peaked in 2021 with 5,036 reports.[80] The percent of suspected child abuse reports that were substantiated decreased slightly from 11.7% in 2023 to 11.6% in 2024.[81] Overall, this was a 10.3% change between 2018 and 2022.[82]

"In Pennsylvania, there are significant racial disparities in the number of suspected child abuse and neglect reports that are received by the [County Children and Youth Agencies] and ChildLine, Pennsylvania's child abuse hotline."[83] "The 2021 [Department of Human Services (DHS)] Racial Equity Report noted that Black [youth] made up 14[%] of the total [youth] population in Pennsylvania but represented 21[%] of potential victims of abuse in [CPS] reports."[84] Between 2015 and 2021, Black Pennsylvanians made up 12% of the population, yet comprised 23% of those with substantiated child abuse reports.[85] In comparison, white youth made up about 82% of the state population and 66% of substantiated cases.[86] Black Pennsylvanians were overrepresented in substantiated child abuse cases by almost two times their proportion of the general population.[87]

In 2023 white youth comprised 64% of the Commonwealth's youth population and 54% of youth who experienced abuse or neglect, Black or African American youth were 13% of the population and 21% of youth who experienced abuse or neglect, and Hispanic or Latino youth were 14% of the population and 18% of those who experienced abuse or

75. 2024 ANNUAL CHILD PROTECTIVE SERVICES REPORT, *supra* note 50, at 29. There is more information regarding General Protective Services statistics, but it is omitted for purposes of length and focus of this Essay.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 5.

80. PA. DEP'T OF HUM. SERVS., CHILD PROTECTIVE SERVS., 2023 ANNUAL REPORT 6 (2024), https://www.pa.gov/content/dam/copapwp-pagov/en/dhs/documents/docs/ocyf/documents/2023-cps-report-pu-60-8-28-24_final-v2.pdf [https://perma.cc/VW2U-XPRJ].

81. 2024 ANNUAL CHILD PROTECTIVE SERVICES REPORT, *supra* note 50, at 5.

82. 2023 STATE OF CHILD WELFARE IN PENNSYLVANIA, *supra* note 52, at 1.

83. 2024 ANNUAL CHILD PROTECTIVE SERVICES REPORT, *supra* note 50, at 24.

84. *Id.*

85. UNIV. OF PA. CAREY L. SCH., CIV. PRAC. CLINIC & TEMPLE UNIV. BEASLEY SCH. OF L., SHELLER CTR. FOR SOC. JUST., PATHWAYS TO POVERTY: HOW THE CHILDLINE AND ABUSE REGISTRY DISPROPORTIONATELY HARMS BLACK FAMILIES 6 (2023) [hereinafter PENN CAREY LAW & TEMPLE LAW, PATHWAYS TO POVERTY], https://scholarshare.temple.edu/server/api/core/bitstreams/b90d8788-cbfa-4a6f-8f81-71c04abf5864/content [https://perma.cc/ARF2-EHD9].

86. *Id.* at 7.

87. *Id.*

neglect.[88] Racial disparities are particularly profound in reports and investigations of neglect. Compared to their proportion of the population, Black youth were represented 2.5 to three times more out of the total number of substantiated reports.[89] Some posit that because neglect is a highly subjective category, it can be shaped by gendered and racialized expectations, potentially exacerbating racial disparities.[90]

II. THE LEGAL THEORY OF DISPARATE IMPACT AND ITS USE IN PENNSYLVANIA

Over the last several decades, numerous state and county children and youth agencies have been sued over alleged abusive or discriminatory practices in their child welfare systems, with a combination of federal constitutional provisions typically serving as the basis for these legal claims.[91] While this litigation has achieved some modest improvements in the procedures and practices of the modern child welfare system,[92] the data cited in this Essay belie any claim that these systems have been fundamentally altered or diminished, as the number of reported cases remain high and racial disparities remain persistent. Even the term "child welfare" has been discredited, as advocates like Juvenile Law Center increasingly prefer to name these systems for what they do—family policing or family regulation, primarily of Black and Brown children and families.[93]

Rather than challenge particular policies or practices at the agency level, this Essay proposes that litigants challenge child abuse reporting statutes themselves, which—under the guise of neutral reporting requirements—have disproportionately swept Black and Brown families into a system that is all too eager to break them up. This practice is a classic example of disparate impact—a theory of race discrimination challenging facially neutral classifications that disproportionately impact protected classes, including on the basis of race.[94]

Disparate impact was initially recognized as a legal theory in challenges to discrimination in employment under federal statutory law.[95] As a legal term, "disparate

88. Williams et al., *supra* note 48 (choose "PA" on the map and scroll down to the heading "Demographics of [M]altreated [C]hildren").

