IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re A.G., a Person Coming Under the Juvenile Court Law.	S271809
MICHAEL G., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY, et al., Real Party in Interest.	Court of Appeal No. G060407 Orange County Superior Court No. 19DP1381

PETITIONER'S OPENING BRIEF ON THE MERITS

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QUESTION PRESENTED

1.) Whether the dependency statutory scheme requires courts to extend reunification efforts beyond the 18-month review, held pursuant to Welfare and Institutions Code[1] section 366.22, when families have been denied adequate reunification services in the preceding review period.

[1] Statutory references are to this Code unless otherwise noted.

INTRODUCTION

The present case involves the adjudication of protected liberty interests at the 18-month review. At issue is whether the statutory scheme requires courts to determine that families were provided adequate reunification services in the period preceding the 18-month review before terminating those services and scheduling the section 366.26 hearing. Given the fundamental liberty interests at stake, such a finding should be mandatory in order for the statutory scheme to comport with due process and fundamental fairness. However, due to an ambiguous statutory scheme, case law has yet to deliver a clear and uniform answer.

Provisions that govern status reviews vary on whether and how a finding of reasonable services conditions the setting of the section 366.26 hearing. Those governing the six- and twelve-month review hearings expressly condition the setting of the section 366.26 hearing on a finding of reasonable services. (§ 366.21, subds. (e)(3) and (g)(1)(C)(ii).) In contrast, the statutes applicable at the 18-month review, namely sections 366.22, subdivision (b) and 361.5, subdivision (a)(4)(A), seem to have eliminated the reasonable services requirement for all but a narrowly-defined subset, that many parents cannot meet. As Justice Goodwin Liu of this Court noted, "it is unclear why the Legislature would have chosen to provide such

protection only to this subset of parents and guardians" (*J.C. v. Superior Court* (Aug. 23, 2017, S243357) Statement Respecting Denial Of Review By Liu, J. (J.C.) [2017 Cal. Lexis 6576, at p. *8].)

The need for settled and uniform guidance on when a court may terminate reunification efforts cannot be overstated. The decision to terminate reunification services, which triggers the setting of the section 366.26 hearing, has the potential to gravely affect this liberty interest as it "is often the prelude to termination of parental rights." (*In re D.N.* (2020) 56 Cal.App.5th 741, 743.) As is well-established, "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." (*Troxel v. Granville (2000) 530 U.S. 57, 65.*) Furthermore, parents and their children have a recognized "interest in each other's care and companionship" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419) and "share an interest in avoiding erroneous termination." (*Santosky v. Kramer* (1982) 455 U.S. 745, 765 [rejecting court's assumption that termination of the natural parents' rights invariably will benefit the child].)

The provision of reasonable services is a vital component of family reunification and ensures the constitutionality of the dependency statutory scheme. "Providing reasonable services is one of 'the precise and demanding substantive and procedural requirements ... carefully calculated

to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents.'" (*In re M.F.* (2019) 32 Cal.App.5th 1, 19, quoting, *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.) As such, a requisite finding of reasonable services should be no hollow formality.

Accordingly, for the statutory scheme to comport with due process and fundamental fairness, the requisite finding of reasonable services in section 366.22 should precondition the termination of services and setting of the section 366.26 hearing for all parents, not just those narrowly defined in section 366.22, subdivision (b)

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STATEMENT OF FACTS / PROCEDURAL HISTORY

Basis for Dependency and Detention

On October 31, 2019, the juvenile court granted the Orange County Social Services Agency's (SSA) request for a protective custody warrant to remove A.G., then 14 years of age, from her parents due to concerns that she was at risk due to Father's paranoia and delusional behavior. (1CT17-19, 22-24.) A.G.'s mother, with whom A.G. had no contact or relationship, was known to be living in North Carolina and could not be located during the initial investigation. (1CT2.)

A.G. reported being afraid of Father and explained that things began to worsen over the past two years. (1CT33-34, 76.) She said Father's thoughts "switched over to demons" when he began reading the Bible three years prior. (1CT77.) He used to say the "munchkins" and demons were after him. (1CT77.) A.G. would ignore Father when he would "babble about demons" because it was scary and embarrassing, especially when her friends were in the car. (1CT77.)

A.G. said she often awoke in the middle of the night to Father throwing and breaking things, punching walls, and yelling. (1CT22, 34.) She said Father would often throw things and do "scary stuff" like talk to demons and to himself. (1CT76.) He would also have outbursts and yell things like, "you're being trained to be a prostitute" or "that's witchcraft."

(1CT76.) Father would only buy her plain clothing that did not "have ties to demons." (1CT76.) He withdrew A.G. from cheer team because he believed the music was associated with the government, demons and witchcraft. (1CT77.)

Father would see and hear things that were not there and believed the government was listening to him. (1CT24, 34.) They once moved because Father believed their house was "bugged" by the government, witches and demons. (1CT22, 33.) Father talked about moving to Arizona for these reasons. (1CT24-25) He also talked about moving to North Carolina to reconnect with A.G.'s mother. (1CT34.) Father also spoke of protecting A.G. by sending her to a host family nobody knew (1CT24) or to a location he would not specify. (1CT34)

Six months prior, Father woke her in the middle of the night screaming for her. (1CT22, 24.) Father believed demons were holding him down and asked A.G. to read the Bible aloud for 2 hours to send them away. (1CT22, 24.) A.G. was terrified and called her eldest brother, who lived outside the home, for immediate help. (1CT22, 24.) This happened once or twice. (1CT77.)

A.G. said the "final straw" occurred on October 30, 2019. On that date, Father whispered to A.G. that they were moving and said, "The devils are listening." (1CT25, 34, 77.) After Father would not say where they were

going, A.G. panicked and called her adult brother Ian[2] to pick her up because she did not understand what was happening and feared she would be hurt. (ICT25, 34, 77.) Father became angry, screamed about the government, threw things and said they had to leave because devils were going to turn A.G. into a prostitute. (1CT25, 34.) Father said he had to keep them safe and wanted to leave the following morning because someone was coming for them. (1CT25.) A.G. ran out of the house and was picked up by a family friend. (1CT34, 77.) A.G. spent the night with her brother Ian and missed school because she was still shaken. (1CT25, 34.)

A.G. wanted to remain in California. (1CT25.) She was in the 9th grade and she said school was good. (1CT33.) She used to spend weekends where her adult brothers lived with the F. family, but Father recently stopped her from going and called the F. parents the devil. (D14.) A.G. felt safe in the F. family's home but did not feel safe going back to Father. (1CT33, 35.) She wanted no contact with him. (1CT42.) Father frequently talked to himself and often told A.G. that voices told him to do things. (1CT35.) A.G. was afraid that the voices would tell him to hurt himself,

[2] A.G. has two adult brothers, Ian and Shane, who began living with the F. family under legal guardianships. Neither brother was the subject of this dependency proceeding. Shane was away at school but would return for holidays. (1CT5, 32.)

A.G. or others. A.G. was afraid of Father because this was the worst he had been. (1CT35.)

However, A.G. reported Father did not hit her, nor threatened to harm her or anyone else, and was meeting her needs which she appreciated. (1CT25, 33, 76.) She denied physical and sexual abuse, or witnessing domestic violence or substance abuse by Father. (1CT33, 76.) Father did not discipline her as she was rarely in trouble. (1CT33.) A.G. said Father had no psychiatric history or mental health diagnoses, and he was not a drug user. (1CT25.)