89. PENN CAREY LAW & TEMPLE LAW, PATHWAYS TO POVERTY, *supra* note 85, at 10.

90. *Id.* at 12.

91. *See* Zach Strassberger, *Crafting Complaints and Settlements in Child Welfare Litigation*, 21 U. PA. J.L. & SOC. CHANGE 219, 221–33 (2018).

92. *See* Julie Farber & Sara Munson, *Strengthening the Child Welfare Workforce: Lessons from Litigation*, 4 J. PUB. CHILD WELFARE 132, 153 (2010).

93. *See Introduction to the Child Welfare System*, JUV. L. CTR., https://jlc.org/introduction-child-welfare-system [https://perma.cc/K7GR-D9KB] (last visited Apr. 5, 2026) (describing the child welfare system "as a system of family regulation or family policing."); ROBERTS, SHATTERED BONDS, *supra* note 8, at 7–8; ROBERTS, TORN APART, *supra* note 18, at 39; *Repeal CAPTA. End Family Policing. Support Families, Not Systems.*, REPEAL CAPTA, www.repealcapta.org/ [https://perma.cc/Y7MG-Q3F6] (last visited Apr. 5, 2026) ("The Child Abuse Prevention and Treatment Act (CAPTA) of 1974 is the federal law that creates a national framework for the modern family policing system, a more accurate term for the 'child welfare' system. CAPTA fails to fulfill its stated purpose of preventing and treating actual child abuse, and it causes tremendous harm to children and families.").

94. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

95. *See id.* at 425–26, 430.

impact"[96] refers to policies, actions, or legislative classifications that appear neutral on their face but in practice or implementation perpetuate historical discrimination that disproportionately affects a "protected class" of people, including, for example, people who identify with a specific race, color, religion, disability, or nation of origin.[97] This theory of discrimination was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*—a case that challenged certain employment practices under Title VII of the Federal Civil Rights Act of 1964—where the Court held that employment practices that are "fair in form, but discriminatory in operation" can be illegal, regardless of the employer's intent.[98]

In *Griggs*, Black employees challenged the Duke Power Company's requirement of a high school diploma and aptitude test as a prerequisite for job transfers into departments that had previously been foreclosed to them.[99] While technically applicable to any employee seeking a transfer, the Court found that the requirements disproportionately excluded Black applicants and were not related to job performance, creating the "business necessity" doctrine to justify such practices.[100]

The disparate impact theory of discrimination, which shifts the focus from intentional conduct to discriminatory consequences, remains a viable legal theory under Title VII and other federal statutes.[101] For example, under Title VI of the Civil Rights Act of 1964, recipients of federal funds cannot discriminate on the basis of race, color, or national origin.[102] Recipients

> may not, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.[103]

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96. U.S. DEP'T OF JUST., C.R. DIV., TITLE VI LEGAL MANUAL 4, 11 (2017), https://www.prrac.org/title_vi_repository/doj/2017_title_vi_manual/title_vi_legal_manual_sec_7_impact_final1.pdf [https://perma.cc/SZK3-K848].

97. *Protected Characteristic*, CORN. L. SCH.: WEX, https://www.law.cornell.edu/wex/protected_characteristic [https://perma.cc/E2R5-KXX5] (last visited Apr. 5, 2026); *see also* 28 C.F.R. § 42.104(a) (2026) (defining race, color, and national origin as protected classes).

98. *Griggs*, 401 U.S. at 431–32; *see also* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (striking the neutral-laundry licensing requirement based on discriminatory impact on Chinese noncitizen residents of San Francisco under the Fourteenth Amendment).

99. *Griggs*, 401 U.S. at 427–28.

100. *Id.* at 431.

101. *See generally* APRIL J. ANDERSON, CONG. RSCH. SERV., IF13057, WHAT IS DISPARATE-IMPACT DISCRIMINATION? (2025), https://www.congress.gov/crs_external_products/IF/PDF/IF13057/IF13057.1.pdf [https://perma.cc/884R-WQAZ] (providing an overview of statutes that allow disparate impact liability, challenges to proving disparate impact claims, and recent changes in enforcement).

102. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; 45 C.F.R. § 80.3(b) (2025).

103. 45 C.F.R. § 80.3(b)(2) (2025) (emphasis added); *see also* Alexander v. Sandoval, 532 U.S. 275, 281 (2001) ("[W]e must assume for purposes of deciding this case that regulations promulgated under [Section] 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under [Section] 601."); U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. FOR C.R. & U.S. DEP'T OF JUST., C.R. DIV., TITLE VI CHILD WELFARE JOINT GUIDANCE 1 (2016) [hereinafter TITLE VI CHILD

In 2016 the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Justice (DOJ) issued a guidance letter about the discriminatory and disparate impact families of color face in the child welfare system.[104] It acknowledged that "[the] DOJ and HHS have investigated a number of complaints alleging race, color, and national origin discrimination in the child welfare system" and that "African American and Native American children are involved in the child welfare system at a rate that is almost twice their representation in the general population."[105]

Challenging discriminatory impact under the Fourteenth Amendment is virtually impossible today, as this legal theory has been severely weakened by the Supreme Court.[106] In *Washington v. Davis*, a case decided five years after *Griggs* and involving a challenge to a police recruitment test, the Court held that discriminatory consequences alone were insufficient to establish liability for discrimination under the Fourteenth Amendment; instead, to prevail on a constitutional claim, litigants must also show discriminatory *intent*.[107]

Fortunately, the Supreme Court's restrictions on disparate impact under the Federal Constitution do not foreclose bringing such challenges under antidiscrimination guarantees in state constitutions.

A. Challenges to the Disparate Impact of Pennsylvania's Child Abuse Laws Under Article I, Section 29 of the Pennsylvania Constitution

1. History of Section 29

Article 1, Section 29 of the Pennsylvania Constitution provides that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the race or ethnicity of the individual."[108] Adopted by Pennsylvania voters in 2021, Section 29's explicit ban on race discrimination may provide a state constitutional basis for attacking the racially disparate impacts of Pennsylvania's child abuse statutes.

Section 29 originated as a resolution to jointly introduce two separate proposed amendments to the Pennsylvania Constitution—Senate Bill 1166,[109] initially proposed on June 5, 2020, to limit the emergency relief powers of the governor, and Amendment A6132, initially proposed on June 10, 2020, which sought to prohibit the "denial or abridgment of equality of rights because of race and ethnicity."[110] The bills were proposed in the aftermath of the murder of George Floyd and as Republican lawmakers across the country were "reeling in emergency powers that governors wielded during the

WELFARE JOINT GUIDANCE], https://www.justice.gov/opa/file/903996/dl?inline [https://perma.cc/8FYV-RE2B] (stating that all recipients of federal funding, including child welfare agencies, must comply with Title VI).

104. TITLE VI CHILD WELFARE JOINT GUIDANCE, *supra* note 103, at 1–2.

105. *Id.* at 2.

106. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (holding discriminatory impact alone is not enough to find a law or official act unconstitutional).

107. *Id.* at 238–39.

108. PA. CONST. art. I, § 29.

109. *See* S.B. 1166, 204th Gen. Assemb., 2019–2020 Reg. Sess. (Pa. 2020).

110. COMMONWEALTH OF PA. LEGIS. J., S. 204th Gen. Assemb., 2019–2020 Reg. Sess., at 591 (2020).

COVID-19 pandemic."[111] When explaining why he introduced the amendment, Pennsylvania State Senator Vincent Hughes spoke of the racism that is "hooked into the DNA of this nation," describing how that troubling history of racism is prevalent in Pennsylvania and reflected in nearly every institution and system including education, housing, and how "we police and . . . protect communities."[112] Senator Hughes highlighted that the "need for additional protections [is] based on that [racist] history."[113] Senator Hughes also noted that action was needed at the state level and that the proposed amendment was critical in working towards racial equity, explaining that Section 29 was modeled after Section 28 of Article 1 of the Pennsylvania Constitution, "which provides for equal rights under the law based on gender."[114]

Building on his thoughts about the persistence of racism in Pennsylvania today, Senator Hughes offered that:

> The need for protections around race and ethnicity at the [s]tate level are manifested even more because of the transgressions that we see happening at the [f]ederal level. Countless numbers of people are questionably appointed to the [f]ederal bench, rightfully unqualified, and clearly with a track record of discrimination. Consequently, the protections that we need to have enshrined need to be lifted up at the [s]tate level . . . .[115]

After its passage by the Pennsylvania General Assembly, Section 29 was officially adopted by Pennsylvania voters as the most recent amendment to the Pennsylvania Constitution in 2021.

2. Pennsylvania Supreme Court Interpretation and Enforcement of Similar Constitutional Guarantees of Individual Rights

With the adoption of Section 29, Pennsylvania continued its history of bridging gaps left by federal civil rights litigation. In 1971 Pennsylvania became the first state in the modern Equal Rights Amendment movement to amend its Constitution to include a new equal rights amendment.[116] Article I, Section 28 provides that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."[117] Recent litigation under Section 28 sheds meaningful light on how Section 29 might be an effective tool for challenging Pennsylvania's child abuse laws. Key to this discussion is the Pennsylvania Supreme Court's decision in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, in which plaintiffs challenged Pennsylvania's Medicaid coverage exclusion for abortion services.[118] The plaintiffs, health care providers and patients

111. *Pennsylvania Voters Back Bid To Ban Race Discrimination in Constitution*, CBS NEWS: PHILA. (May 19, 2021, at 07:16 ET), https://www.cbsnews.com/philadelphia/news/pennsylvania-voters-back-bid-to-ban-race-discrimination-in-constitution/ [https://perma.cc/6478-CZ76].