Father told the social worker the issue was that A.G. was against moving out of state. (1CT44.) When A.G. became aware of the impending move, she panicked and told Father she would not be moving with him. (1CT44.) Father believed it was best for A.G. to leave California's culture that divides families and encourages narcissism and liberals. (1CT45.) He felt California lacks Christian values and he wanted to move to a state like North Carolina where the Bible is accepted. (1CT44, 81.) Father wanted to protect A.G. from all modern day witchcraft and from becoming a harlot or prostitute, which he clarified was not someone who sells their body for sex but someone who is brainwashed into slavery by the state of California and commits their values and soul to the anti-Christian agenda. (1CT22, 37, 44, 81.) Father was concerned for A.G.'s well-being and said multiple times,

"they are trying to get her," referring to the government, her friends, and people at school. (1CT81.)

When asked about A.G. being fearful of these issues, Father denied discussing them with her in detail and said he had been gentle with her and wanted to protect her. (1CT81.) Father denied knowing how his behaviors affected A.G.'s well-being. (1CT81.) Father said he received "indications" to move but was vague about his plan. (1CT37-38.) Father had not planned to tell A.G. about the move, but since she was "onto him," he told her and she became upset and cried. (1CT37-38.)

Father denied having mental health or substance use issues. (1CT22, 37, 95.) He said he is a Christian who regularly attends church. (1CT95.) He denied hearing voices, throwing and breaking items, and punching walls. (1CT44.) He also denied believing his home had been bugged. He explained that as a forensic scientist having undergone many psychological assessments, he could not have maintained his position had he been found mentally unstable. (1CT44.)

Father said he retired the previous week after 17 years of working for the Orange County Sheriff Department Crime Lab. (1CT37, 81, 97.) He provided a business card showing his job title as a Forensic Scientist III in the Coroner's office. (1CT81.) He reported seeing witchcraft, anti-Christ

rituals and special trainings to brainwash government workers but would not discuss propriety matters. (1CT37, 81.)

A.G. said her last contact with her mother was when she was in fifth or sixth grade. (1CT77.) Father would not allow A.G. to see her mother after she had taken A.G. to North Carolina without telling him. The police got involved and Father was awarded full custody of A.G. by the family law court. (1CT24, 37.)

The F. parents took in A.G.'s adult brothers, Ian and Shane, into their home when the boys were 16 and 13 years of age respectively. (1CT32, 38.) Father agreed to the F. parents being the boys' legal guardians while A.G. remained in Father's care. (1CT32.) The F. mother said there had been increasing concern over the past two years about A.G.'s well-being due to Father's worsening mental health and A.G.'s increasing fear of him. (1CT32-33.) She always thought Father was mentally ill and had heard him increasingly rant about the government, religion, Satan and demons that were after him and A.G. (1CT32.) Father did not want A.G. spending time with the F. parents whom he called devils for stealing A.G.'s brothers and brainwashing them against him. (1CT32-33, 35, 38-39.)

A.G.'s brother Ian said Father had always been "off" but he began to worsen about two years prior. (1CT35.) Ian said Father can present as normal but something flips a switch and he goes off on a rant. Father talked

to himself, spoke of demons and witchcraft, and believed the government was out to get him. He continuously texted "warnings" about artificial intelligence taking over the world. (1CT35.) Ian was worried that voices would tell him to harm A.G. (1CT36.)

On November 4, 2019, SSA filed a dependency petition alleging in ¶ b-1, that Father had unresolved mental health issues; in ¶ b-2, that Mother had a history of mental health issues, which may be unresolved; in ¶ b-3 that Mother had a criminal history that includes convictions and/or arrests for driving under the influence of alcohol (Vehicle Code section 23152(b), and willful cruelty to a child (Penal Code section 273a(b)); and in ¶ b-4, that Mother's whereabouts were unknown and she had not maintained a relationship with A.G. (1CT51.)

Detention Findings and Orders

At the detention hearing on November 5, 2019, the juvenile court detained A.G. from the parents and ordered monitored family time of ten hours per week for Father. (1CT56; RT7-8.) The court clarified that visits would occur with A.G.'s input but she would not have veto power. (1CT57; RT10-11.) SSA would determine the time, place and manner of family time. (1CT57; RT10-11.)

Post-Detention to Jurisdiction and Disposition

A.G. had been living with her adult brother Ian in the home of the F. family. (1CT65, 107.) The F. family lived in a two-level, four-bedroom and one bonus room, 4.5 bathroom house in a gated community in Newport Coast. (1CT139.) A.G. had her own bedroom. (1CT139.) A.G. enjoyed living with her brother and being around family after feeling alone living with Father. (1CT77.) She said the home was normal and calm due to the absence of yelling. Although A.G. felt "scared, mad, and sad" and unsafe with Father, she wanted him to get help and address his mental health issues to be "normal" and said she would return to him once he got better and was safe to be around. (1CT77-78, 98-99.)

A.G. listed her father among the persons who love her and are important in her life. (1CT94.) As of November 15, 2021, A.G. was not ready for visits as she wanted Father to enroll in services to get the help he needed. (1CT110.) She felt that if visits began prior to him servicing, nothing would change. However, A.G. was open to having monitored phone calls with Father. (1CT110.) The F. parents said A.G. missed her father but was afraid to see him. They wanted him to get better but felt he had hit rock bottom. (1CT94.)

Father wanted A.G. returned to his care so they could move to North Carolina. (1CT99.) He said he is a good and loving father to A.G., had a good relationship with her and had provided for all her needs. (1CT96.)

After initially feeling services were unnecessary, he became willing to participate in them to start the reunification process. (1CT98.) However, Father did not feel the need for nor was interested in taking medication. (1CT98.) Father worried about how long it would take for his daughter to be returned to his care. (1CT98.)

On November 7, 2019, Father collaborated with the Family Services Worker on case plan services and signed the case plan development forms. (1CT100, 111.) Father was recommended to participate in individual counseling, parent education, and parent mentor services. (1CT100-101.) Father believed counseling services could benefit A.G. and wanted her to talk about the current situation. (1CT106.)

Services

On December 3, 2019, SSA reported Father and Mother were willing to accept services to "become the parents their children need them to be." (1CT111.) SSA recommended family reunification services to the parents. (1CT65.) Father's case plan included general counseling and if necessary, medication; a psychological evaluation; and parenting education. (1CT116-117.)

On December 6, 2019, Father's therapist reported that Father denied knowing he had to engage in therapy services. (1CT130.) When told

therapy was recommended but not required, Father said he would wait for the next court hearing to be court ordered. (1CT131.)

Family Time

A.G. had no desire to see Father until he enrolled in services but was willing begin with monitored phone calls. (1CT109.) On December 5, 2019, A.G. said the phone calls with Father made her sad because "he tries to make me feel bad for him." (1CT130.) A.G. felt Father was acting as if nothing was wrong and she declined all visits with him. A.G. wanted to remain in her current placement and "worried" about returning to live with her father. (1CT130.)

As of January 17, 2020, the caregivers reported that Father had not called A.G. for three weeks. (1CT138-141.) The caregivers said A.G. was hurt around Christmas because Father did not call or send her a gift, but took out one of the adult brothers and spent a lot of money on him. (1CT141.) However, a phone call on January 13, 2020 reportedly went fine. Father talked about how he was helping his father on a vineyard and would be moving into a guesthouse in San Marcos. (1CT141.)

A.G. reported feeling safe in her placement. (1CT142.) She at times felt intimidated and manipulated by Father when he tried to make her feel bad for him and uncomfortable by saying he knows everything she says to the social worker. (1CT142.) A.G. said Father has two sides; one that talks

about demons, and the other that is "normal." She said she misses the normal side and it makes her sad. (1CT142.)

Jurisdiction and Disposition Findings and Orders

On January 28, 2020, the dependency petition was amended to strike the reference in paragraph B-1 to a suicide attempt that was mistakenly attributed to Father. (1CT146; RT16-17.)

During the evidentiary hearing, Father testified that as a Christian, he believes in the existence of demons and witches. (RT21-23, 33.) However, he denied hearing voices, and said he had never been told by a demon to do anything aggressive to his daughter. (RT20, 24, 31.) He did not believe the government bugged his home. (RT24-25.) Father was concerned that if A.G. remained in secular California, she would become a prostitute, which he clarified meant she would turn from God to idolatry. (RT25.) Father contemplated moving to North Carolina, three hours from where A.G.'s mother lives, and where he could easily find work with his chemistry degree. (RT26-27.) Father denied planning to send A.G. off to live with a host family. (RT35.) Father argued there was no substantial risk A.G. would suffer serious physical harm or illness in Father's care. (RT44.)

Although the juvenile court respected Father's firmly held religious beliefs, the court nonetheless found A.G. was at risk of physical and emotional danger in Father's care. (RT50-52.) The juvenile court found the

amended petition to be true, declared A.G. to be a dependent, and made removal findings pursuant to section 361, subdivision (c)(1). (1CT147-148, 151-153; RT51-52.) The court also ordered a psychological evaluation pursuant to Evidence Code section 730 evaluation (730 evaluation) of Father to ascertain his beliefs and "what we need to work on and don't need to work on." (1CT149; RT54.) The evaluation was to address the "presence of developmental disabilities / psychiatric dysfunctions which would interfere with parenting capacity" and "whether parent is suffering from mental disorder that requires specialized treatment." (1CT159.) The court appointed Dr. Jennifer Bosch to conduct the 730 evaluation by April 23, 2020. (1CT155-156.)

The juvenile court also approved the case plan which required Father to participate in individual, conjoint, family and/or group therapy, participate in parenting education, take medication if deemed necessary, and cooperate with a psychological evaluation ordered by the court and follow its recommendations. (1CT116-117, 152.)

Father appealed the juvenile court's jurisdictional and disposition orders and findings, which were affirmed by the Fourth District Court of Appeal, Division Three in an unpublished opinion in case number G059045 on October 27, 2020. (1CT290-302.)

Six-Month Review Period

At the six-month review hearing, SSA recommended continuing reunification services to the twelve-month review. (1CT247.)

Family Time

After in-person visitation was suspended by an Orange County Juvenile Court administrative order on March 19, 2020, A.G. and Father were scheduled to have once per week phone calls. (1CT260, 263.) Calls were inconsistent due to A.G. declining contact with Father until he engaged in treatment. (1CT251, 263.) A.G. opted to text instead but very much wanted to visit Father once he sought mental health treatment and counseling. (1CT254, 260.) She was disappointed to hear about Father's non-engagement in services that would otherwise demonstrate a desire to work on himself and increase the likelihood of them being reunified. (1CT260, 262.) On February 24, 2020, A.G. said despite feeling bad, she would not call Father because it "ruins" her mood and makes her worry that he is not well. (1CT254, 261.) A.G. wished her father would seek mental health treatment. (1CT261.)

On April 28, 2020, A.G.'s therapist reported A.G. was fearful of talking to Father because he seemed mentally unstable and displayed what appeared to be schizophrenic symptoms. (1CT255.) A.G.'s therapist opined Father needed a psychiatric evaluation and possibly medications to address

his mood and possible delusions and hallucinations. (1CT255.) The therapist opined it would not be in A.G.'s best interest to engage with Father while he is untreated and continued to frighten her by going off on theoretical and religious tangents about the government. (1CT255, 262.)

Father's Services

Father's cooperation with the case plan and efforts and progress made toward alleviating or mitigating the causes necessitating court involvement were noted to be minimal. (1CT257.) On February 28, 2020, the social worker reviewed the case plan with Father but Father wanted to review the case plan with his attorney before signing it. (1CT257.) He refused to sign a referral for therapy stating he was unaware of the substantiated allegations and requested to speak with his attorney before proceeding with services. (1CT263.)

On February 28, 2020, Father told Senior Social Worker McBeath (SSW McBeath) he believed the juvenile court's order for the 730 evaluation violated his First Amendment right, and at the time his appeal was still pending. (1CT218-219, 257.) Father felt his testimony at the jurisdiction hearing was minimized and made to seem like he had mental health issues. (1CT219.) He found it "appalling" that the judge wanted him to change his beliefs. Father said the entire matter was a "huge misunderstanding" driven by A.G.'s fear of moving. Father passionately

shared his devout Christian beliefs but acknowledged how non-Christians might be offended by him calling people witches and demons, terms he said are often used by Christians. (1CT219.)

Father also felt social services' reports had been wrong and biased, and he was hesitant to allow himself to be misstated again in a 730 evaluation. (1CT220, 262.) Father referenced a report that falsely said he attempted or wanted to commit suicide. Father had been talking about Mother's mental health issues and was misconstrued. (1CT220.) Father declined to participate in the evaluation. (1CT219.)

SSW McBeath opined that Father's devout religious beliefs were hindering his relationship with A.G. and that in order to reconcile with her, he must be willing to seek help and participate in services. (1CT220-221.) SSW McBeath reported that if Father agreed to engage in therapy, a recommendation for therapeutic visitation may be appropriate to assist with reunification. (1CT221.) However, SSW McBeath opined that the reunification prognosis was fair at best as A.G. was declining all contact with either parent. (1CT221.) SSW McBeath recommended that "the Court authorize visits between the youth and father to occur in therapy." (1CT221.)

As of July 22, 2020, Father still had not signed the case plan nor completed the 730 evaluation as he maintained that doing so would violate

his First Amendment rights. (1CT257, 263.) Nevertheless, SSA reported that Father had complied with court orders and kept all appointments with the social worker. (1CT258, 263.)

6-Month Review Findings and Orders

At the six-month review hearing held on September 15, 2020, the juvenile court found that returning A.G. to the parents would create a substantial risk of detriment to her safety, protection or physical or emotional well-being. (1CT284.) The court found that reasonable services had been provided or offered to the parents and noted the parents' progress toward alleviating or mitigating the causes necessitating placement were minimal. (1CT284.) The court found there was a substantial probability that A.G. may be returned to the parents' custody by the 12-month review hearing, which it scheduled on December 17, 2020. (1CT284.)

12-Month Review Period

On November 9, 2020, SSA requested the appointment of a new 730 evaluator on Father's behalf because Dr. Bosch would be on vacation until December. (2CT306, 318.) Dr. Bosch reported the referral was "archived" because Father several times before said he was not interested in the evaluation and that it was being forced upon him. (2CT306, 318.) Now, roughly two weeks from the appellate court's decision affirming the jurisdiction and disposition findings and orders, Father wanted the

evaluation to show his progress before the upcoming court date. (2CT306, 318.) The juvenile court appointed Dr. Gerardo Canul and ordered him to make treatment recommendations for Father as well as address the issues stated in the prior appointment. (2CT307, 311, 315, 319.)

On December 17, 2021, SSA recommended continuing reunification services to the 18-month review. (2CT340.) From August 19, 2020 through October 21, 2021, Senior Social Worker Janet Ford was assigned the case while SSW McBeath was on a leave of absence. (2CT343.)

Father's Services

Father's participation in services improved. His cooperation with the case plan and efforts and progress made toward alleviating or mitigating the causes necessitating court involvement improved from "minimal" at the previous hearing to "moderate." (2CT348.) Since the previous review hearing, Father had signed the case plan and engaged in recommended services including individual counseling and a parenting class. (2CT343, 350.) Father tried to complete his 730 evaluation prior to the December 17, 2020 court date, and was noted to have made efforts to "[c]omply with medical or psychological treatment." (2CT343-344, 354.) Father agreed to meet his social worker halfway for a compliance visit and accepted a copy of visitation guidelines. (2CT350.)