112. COMMONWEALTH OF PA. LEGIS. J., S. 204th Gen. Assemb., 2019–2020 Reg. Sess., at 591 (2020).

113. *Id.*

114. *Id.*

115. *Id.*

116. PA. CONST. art. I, § 28.

117. *Id.*

118. 309 A.3d 808, 819–20 (Pa. 2024).

enrolled in or eligible for Medicaid coverage, sought declaratory and injunctive relief against Pennsylvania's DHS and certain government officials.[119]

Pennsylvania's Supreme Court had previously grappled with these coverage exclusions decades earlier in *Fischer v. Department of Public Welfare*, which involved a challenge to state law that prohibited the use of state and federal funding for abortions except where the mother's life was in danger or in cases of rape or incest.[120] In a unanimous opinion rejecting the state constitutional challenges—including equal protection guarantees in Sections 1, 26, 28, and 32 of the Pennsylvania Constitution—the court determined the Commonwealth's Constitution "does not prohibit differential treatment among the sexes when, as here[,] that treatment is reasonably and genuinely based on physical characteristics unique to one sex."[121] Finding no classification which required anything more than rational basis review, the court upheld the coverage exclusion under Section 28.[122] Notably, the court held that the appropriate equal protection analysis for state constitutional claims should be derived from federal precedent.[123] Though the court understood it was free to interpret the Commonwealth's Constitution more broadly than the Federal Constitution, the court noted that federal constitutional analysis may be used "as an interpretational aid" for state constitutional claims.[124]

Fischer dealt a near fatal blow to the promise of full equality which motivated the passage of Section 28 originally. Though the *Fischer* court made no express holding on the right to abortion itself, limiting the decision to state funding for abortion, *Fischer* essentially upheld a law that burdened women simply for being women and established a high threshold for state equal protection claims modeled after federal standards.

Almost forty years later, the court revisited *Fischer* in *Allegheny*, finding that it was necessary to reconsider the question of "whether the Equal Rights Amendment prohibits statutory classifications based on 'physical characteristics unique to one sex' just as it prohibits other statutory classifications that depend on the sex of a person."[125] The providers in *Allegheny* argued that the *Fischer* court had abandoned the principles and language of the Equal Rights Amendment when it held that the coverage exclusion was beyond the reach of the Amendment.[126] The provider plaintiffs argued that the Equal Rights Amendment prohibited legislative regimes that are facially neutral with discriminatory impact and that the coverage exclusion for abortion care was rooted in gender-based stereotypes regarding the "primacy of childbearing and childrearing for women."[127] The providers supported their claims by undertaking an analysis of the Equal

119. *Id.*

120. 502 A.2d 114, 116 (Pa. 1985), *overruled by* Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 945 (Pa. 2024); *see also* Anderson v. Upper Bucks Cnty. Area Vocational Tech. Sch., 373 A.2d 126, 129 (Pa. Commw. Ct. 1977) (describing challenge to exclusion of pregnancy from disability classification).

121. *Fischer*, 502 A.2d at 125 (quoting People v. Salinas, 551 P.2d 703, 706 (Colo. 1976) (en banc)).

122. *Id.* at 123 (citing Martin v. Unemployment Comp. Bd. of Rev., 466 A.2d 107, 111–12 (Pa. 1983)).

123. *Id.* at 121 (quoting Kroger Co. v. O'Hara Twp., 392 A.2d 266, 274 (Pa. 1978)).

124. *Id.*

125. *Allegheny*, 309 A.3d at 861.

126. *Id.*

127. *Id.* at 862.

Rights Amendment under the four-factor test laid out in *Commonwealth v. Edmunds*,[128] a Pennsylvania Supreme Court case decided after *Fischer*.[129] The four factors include "(1) [the] text of the Pennsylvania constitutional provision; (2) [the] history of the provision, including Pennsylvania case-law; (3) related case-law from other states; (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."[130] The *Allegheny* court considered the *Edmunds* factors, "lead[ing] to the unremarkable conclusion that to treat a woman differently based on a characteristic unique to her sex is to treat her differently because of her sex, which triggers [Pennsylvania's] Equal Rights Amendment."[131]

First, as to the text of the Equal Rights Amendment, the *Allegheny* court found its language unambiguous; the equality of rights may not be "abridged," and the government cannot "withhold the . . . enjoyment of" the rights.[132] The distinction between "the male or female division of our species" depends on, according to the *Allegheny* court, "the reproductive functions and the sum of the physical and functional differences that distinguish the male and the female."[133]