Father's counselor, Linda Cleveland O'Keefe (O'Keefe), reported working with Father and developing with him specific goals to (1) gain an understanding of A.G.'s perspective; (2) develop a communication strategy to strengthen his relationship with A.G.; and (3) work to provide a safe, supportive environment for A.G. (2CT350-351.) O'Keefe noted Father was doing well in "establishing his own goals and focusing on strengths," and needed to continue to "engage with [A.G.] and establish trust." (2CT351.) Father said he could relate to and work with O'Keefe and planned to discuss the changes that occur in the teenage brain. (2CT350.)

Family Time

Although Father and A.G. were authorized ten hours of weekly supervised family time, no in-person visitation occurred because A.G. was not open to seeing Father in person. (2CT355, 373.) And although phone calls of once per week were authorized, Father and A.G. had only one phone call since 2019. (2CT350, 373.)

However, A.G. became more open to having visits with Father. She told SSW McBeath she wanted phone calls and more time to participate with Father in reunification services. (2CT356-357.) A.G. declined phone calls with Mother as she wanted to primarily focus on salvaging her relationship with Father. (2CT343.)

Father said he wanted to see his daughter and persistently asked what else he could do to help facilitate family time with her. (2CT343-344, 356.) When Father was asked about his family's needs, he wholeheartedly agreed with A.G. being returned to him and said she never should have been taken in the first place. (2CT350.)

A.G. preferred phone calls every other week until she could assess how the calls went. Father asked for extra phone calls with A.G. for the holidays. (2CT373.) At the Child and Family Team meeting on November 23, 2020, it was determined that phone calls would occur every two weeks and would increase to weekly if they went well. (2CT374, 365.) A plan was made to gradually progress to in-person family time. (2CT355.)

12-Month Review Findings and Orders

At the 12-month review hearing held on December 17, 2020, the juvenile court found that returning A.G. to the parents would create a substantial risk of detriment to her safety, protection, or well-being, and determined that the parents were provided or offered reasonable services. (2CT378.) The court also found that there was a substantial probability that A.G. would be returned to the parents within six months based on consistent and regular visits, significant progress in resolving the problems that led to A.G.'s removal from the home, and their demonstrated capacity and ability to complete the objectives of the case plan and provide for the

child's safety, protection, physical and emotional well-being, and special needs. (2CT378.) The juvenile court scheduled the 18-month review hearing on April 29, 2021, and ordered SSA to assess the appropriateness of conjoint counseling. (2CT378-379, 383.)

Father's 730 Evaluation by Dr. Gerardo D. Canul

On December 17, 2020, the juvenile court received Father's 730 psychological report prepared by Dr. Gerardo D. Canul. (2CT384) Dr. Canul conducted a clinical interview and Mental Status Examination (MSE), which is a cognitive and intellectual assessment. (2CT388.) Dr. Canul found Father to be cooperative, of average intellectual functioning, with average verbal reasoning skills, oriented to place, time and date with an appropriate level of attention and affect, and speech that was clear and moderately coherent. (2CT389-390, 392.) Father did not appear to be responding to or be preoccupied with internal stimuli during the interview. (2CT391.)

Dr. Canul reported that Father had been a Christian since childhood and described himself as a non-denominational, "new born –Calvary chapel – Christian." (2CT386.) Father believed the words of the Bible are straight from God and that one cannot pick and choose from it. (2CT385, 387) As the Bible mentions demons, Father believes demons exist in the spiritual sense, but he denied experiencing delusions, hallucinations and odd beliefs.

(2CT387, 390.) Father was unsure if his experience with paralysis and difficulty breathing was a demonic attack. (2CT390.) He asked A.G. to read him the Bible because it was the word of God. (2CT390.)

Father had been in six therapy sessions with O'Keefe and said his therapy goal was to understand A.G. (2CT387.) Father was reading "Wonder of Girls" to understand her mind. (2CT387.) He wanted to move A.G. somewhere more scientific and biblical. (2CT388.) He found North Carolina to be a good area with nice people and a different social structure and wanted to reestablish his relationship with A.G. there. (2CT388.) When asked how he planned to maintain his "psychiatric consultation and monitoring," he said, "Not at this time" and explained, "I am a Christian who will not shut his mouth about my beliefs." (2CT389.)

Dr. Canul opined that Father is "unable to recognize that his rigidly held beliefs on religion and his tangential thinking is problematic for him and in his parenting of the minor." (2CT392.) Dr. Canul further opined, "Currently, he strongly disagrees to needing psychiatric monitoring and needing psychiatric medication to assist him with managing his psychiatric functioning in particular his likely thought disorder." (2CT392.)

Dr. Canul's observations included the following: the "[p]resence of developmental disabilities/psychiatric [psychological] dysfunction, which would interfere with parenting capacity"; Father was "experiencing several

significant personal stressors/life challenges (current Dependency Court challenge), minimal social/familial support; Father demonstrated a "pattern of defiance towards taking part in his case plan;" and there was a "likely undiagnosed history of thinking problems." (2CT393.) Dr. Canul believed Father's "psychological and psychiatric problems are significant," but noted "[t]here is no data to suggest the presence of developmental challenges." (2CT393.)

As for treatment, Dr. Canul opined that Father would benefit from "maintaining counseling and ongoing monitoring and consultation with a psychiatrist to effectively manage his mental health functioning." (2CT393.) Dr. Canul noted Father "remains focused on his religious beliefs and rigidly focused on discussing his religious beliefs without recognizing the detriment to his parenting capacity. He will benefit from receiving support and a professional context to develop enhanced decision-making skills and improved stress and coping skills." (2CT393.) Dr. Canul opined, "Ongoing psychiatric treatment/consultation and monitoring of [Father] will be needed given his psychiatric history and his ongoing life challenges. He will need to maintain active communication with his psychiatric to manage/treat his possible symptoms of depression and thinking problems/odd beliefs." (2CT393-394.) Dr. Canul concluded, "Prognosis is guarded." (2CT394.)

18-Month Permanency Review Period

At the 18-month review, Father's new social worker, Senior Social Worker Raul Reyes (SSW Reyes), recommended terminating reunification services. (2CT397, 411.) However, SSW Reyes opined that a section 366.26 hearing would not be in A.G.'s best interest because she was not a proper subject for adoption and had no one willing to accept legal guardianship. (2CT397.) SSW Reyes acknowledged that his interaction with Father was limited due to the brief period of time he had been on the case. (2CT400, 410.)

On May 25, 2021, Father told SSW Reyes he would be moving to Raleigh, North Carolina and starting a job with the Department of Agriculture on June 17, 2021. (2CT442.)

Services

Father's "cooperation with the case plan and efforts and progress made toward alleviating or mitigating the causes necessitating court involvement" were again reported to have been "moderate." (2CT404-405, 411.) SSW Reyes confirmed Father completed his parenting program on November 3, 2020 and was on track to completing general counseling on April 15, 2021. (2CT407, 411.)

Father consistently saw his therapist O'Keefe for general counseling. (2CT400, 406.) O'Keefe continued to work with Father on understanding

and respecting A.G.'s perspective and point of view, providing space, setting boundaries, as well as building a supportive and safe environment. (2CT401, 406.) O'Keefe reported Father was open to A.G.'s perspective and he felt nothing was currently wrong. (2CT406.) She said Father denied having delusions of demons, but came from a very Christian perspective with strong beliefs. (2CT406.) O'Keefe reported Father had begun to understand why his daughter had become and continued to be frightened when he spoke of demons and asked her to pray for him. (2CT406.) O'Keefe was unsure if Father believed that was the reason A.G. left him. (2CT406.) Nonetheless, O'Keefe reported Father's therapy was scheduled to close on April 15, 2021. (2CT401, 406.)