With respect to the second factor, the history of the provision, the court noted first that there is no federal counterpart to Pennsylvania's Equal Rights Amendment; thus, the court could "not find guidance from the [F]ederal Constitution."[134] Federal equal protection debates could provide some context to interpreting Section 28, but the Federal Constitution could not entirely guide the Pennsylvania Supreme Court's analysis. The *Allegheny* court spent some time in its opinion analyzing the history of sexism and the historical origins of unequal treatment of women under the law.[135] Despite the many landmark achievements leading to the Equal Rights Amendment, the court acknowledged the necessity of the Equal Rights Amendment, as its first decade saw significant, positive changes in otherwise discriminatory laws.[136] This momentum was stalled by the *Fischer* decision, which the *Allegheny* court noted had stymied the development of Article 1, Section 28 jurisprudence.[137]

The *Allegheny* court then considered the third factor, case law from other states that the *Fischer* relied upon to draw its conclusion that the Equal Rights Amendment "does not prohibit differential treatment among the sexes when, as here, that treatment is reasonably and genuinely based on physical characteristics unique to one sex."[138] The *Allegheny* court determined that the case law from other states could "not support the adoption of a sweeping exception to the Equal Rights Amendment," and that the law

128. *See id.* at 861–64.

129. Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991).

130. *Id.*

131. *Allegheny*, 309 A.3d at 867.

132. *Id.* at 868 (omission in original).

133. *Id.* at 869.

134. *Id.*

135. *Id.* at 865–73.

136. *See id.* at 873.

137. *Id.* at 852–54.

138. *Id.* at 877 (quoting Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 125 (Pa. 1985), *overruled by Allegheny*, 309 A.3d at 945).

review articles cited in the *Fischer* opinion were misinterpreted by the *Fischer* court.[139] In the last step of the *Edmunds* analysis, the *Allegheny* court found that policy considerations supported its conclusion that the Equal Rights Amendment "does not contain an exception from the prohibition against denying or abridging an individual's rights based on characteristics unique to one sex."[140] Socioeconomic disparities due to the historic subjugation of women in society held more weight than jurisprudential concerns such as stare decisis.[141]

The court found that Pennsylvania's "Equal Rights Amendment affords rights beyond those guaranteed by our equal protection provisions."[142] This conclusion was drawn from the chronology of its passage and comparison to other states that passed similar state Equal Rights Amendments (and the other *Edmunds* steps briefed by the providers in *Allegheny*).[143] The court held that the *Fischer* court had erred in interpreting Section 28 and now

> when a statute is challenged as violative of Section 28, a sex-based distinction is presumptively unconstitutional, and it is the government's burden to rebut the presumption with evidence of a compelling state interest in creating the classification and that no less intrusive methods are available to support the expressed policy.[144]

In addition to revisiting Section 28 in *Allegheny*, the court also reconsidered its prior interpretations of Section 26, Pennsylvania's Equal Protection Clause. Section 26 provides that: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."[145] As with its analysis of the Equal Rights Amendment, the court again found that the *Fischer* court incorrectly used a federal framework to analyze a Section 26 challenge.[146] Subjecting Section 26 to an *Edmunds* analysis as well, the *Allegheny* court found that Section 26 was "notably different from the stand alone [F]ederal Equal Protection Clause," highlighting that it was more specific in its text.[147]

> Accordingly, we must give meaning to the unique language employed in Section 26, which is distinct from what is explicitly contained within the [F]ederal Equal Protection Clause. In interpreting this provision, we

139. *Id.*

140. *Id.* at 882.

141. *Id.*

142. *Id.* at 889.

143. *See id.* at 877–81.

144. *Id.* at 891. Justice Wecht, in his concurrence, also addressed the availability of disparate impact claims under Section 28. *Id.* at 974–78 (Wecht, J., concurring). Justice Wecht noted that when Pennsylvanians were considering the Equal Rights Amendment, "the Supreme Court of the United States was interpreting the [F]ederal Constitution anemically, in a manner that did not effectively rectify sex discrimination. In particular, the Supreme Court requires state action, imposes a formal model of equality, applies intermediate rather than strict scrutiny, *and is unwilling to examine disparate impact*." *Id.* at 973–74 (emphasis added). According to Justice Wecht, "[*i*]*n each respect*, the [Equal Rights Amendment] has the capacity to provide broader protections than federal equal protection." *Id.* at 974 (emphasis added).

145. PA. CONST. art. I, § 26.

146. *Allegheny*, 309 A.3d at 918.

147. *Id.* at 924–25.

> acknowledge that its language has an ordinary meaning that voters would have been familiar with when they ratified the amendment.[148]

The court then detailed the legislative history of Section 26:

> We cannot ignore that [Section 26] was adopted in the midst of the Civil Rights Movement. This helps to inform us of the spirit with which the amendment was drafted, proposed, and adopted. In fact, as previously discussed, the Committee that initially drafted this provision expressly referenced preventing the Commonwealth from discriminating "on the basis of race" in its report.[149]

The court acknowledged that, given the context and history of Section 26 emerging out of the modern Civil Rights era, drafters and citizens of Pennsylvania intended to afford broader protections than what already existed at the time under federal equal protection law and the Fourteenth Amendment.[150] The court rejected the rationale that Section 26 was essentially the same as the Federal Equal Protection Clause, arguing:

> A conclusion that [the Pennsylvania] Constitution's equal protection provisions are to be read in lockstep with the [F]ederal Equal Protection Clause runs the risk of rendering our own constitutional text, history, traditions, and jurisprudence a mere row of shadows. . . . That we generally apply the same means-ends test to state equal protection claims as articulated by federal courts for Equal Protection Clause cases does not mean that we are bound by federal interpretations of the test, nor does it mean that we defer to or are bound by Equal Protection Clause analyses of similar claims. *Certainly we are not bound by interpretations of the scope of the protections of the Equal Protection Clause when interpreting provisions of our Charter that speak, as Article I, Section 26 does, to prohibiting discrimination in the exercise of a civil right*.[151]

Rejecting its own prior case law, the Pennsylvania Supreme Court noted that while Section 26 may not create new substantive rights, to argue Section 26 only "amounts to mere surplusage of the [F]ederal Equal Protection Clause ignores the unique text of Section 26 [and] the historical context."[152] It always should have been

> beyond doubt that the text of Article I, Section 26 along with its history demand[ed] a distinct interpretation and application. . . . If the government is not neutral in its treatment of the exercise of a right, Section 26 is implicated. If the right is one that is fundamental, then only evidence of a compelling government interest and a finding that there are no less intrusive means to advance the interest will save the government action.[153]

The court thus held that Section 26 requires the government to maintain a position of neutrality regarding citizens' exercise of their constitutional rights. Only where there is "justification to sustain a legislative classification" can the state depart from this neutrality.[154] The court determined that when

148. *Id.* at 925.

149. *Id.* at 927.

150. *Id.* at 924–27.

151. *Id.* at 933–34 (emphasis added) (internal quotation marks omitted).

152. *Id.* at 934.

153. *Id.* at 938.

154. *Id.* at 945.

> presented with a legislative classification that touches on the exercise of a civil right and it is being challenged on the basis that it is discriminatory, the court shall determine whether the classification operates neutrally with regard to the exercise of that right. If it does not, the court shall then conduct a commensurate means-end review.[155]

In other words, any challenge under Section 26 must begin with a question of whether a constitutional right is implicated, proceed to the question of whether the law is neutral with respect to how any person exercises that right, and then, if it is not neutral, a means-end review based on the nature of the right at issue and the extent to which the articulated government purpose is advanced by the legislation in question.

3. Application of Section 29 to Racial Disparities Under Pennsylvania's Child Abuse Laws

The Pennsylvania Supreme Court has not had the opportunity to analyze Section 29 since the *Allegheny* ruling.[156] However, the court was clear in *Allegheny* that it will apply its own meaning to distinctive provisions of the Pennsylvania Constitution that lack any federal counterpart. Analyzing Section 29 under the *Edmunds* four-factor test, as the court did with respect to the Equal Rights Amendment in *Allegheny*, leads to similar conclusions about the meaning and scope of Section 29.

a. Text of Section 29

The text of Section 29 is as unambiguous as Section 28. The similar language of Section 28 was interpreted in *Allegheny* as meaning "the government cannot withhold the . . . enjoyment of the rights" and "the equality of rights may not be abridged, meaning they can neither be reduce[d] [n]or lessen[ed] in . . . scope[,] nor can they be diminish[ed] or curtail[ed]."[157] In *Allegheny*, the Supreme Court of Pennsylvania utilized a dictionary definition of "sex" to clarify when exactly a law might withhold or diminish the scope of the rights on account of an individual's sex.[158] A claim under Section 29 might similarly use definitions such as the following from Section 1093: "[T]he term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent;"[159] and "the term 'ethnic group' means a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage."[160]

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155. *Id.*

156. There have been two cases filed in federal court that raised section 29 claims as well as other federal claims. Sargent v. Sch. Dist. of Phila., No. 22-cv-1509, 2022 WL 3155408, at *2 (E.D. Pa. Aug. 8, 2022); Memphis St. Acad. Charter Sch. at J.P. Jones v. Sch. Dist. of Phila., No. 22-02760, 2023 WL 4032660, at *2 (E.D. Pa. June 15, 2023). Neither case addressed the state claims. *See Sargent*, 2022 WL 3155408, at *4 n.5; *Memphis St.*, 2023 WL 4032660, at *2 n.1.