Despite these improvements, SSW Reyes reported, rather inconsistently, that Father made "minimal" progress with court orders and the case plan. (2CT407.) However, SSW Reyes admitted he had been unable to discuss the case plan with Father due to having limited time. (2CT405.) Moreover, SSW Reyes admitted he could not find Father's current case plan. (2CT405.)

SSW Reyes reported Father had not participated in psychiatric counseling. (2CT411.) However, neither of Father's two most recent social workers reviewed Father's 730 evaluation. SSW McBeath reported discussing the report with Father on January 12, 2021 even though she had

not received a copy of it. (2CT406.) On January 14, 2021, SSW McBeath received an email from Father complaining that the 730 evaluation was poorly written and contained many errors, including erroneous reporting of his attire. Father questioned the integrity of the report. (2CT406.)

SSW Reyes had not seen a copy of the report but discussed it with O'Keefe anyway. (2CT406.) O'Keefe said Father saw no need for the evaluation. (2CT406.) On March 11 and April 13, 2021, SSW Reyes reported he looked for Father's 730 evaluation in the case file and legal file but could not find it. (2CT407.) On April 29, 2021, the juvenile court noted that the court and all parties had the 730 evaluation. (2CT438.)

Family Time

Father and A.G. had regular phone calls but no in-person family time during the review period. (2CT400, 408.) On February 28, 2021, Father told SSW Reyes that SSW McBeath had scheduled to work on in-person family time. (2CT400.) SSW Reyes told Father he was familiarizing himself with the case and would discuss it in two weeks. (2CT400.)

On March 31, 2021, A.G. said her phone calls with Father had gone well and she was open to having FaceTime video calls with him. (2CT408, 411.) A.G. wanted to wait on having in-person family time until Father received psychological help and medication. (2CT408, 411.)

On May 18, 2021, A.G. told SSW Reyes she was open to in-person family time with her father. (2CT441.) On June 10, 2021, the juvenile court ordered SSA to make best efforts to facilitate family time with the parents. (2CT446.)

On June 17, 2021, the caregivers informed SSW Reyes they were interested in becoming A.G.'s legal guardians. (2CT450.) SSA recommended terminating reunification services and scheduling a section 366.26 hearing. (2CT450.)

18-Month Permanency Review Hearing

The 18-month review hearing began on June 17, 2021.

Testimony of SSW Reyes

SSW Raul Reyes was assigned to A.G.'s case from February 3, 2021 to the end of May 2021. (RT63, 89, 98.) SSW Reyes described his role as seeing where the parents are in their case plan, answering their questions and providing resources. (RT63.)

Father's case plan required participation in general counseling and a parenting class, both of which Father completed. (RT63, 89.) Father completed counseling with his therapist Linda O'Keefe in April of 2021. (RT106.) SSW Reyes made no additional referrals. (RT64, 92, 107.) Father confirmed to SSW Reyes that he had moved to North Carolina on May 25. (RT98, 105-106.)

SSW Reyes testified that arranging family time is one of his duties. (RT100.) He spoke to A.G. and Father about family time at monthly compliance visits. (RT101.) Father and A.G. had consistent telephone calls with one another between February and the date of the hearing. (RT67, 99, 102.) A.G. said telephone conversations were going well and she was open to having FaceTime video calls with Father. (RT67, 118.)

Although Father asked SSW Reyes to facilitate in-person family time in February of 2021, SSW Reyes said he did nothing to facilitate such time nor talk to the caregivers about it. (RT99, 102.) At the end of March, SSW Reyes asked A.G. about in-person visitation but A.G. said she was not ready until Father received psychological therapy and was on medication. (RT67, 90.) However, SSW Reyes did not tell A.G. that Father had completed psychological counseling. (RT90, 117.) When asked why he did not refer Father for psychiatric medication, he answered, "Lack of time. I'm sorry." (RT108.) When asked if he knew whether Father and A.G. had video visits, SSW Reyes did not know. (RT67.) SSW Reyes did not know how many phone calls Father and A.G. shared between February and April. (RT102.)

A.G.'s case plan included conjoint therapy but SSW Reyes never referred Father and A.G. to conjoint counseling, nor determined if it would be appropriate. (RT67, 94, 116.) SSW Reyes never explained conjoint

counseling to A.G. (RT117.) SSW Reyes reasoned that Father had finished his therapy mid-April when A.G. was hesitant about having in-person contact with Father. (RT68.) He also considered that Father's therapist said he was only beginning to understand what A.G. went through, and was unsure if Father fully believed A.G. left him over the incident involving Father's paralysis and A.G. praying over him. (RT104-105.)

For these same reasons, and because SSW Reyes was being asked to transfer the case to a new worker, SSW Reyes did not refer Father to additional therapy after April 2021. (RT107-108.) SSW Reyes also never referred Father to a psychiatrist or additional counseling after Father finished counseling with Linda O'Keefe. (RT91-92.)

SSW Reyes opined that A.G. could not be safely returned to the parents and recommended terminating reunification services. (RT71.) SSW Reyes believed that based on the 730 evaluation, Father "still needs help psychologically, with psychological counseling and medication." (RT71-72, 91, 113.) SSW Reyes was aware that a 730 evaluation had been ordered when he was assigned to the case in February of 2021 and he searched for a copy of the report on March 11 and April 13. (RT111.) SSW Reyes did not actually review the 730 evaluation until June 17, 2021, the day he testified, and never spoke with Father about the evaluation. (RT108-109, 111-112.) When asked to clarify if he believed Father needed medication in order to

have A.G. safely returned to him, SSW Reyes answered, "I don't think I can honestly answer that." (RT114.)

The Court's Ruling

On June 22, 2021, the juvenile court found that returning A.G. to the parents would create a substantial risk of detriment to A.G.'s safety, protection or physical or emotional well-being. (2CT462.) The court also found that reasonable services had not been provided or offered to the parents. (2CT462; RT164.) Although the court said it was clear that Father did not intend to participate in any psychological, psychiatric or medication services, the court found it unreasonable that SSW Reyes received Father's 730 evaluation just before the hearing when the court had it as early as December 17, 2020. (RT166-167.) The court noted it had made clear earlier in the case that Father's psychological issues needed to be determined as part of his case plan. (RT167.) The court also found SSW Reyes' "erroneous beliefs with regard to Mother's visitation plan [were] unreasonable." (RT167.)

Despite these findings, the court believed that case law dictated that a failure to provide reasonable services does not automatically require an extension of the servicing period. (RT168.) Citing *San Joaquin Human Services Agency vs. Superior Court* (2014) 227 Cal.App.4th 215, the court stated it had to additionally find a substantial probability that A.G. can be

returned to the parents within an extended period based on the factors in section 366.22, subdivision (b)(1) through (3). (RT168-169.) On these factors, the court found that additional services would not be in A.G.'s best interest, and that the parents were not making significant and consistent progress in treatment and in establishing a safe home, and that there was not a likelihood that further services would positively impact reunification. (RT169.) Accordingly, the court declined to extend reunification services, terminated them and scheduled a section 366.26 hearing on October 18, 2021. (2CT462, 464; RT169, 171.)

Father filed a petition for extraordinary writ relief challenging the juvenile court's order terminating reunification services and setting the section 266.26 hearing. (*Michael G. v. Superior Court* (2021) 69 Cal.App.5th 1133, 1138 (*Michael G.*).) Father argued the juvenile court erred in terminating reunification services after SSA failed to provide reasonable services in the preceding review period thereby depriving him of due process. (*Ibid.*) Father further contended the court should have granted an extension of reunification services under section 352. (*Ibid.*)

On October 6, 2021, the Fourth District Court of Appeal, Division Three denied Father's writ petition. (*Michael G., supra*, 69 Cal.App.5th at p. 1144.) The Court found the statutory scheme provides parents with fundamental fairness and therefore satisfies due process requirements.