157. *Allegheny*, 309 A.3d at 868 (alterations in original) (internal quotation marks omitted).

158. *Id.* at 868–69.

159. 18 U.S.C. § 1093(6).

160. *Id.* § 1093(2).

b. History of Section 29

Again, following the line of reasoning in *Allegheny*, a discussion of the relevant history for an *Edmunds* analysis of Section 29 would include a discussion of the history of racism in Pennsylvania to demonstrate the necessity of the amendment. Like Section 28, there is no exact federal counterpart to Section 29. Section 29 is specific in its goals and unique even when compared to other state constitutions. This section of the *Edmunds* analysis requires detailed discussion of the legislative history behind Section 29. A successful Section 29 claim would likely have to prove the Amendment was necessary because racism persists in many facets of life in Pennsylvania and no other equal protection provisions have entirely eradicated the problem—or else there would have been no need to add the recent Amendment in the first place. Similar to the *Allegheny* court's discussion about the necessity of Section 28, a claimant would need to argue that landmark achievements along the path towards full racial equality have not gone far enough and Section 29 must be utilized more actively and assertively by the courts.[161] These concerns are specifically addressed in the legislative history to Section 29.[162]

c. Relevant Case Law of Section 29

The next step in an *Edmunds* analysis is a close examination of Pennsylvania case law. As previously discussed, there is very little case law pertaining specifically to Section 29, and each of the cases was decided before *Fischer* was overturned.[163] This step in the *Edmunds* analysis might instead touch upon the case law pertaining to Section 26 or Section 28, as discussed throughout this Essay. Because the only cases involving Section 29 claims have either not addressed those claims directly or have relied on standards for interpreting Section 26 and Section 28—and more importantly, those claims were brought in federal court rather than state court—this step in the *Edmunds* analysis might also provide an opportunity to emphasize that the Supreme Court of Pennsylvania has not yet been afforded the opportunity to determine its own standard of review for Section 29 claims and therefore the court is not bound by any particular analytic framework.

This step can also examine case law from other states interpreting analogous provisions.[164] Delaware has the most analogous provision to Pennsylvania's Section 29. In 2019 Delaware adopted a state Equal Rights Amendment, Section 21, providing that "[e]quality of rights under the law shall not be denied or abridged on account of sex."[165] Two years later, on January 28, 2021, lawmakers unanimously extended Delaware's Section 21 antidiscrimination protections, adding more protected classes.[166] The newly passed Amendment now provides that "[e]quality of rights under the law shall not be denied or abridged on account of race, color, national origin, or sex."[167]

161. *See Allegheny*, 309 A.3d at 870–77.

162. *See supra* Part II.A.1.

163. *See supra* note 156.

164. *See, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887, 895–96 (Pa. 1991).

165. DEL. CONST. art. I, § 21 (amended 2021).

166. *Id.*

167. *Id.*

To date, there has been only one lawsuit filed relying on the antidiscrimination provisions of Section 21, *Giles v. Town of Elsmere*.[168] *Giles* involved a challenge to the plaintiff's alleged exclusion from the State of Delaware's County and Municipal Police and Fire Pension Plan on the basis of her sex.[169] In addition to the state claim, the plaintiff in *Giles* also alleged violations of the Fifth and Fourteenth Amendments of the United States Constitution.[170] Because the case consolidated both federal and state claims, the *Giles* court did not provide a separate, specific discussion of the requirements for the Section 21 state constitutional claims. The court only discussed federal equal protection and due process guarantees and denied the plaintiff's claims because she had not provided sufficient evidence or any "reasonably conceivable set of circumstances" to support the contention that her constitutional right to due process or equal protection had been compromised.[171]

Connecticut also has an anti-race discrimination provision in its Constitution, which provides that "[n]o person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."[172] In *State v. Geisler*, the Connecticut Supreme Court established a six-factor test for analyzing independent claims under the state Constitution.[173] Those six factors are (1) textual approach, (2) holdings and dicta of the Connecticut Supreme Court, (3) federal precedent, (4) sister state decisions, (5) historical approach, and (6) economic and sociological considerations.[174] Similar to Pennsylvania's approach, the purpose of the test established in *Geisler* is to "encourage a principled development of [Connecticut's] constitutional jurisprudence."[175]

In *Sheff v. O'Neill*, the Connecticut Supreme Court considered whether the government has a constitutional duty to remedy educational impairments that result from segregation even when the segregation was not intentional by the state.[176] The plaintiffs filed a four-count complaint alleging unlawful discrimination in schools in violation of Article I, Section 20 and Article 8, Section 1 of the Connecticut Constitution, which states, "[t]here shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."[177] The court concluded that the provisions permitted state constitutional challenges where there are substantial disparities in educational opportunities resulting from racial or ethnic segregation.[178] The court declined to address whether "discrimination," as it is used in the Connecticut Constitution, required a showing of intent, but referenced the legislative history of Article I, Section 20: "[T]he convention delegates' manifest intent that [Article

168. No. N22M-02-006, 2022 WL 17826005, at *6 (Del. Super. Ct. Dec. 20, 2022).

169. *Id.* at *7.