(*Ibid.*) The Court also found no abuse of discretion in the juvenile court's finding that additional services would not be in A.G.'s best interest. (*Id.* at p. 1145.)

Father's petition for review was filed with this Court on November 15, 2021 and was granted on January 19, 2022.

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ARGUMENT

I. BECAUSE THE PROVISION OF REUNIFICATION SERVICES IS ONE OF THE PRECISE AND DEMANDING SUBSTANTIVE AND PROCEDURAL REQUIREMENTS THAT ENSURES DUE PROCESS AND FUNDAMENTAL FAIRNESS IN THE STATUTORY SCHEME, A FINDING OF REASONABLE SERVICES AT THE 18-MONTH REVIEW SHOULD PRECONDITION THE ORDER TERMINATING SERVICES AND SCHEDULING THE SECTION 366.26 HEARING.

A. Overview of the Dependency Statutory Scheme

In evaluating whether a parent is denied due process by the limits of a particular statute, here, section 366.22, it is important to examine the entire statutory scheme. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

"The juvenile dependency law is designed 'to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.'" (*In re A.R.* (2021) 11 Cal.5th 234, 245, quoting Welf. & Inst. Code, § 300.2.) But that is not the dependency law's only objective. In addition to ensuring the safety, protection and well-being of children, the law's "focus shall be on the preservation of the family." (§ 300.2.)

Indeed, "[f]amily preservation ... is the first priority when child dependency proceedings are commenced. [Citation.]" (*In re Precious J.* (1996) 42 Cal.App.4th 1463, 1472.) To that end, dependency proceedings should "preserve and strengthen the minor's family ties whenever possible" (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 546), and adhere to the principle that "[m]aintenance of the familial bond between children and parents - even imperfect or separated parents - comports with our highest values and usually best serves the interests of parents, children, family, and community." (*In re Kieshia E.* (1993) 6 Cal.4th 68, 76.)

Accordingly, once the child has been declared a dependent, "the statutory scheme is designed to allow retention of parental rights to the greatest degree consistent with the child's safety and welfare, and to return full custody and control to the parents or guardians if, and as soon as, the circumstances warrant." (*In re Ethan C.* (2012) 54 Cal.4th 610, 625.)

"To achieve the goal of preserving the family whenever possible, the Legislature required the county child welfare departments to develop and implement family reunification plans and required the courts to monitor those plans through periodic review." (*In re Daniel G.* (1994) 25 Cal.App.4th 1205.) At these status reviews, "there [is] a statutory presumption that the child should be returned to the custody of the parent." (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253, referencing, §§

366.21, subds. (e), (f), 366.22, subd. (a).) Additionally, the court must "determine, among other things, whether reasonable reunification services have been offered." (*In re Daniel G., supra*, 25 Cal.App.4th 1205, citing §§ 366.21, subds. (e), (f), (g)(1); 366.22, subd. (a).) "Until permanency planning, reunification of parent and child is the law's paramount concern." (*Judith P. v. Superior Court, supra*, 102 Cal.App.4th at p. 546, citing § 366.22, subd. (a).)

"Ordinarily reunification services are available to parents for a maximum of 18 months from the physical removal of the children from their home." (*T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1251; § 361.5, subd. (a)(3)(A).) "If the child may not safely be returned to the parents within a maximum of 18 months from removal, the court must develop a permanent plan for the child." (*In re Marilyn H., supra*, 5 Cal.4th at p. 308.) "Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability. A hearing pursuant to section 366.26 to select and implement a permanent plan for the children is to be heard within 120 days from the time it was set. (§§ 361.5, subd. (f), 366.21, subds. (e) & (g), 366.22, subd. (a).)" (*Id.* at p. 309.

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B. The "Critical" Decisions Made at the 18-month Review Determine Protected Liberty Interests and Therefore Warrant Fundamentally Fair Procedures that Comport with Due Process.

The section 366.22 permanency review hearing, held eighteen months after the child's initial removal[3] from the parents, "represents a critical juncture in dependency proceedings," as it is where "'critical" decisions concerning parental rights are made. [Citations.]." (*In re J.E.* (2016) 3 Cal.App.5th 557, 563-564.) "The Legislature has determined that the juvenile court must embrace or forsake family preservation at this point by circumscribing the court's options." (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1015; § 366.22, subd. (a)(3).) "Absent extraordinary circumstances,...'the court must return children to their parents and thereby achieve the goal of family preservation or terminate services and proceed to devising a permanent plan for the children." (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 596, internal citations omitted.)

As this Court has recognized, the 18–month review "is generally a party's final opportunity to litigate the issue of parental fitness as it relates to any subsequent termination of parental rights, or to seek the child's

[3] "Initial removal" is defined as the date on which the child was taken into custody by the social worker or deemed taken into custody when put under a hospital hold pursuant to section 309, subdivision (b). (Cal. Rules of Court, rule 5.502(21).)

return to the parent's custody." (*In re Matthew C.* (1993) 6 Cal.4th 386, 392.) At the ensuing section 366.26 hearing, "[i]f the court determines that the child is likely to be adopted, ... the court findings made at the earlier 12- or 18-month status review hearing that the child should not be returned to parental custody shall then, in the words of the statute, 'constitute a sufficient basis for the termination of parental rights unless the court finds that termination would be detrimental' to the child." (§ 366.26, subd. (c)(1).) (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 259.) "Thus, terminating reunification services to a parent is significant; it is often the prelude to termination of parental rights." (*In re D.N.*, *supra*, 56 Cal.App.5th at p., 743.)

These critical decisions on family relationships at the 18-month review warrant fair and just procedures that comport with due process and protect against the erroneous abandonment of reunification efforts. The interests at stake are unquestionably compelling. "All parents, unless and until their parental rights are terminated, have an interest in their children's "companionship, care, custody and management...." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 306.) This "fundamental liberty interest ... does not evaporate simply because [the parents] have not been model parents or have lost temporary custody of their child to the State." (*Santosky v. Kramer*, *supra*, 455 U.S. at pp. 753–754.) Rather, the parents' compelling interest

"undeniably warrants deference and, absent a powerful countervailing interest, protection." (*Lassiter v. Department of Social Services of Durham County, N. C.* (1981) 452 U.S. 18, 27, internal citation omitted.)

Accordingly, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures" that meet the requisites of the Due Process Clause. (*Santosky v. Kramer*, *supra*, 455 U.S. 745, 753–754.) "In contested juvenile court proceedings, the due process clause of the Fourteenth Amendment requires that 'not only must there be actual fairness in the hearing but there must be the appearance of justice.'" (*In re Emily D.* (2015) 234 Cal.App.4th 438, 445, internal citations omitted.)

C. The Provision of Reunification Services is One of the Precise and Demanding Substantive and Procedural Requirements that Ensures Due Process and Fundamental Fairness in the Statutory Scheme.

Family reunification services are vital to ensuring fundamental fairness in the dependency statutory scheme. They are an "integral component" to family preservation, which is dependency law's "first priority through the review hearing stage of dependency proceedings. [Citation.]" (*In re James Q.* (2000) 81 Cal.App.4th 255, 263; *In re Elizabeth R.*, *supra*, 35 Cal.App.4th at p. 1787.) Generally, "[w]henever a child is removed from a parent's or guardian's custody, the juvenile court

shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians." (§ 361.5, subd. (a).)

> '[T]he focus of reunification services is to remedy those problems which led to the removal of the children.' [Citation.] A reunification plan must be tailored to the particular individual and family, addressing the unique facts of that family. [Citation.] A social services agency is required to make a good faith effort to address the parent's problems through services, to maintain reasonable contact with the parent during the course of the plan, and to make reasonable efforts to assist the parent in areas where compliance proves difficult.
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> (*Katie V. v. Superior Court*, *supra*, 130 Cal.App.4th at p. 598.)

Moreover, the provision of reasonable services is one of the significant safeguards that ensures the constitutionality of dependency law. Our system, which "operates, in many cases to deprive parents and children of their constitutional rights to parent and of their rights to be raised by their families of origin," passes constitutional muster "because of the significant safeguards built into this state's dependency statutes." (*Judith P. v. Superior Court, supra,* 102 Cal.App.4th 535, 545; see also, *In re A.R.*, *supra*, 11 Cal.5th at p. 245 [Legislature enacted several significant procedural protections to guard against erroneous termination of parental rights].) "Clearly, one of the 'precise and demanding' substantive requirements [an agency] must meet to satisfy due process is affording

reasonable reunification services. To put it another way: in order to meet due process requirements at the termination stage, the court must be satisfied reasonable services have been offered during the reunification stage." (*In re Daniel G.*, *supra*, 25 Cal. App. 4th at pp. 1215-1216.) Furthermore, "[p]roviding reasonable services is one of 'the precise and demanding substantive and procedural requirements ... carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents.'" (*In re M.F.* (2019) 32 Cal.App.5th 1, 19, quoting, *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.)

D. The Current State of the Law Governing the 18-Month Review Fails to Reliably Ensure Families Receive Reasonable Services in the Reunification Period Preceding the Critical 18-month Review.

Despite the importance of reunification services in the dependency statutory scheme, statutes governing the 18-month review do not reliably ensure families receive reasonable services in the preceding review period. Under section 366.22, subdivision (a), courts must determine whether reunification services were provided in the preceding review period. However, unlike at the 6- and 12-month reviews, which prohibit the setting of the section 366.22 hearing upon a finding that reasonable services were

not provided (§§ 366.21, subd. (e)(3), 366.21, subd. (g)(4)[4]), section 366.22, subdivision (a) offers no such prohibition at the 18-month review. In fact, in 1991, the Legislature amended section 366.22, subdivision (a) to delete that very requirement. (*Mark N. v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1016, fn. 9, referencing, Legis. Counsel's Dig., Sen. Bill No. 475 (1991-1992 Reg. Sess.) Summary Dig., p. 352 ["This bill would require a court to determine whether reasonable services have been offered or provided to the parent or guardian but would delete that requirement as a precondition for developing a permanent plan"].)

However, in 2009, the Legislature amended subdivision (b) of section 366.22, and reinstated the prohibition on setting a section 366.26 where reasonable services are not provided. (§ 366.22, subd. (b)(3)(C).) Currently, the statute provides in part: "The court shall not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian." (§ 366.22, subd. (b)(3)(C).) However,

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[4] Section 366.21, subdivision (e)(3) provides: If "the court finds ... that reasonable services have not been provided, the court shall continue the case to the 12-month permanency hearing." Section 366.21, subdivision (g) provides that when the child cannot be returned to the parent, the court shall "[o]rder that a hearing be held within 120 days, pursuant to Section 366.26, but only if the court does not continue the case to the permanency planning review hearing and there is clear and convincing evidence that reasonable services have been provided or offered to the parents or legal guardians."

several appellate courts, including the Court of Appeal herein, found this provision applicable only as to the narrow subset of parents defined within subdivision (b)[5]. (*Michael G. v. Superior Court*, *supra*, 69 Cal.App.5th at p. 1143; *N.M. v. Superior Court* (2016) 5 Cal.App.5th 796, 806; *Earl L. v. Superior Court* (2011) 199 Cal.App.4th 1504; *San Joaquin Human Services Agency v. Superior Court* (2014) 227 Cal.App.4th 215, 224.) But given the significance of reasonable services in the statutory scheme as well as the fundamental liberty interests at stake at the 18-month review, it is unclear why the Legislature would have limited such protection only to this subset of parents and guardians. (*T. J. v. Superior Court,* 21 Cal.App.5th 1229, 1253, quoting, *J.C. v. Superior Court* (Aug. 23, 2017, S243357) Statement Respecting Denial Of Review By Liu, J. (J.C.) [2017 Cal. Lexis 6576, at p. *8].)

Notably, section 361.5, subdivision (a)(4)(A), which delineates the statutory time limits in dependency proceedings, provides:

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[5] The subset includes the following: (1) a parent making significant and consistent progress in a court-ordered residential substance abuse treatment program, (2) a minor or a dependent parent at the time of the initial hearing who is making significant and consistent progress in establishing a safe home for the child's return, or (3) a parent recently discharged from incarceration, institutionalization, or the custody of the Department of Homeland Security (DHS) and who is making significant and consistent progress in establishing a safe home for the child's return. (§ 366.22, subd. (b); see also § 361.5, subd. (a)(4)(A) [similar].)

> "[C]ourt-ordered services may be extended up to a maximum time period not to exceed 24 months after the date the child was originally removed from physical custody of the child's parent or guardian if it is shown, at the hearing held pursuant to subdivision (b) of Section 366.22, that the permanent plan for the child is that the child will be returned and safely maintained in the home within the extended time period. The court shall extend the time period only if it finds that it is in the child's best interest to have the time period extended and that there is a substantial probability that the child will be returned to the physical custody of the child's parent or guardian who is described in subdivision (b) of Section 366.22 within the extended time period, *or that reasonable services have not been provided to the parent or guardian.*
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> (Italics added.)

Not surprisingly, tension in the statutory scheme governing the 18-month review has resulted in varying opinions throughout the state. The Fourth District, Division 1 concluded that section 361.5, subdivision (a)(4)(A), particularly the italicized language quoted above, "explicitly authorizes the extension of services to the 24-month date on … a finding that reasonable services were not offered or provided." (*In re M.F.*, *supra*, 32 Cal.App.5th 1, 23.)

However, most courts have taken a stricter view, and concluded that the provisions directly applicable to the 18-month review authorize extensions of services beyond eighteen months only for parents who fall within the narrow subset defined in subdivision (b), and meet the statute's strict conditions. (*Michael G. v. Superior Court*, 69 Cal.App.5th at p. 1143,

fn. 5 [expressly disagreeing with *In re M.F. supra*, 32 Cal.App.5th 1]; *In re Malick T.* (2022) 73 Cal.App.5th 1109, 1124, fn.11; *N.M. v. Superior Court, supra*, 5 Cal.App.5th at p. 806; *Earl L. v. Superior Court, supra*, 199 Cal.App.4th at 1504; *San Joaquin Human Services Agency v. Superior Court* (2014) 227 Cal.App.4th 215, 224.) Under section 366.22, subdivision (b), parents who fall within the subset, even when deprived of reasonable services, must still demonstrate by clear and convincing evidence that their child's best interests would be met by an extension of servicing up to a date 24 months from the child's initial removal from the parents.

Despite the differing interpretations, courts have nonetheless determined that the amendment to section 366.22, subdivision (b) did not limit a trial court's discretion to continue services beyond the 18-month review where reasonable services were not provided. As pointed out by the First District Court of Appeal, Division 4, "the Legislative Counsel's Digest indicates the amendment was intended to 'provide additional circumstances in which court-ordered services may be extended,' implicitly recognizing that other circumstances already justified such an extension." (*T.J. v. Superior Court, supra,* 21 Cal.App.5th at p., 1254, citing (Legis. Counsel's Dig., Assem. Bill No. 2070 (2007–2008 Reg. Sess.) Stats. 2008, Summary Dig., p. 202; see also, *In re J.E.* (2016) 3 Cal.App.5th 557, 565

[2009 amendment did not limit court's discretion to continue 18–month hearing and extend services under section 352].)