170. *Id.* at *2.

171. *Id.* at *6.

172. CONN. CONST. art. I, § 20.

173. 610 A.2d 1225, 1232 (Conn. 1992), *abrogated by* State v. Brocuglio, 826 A.2d 145 (Conn. 2003).

174. *Id.*

175. Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 227 (Conn. 2010).

176. 678 A.2d 1267, 1278–79 (Conn. 1996).

177. CONN. CONST. art. VIII, § 1.

178. *See Sheff*, 678 A.2d at 1283.

I, Section] 20, by prohibiting segregation, should provide 'total protection against discrimination'" supports the "conclusion that [the legislature] intended to encompass de facto segregation in the circumstances presented by the present case."[179]

4. Policy Considerations Including Unique Issues of State and Local Concern, and Applicability Within Modern Pennsylvania Jurisprudence

The *Edmunds* analysis lastly calls for a consideration of the state constitutional provision's application to the modern scheme of Pennsylvania jurisprudence.[180] Like *Allegheny*, a reviewing court might be concerned about "further engrain[ing] the socioeconomic disparities that continue to exist as a result of . . . historic subjugation."[181] The text and legislative history of the provision establish that Pennsylvania has made a strong commitment to eradicating race discrimination with the adoption of Section 29, and there is no explicit bar to also considering facially neutral laws and policies that do not in fact operate in a neutral fashion when it comes to the differential impact of Pennsylvania's child abuse reporting statutes on Black children and their families.

In accordance with *Allegheny*, a reviewing court must therefore apply a strict scrutiny analysis to any race-based disparate impact. This is true not only because race is a suspect classification,[182] but also because the right at stake—family integrity—is a fundamental right.[183] Under strict scrutiny, the burden is on the Commonwealth to establish that the mandatory reporting of neglect under Pennsylvania law serves a compelling state interest that cannot be addressed through a more narrowly tailored solution.[184]

While the protection of children may well be a compelling state interest, there are more narrowly tailored means to achieve this goal that can continue to offer protection to abused children without requiring that virtually any individual who has regular contact with children make subjective judgments about whether parents, or their homes, are suitable to raise their children. At a minimum, either removing neglect as a basis for mandatory reporting entirely or defining it in a way that limits reporting to objective factors are alternative strategies that Pennsylvania could employ. Pennsylvania could also eliminate mandatory reporting altogether. Of course, before a court would have to make this calculus, it must also find that Pennsylvania's facially neutral reporting requirements disproportionately impact Black families or other families of color. As set

179. *Id.* at 1284.

180. Commonwealth v. Edmunds, 586 A.2d 887, 901 (Pa. 1991).

181. Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 882 (Pa. 2024).

182. *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (explaining that any legal restriction that abridges the fundamental rights of a single racial group is immediately suspect and subject to the most rigid scrutiny), *abrogated on other grounds by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

183. *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923) ("That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected."); Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (explaining the expansive nature of fundamental liberty interests, including the right to seek knowledge, marry, rear children, and exercise religious freedom, and that the state may not interfere with fundamental liberty interests unless the intervention is narrowly tailored to a compelling state interest).

184. Loving v. Virginia, 388 U.S. 1, 11 (1967) (explaining the burden of proof when strict scrutiny applies).

forth in this Essay, currently available data show disparities exist, but whether the increased likelihood that Black families will be the subject of child abuse reports and investigations is sufficient to trigger a means-end analysis requires a significantly deeper dive into the data, as well as into actual reports and other relevant materials. Reports and investigations would need to be scrutinized to separate neglect-only claims, but even reports involving allegations of physical abuse would need to be reviewed carefully for racial bias. This level of analysis is beyond the scope of this Essay.

CONCLUSION

Contemporary child abuse reporting statutes perpetuate the historic legacy of centuries of discrimination against Black families and children, leading too often to the unwarranted breakup of these families and the destabilization of whole communities. While there has been substantial litigation aimed at specific child welfare practices such as training, caseloads, and family surveillance through search warrants or conditions of placement, little has been done to directly challenge the disparate racial impact of the very statutes and regulations that allow this system to exist. As the viability of challenges to de facto race discrimination by government actors has been eradicated under the Fourteenth Amendment absent a showing of discriminatory intent, state constitutional provisions explicitly barring race discrimination or more general state equal protection guarantees provide new pathways to bring such legal claims.