Thus, "[n]otwithstanding [the] statutory limits on reunification services, a juvenile court may invoke section 352[6] to extend family reunification services beyond these limits if there are 'extraordinary circumstances which militate[ ] in favor of such an extension." (*In re D.N.*, *supra*, 56 Cal.App.5th at p. 762 (*D.N.*) As the appellate court in *D.N.* determined, "Extraordinary circumstances exist when "inadequate services" are offered by the child welfare agency or "an external force over which [the parent has] no control" prevented the parent from completing a case plan." (*Ibid.*) Numerous courts have similarly applied section 352 to extend services beyond eighteen months where reasonable services were not provided. (See, *In re J.E., supra,* 3 Cal.App.5th 557, 567; *Mark N. v. Superior Court*, *supra*, 60 Cal.App.4th at p., 1017; *Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1424; *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1792, 1796.)

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[6] Section 352 authorizes continuances of "any hearing" beyond statutory time limits provided there is good cause and continuing the case will not be contrary to the interests of the minor. (§ 352, subd. (a)(1) and (2). "In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (§ 352, subd. (a)(1).)

While case law has provided varying interpretations of on the law governing the 18-month review, and have utilized section 352 as an alternative remedy to section 366.22's perceived limitations, there still remains no settled uniform approach to remedying deprivations of reasonable services that occur in the period preceding the critical 18-month review.

E. The Law Should Ensure Families Receive Reunification Services as a Precondition to the Termination of Reunification Services and Scheduling of the Section 366.26 Hearing in Order to Promote Fair and Accurate Decisions on Fundamental Family Interests.

As noted above, an order "terminating reunification services to a parent is significant; it is often the prelude to termination of parental rights." (*In re D.N.*, *supra*, 56 Cal.App.5th at p. 743.) "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." (*Santosky v. Kramer*, supra, 455 U.S. at pp. 753-754.) "The essential characteristic of due process in the statutory dependency scheme is fairness in the procedure employed by the state to adjudicate a parent's rights." (*In re James Q.* (2000) 81 Cal.App.4th 255 265, internal citation omitted.)

Parents deprived of reasonable services are significantly and unfairly hampered in their ability to demonstrate at the 18-month review that their children can be safely returned to their care. Although reunification is

presumed at the 18-month review, it is far from being guaranteed. Courts may deny reunification upon a showing by a preponderance of the evidence that reunification "would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a)(1); Cal. Rules of Court, rule 5.720.) The burden of proving detriment "is squarely on [the child welfare agency], not the parents." (*M.G. v. Superior Court of Orange County* (2020) 46 Cal.App.5th 646, 660.)

When an agency deprives parents of reasonable services, deliberately or not, it may unfairly ease its burden of proving detriment at the 18-month review.[7] In determining risk of detriment, courts "consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided." (§ 366.22, subd. (a)(1).) Conversely, "[t]he failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence

[7] The present case illustrates how a deprivation of reasonable services may unfairly be used to prove detriment. At the 18-month review hearing, when asked why A.G. could not be safely reunified with her father, the social worker testified that based on a psychological evaluation of Father, he believed Father "still need[ed] help psychologically, with psychological counseling and medication." (RT71-72, 91, 113.) However, the first time the social worker reviewed the evaluation was earlier that day. (RT108-109, 111-112.)

that return would be detrimental." (Ibid.) As a result of being deprived of adequate reunification services in the preceding review period, a parent at the 18-month review will struggle to demonstrate regular participation, efforts and substantive progress in court-ordered services. And the court, consequently, will struggle to accurately assess whether the family can be safely reunified or should have its services terminated. With pressure to heed statutory time limits and the ambiguity in section 366.22, parents rightfully worry courts will feel compelled to choose the latter.

For these reasons, the statutory scheme governing 18-month review hearings must ensure families deprived of reasonable services in the preceding review period receive the services they were due with an extended reunification period. "It is fundamentally unfair to terminate either a parent's or a child's familial relationship if the parent and/or child has not had an adequate opportunity to prepare and present the best possible case for continuation of reunification services and/or reunification." (*Judith P. v. Superior Court*, supra, 102 Cal.App.4th a pp. 557-558 [reversing termination of services because agency's failure to timely provide status review report violated substantive due process].)

Enforcing the promise of reunification services promotes accurate and just decisions on the fundamental liberty interests at stake at the 18-month review. When "appropriate services designed to mitigate risk to the

child have not been provided to a parent, it is likely risk to the child will not have been mitigated. Thus, where reasonable services have not been provided or offered to a parent, there is a substantial likelihood the juvenile court's finding the parent is not likely capable of safely resuming custody of his or her child may be erroneous." (*In re M.F., supra,* 32 Cal.App.5th at, 18-19, internal citation omitted; see also *Stanley v. Illinois*, 405 U.S., at 652 ["the State registers no gain towards its declared goals when it separates children from the custody of fit parents"].) Accordingly, "[i]t is incumbent upon the juvenile court… to ensure a parent has a reasonable opportunity to pursue reunification. (*In re Luke L.* (1996) 44 Cal.App.4th 670, 681.)

Additionally, failing to enforce the reasonable services requirement could have adverse consequences not intended by the Legislature. "For example, such an interpretation 'could ... tend to create an incentive for supervising agencies to avoid their statutory obligations to provide services by simply 'waiting things out' through delay." (*In re M.S.* (2019) 41 Cal.App.5th 568, 596, citing, *T.J. v. Superior Court, supra*, 21 Cal.App.5th at p. 1257.) "Particularly given the stakes involved, [courts] do not view this as a reasonable reading of the statutory scheme" (*Ibid.*)

Further, in light of the critical decisions made at the 18-month review, the agency should be required to fulfill its statutory duty to provide

parents with reasonable services in the 18-month review period. (§ 361.5, subd. (a).) That expectation is not unfairly burdensome. "The standard is not whether the services provided were the best that might have been provided, but whether they were reasonable under the circumstances." (*Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) Further, if the social worker truly serves as an "impartial arm of the court" (*In re Ashley M.* (2003) 114 Cal.App.4th 1, 7-8, internal citations omitted), then courts should ensure its social worker has duly fulfilled the statutory mandate to provide court-ordered reunification services before abandoning family reunification efforts and scheduling the section 366.26 hearing.

F. The Statutory Scheme Must Ensure That Parents and Children Are Provided Reasonable Services in the Period Preceding the 18-month Review.

Because the statutes governing the 18-month review, particularly sections 366.22 and 361.5, do not reliably ensure parents receive reasonable services in the critical 18-month review period, the statutory scheme is fundamentally unfair and deprives parents who have been denied reasonable services of due process.

> Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty or property by unreasonable or arbitrary legislation. [Citation.] In substantive due process law, deprivation of a right is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation that is reasonably applied; that is, the law must have a reasonable

and substantial relation to the object sought to be attained. [Citation.]

(*In re Marilyn H., supra*, 5 Cal.4th at p. 306-307.)

Father humbly submits that section 366.22, to the extent its remedy for a deprivation of reasonable services is available only to the narrow subset of parents defined therein, is not reasonably nor substantially related to dependency's overarching goal of reunification whenever possible, nor in line with fundamental fairness and due process. To comport with these important principles, the relief provided in section 366.22, subdivision (b)(3)(C) should be interpreted to apply to all parents deprived of reasonable services in the period preceding the 18-month review. Thus, until the Legislature responds with more clarity in the statutory scheme, this interpretation best upholds these important principles.

Alternatively, although section 352 is a welcome alternative to the narrow interpretations of section 366.22, subdivision (b), section 352 is an imperfect remedy. First, the aggrieved parent deprived of reasonable services unfairly bears the burden of proof, not the agency whose duty it was to provide such services in the first place. Second, the statute's relief is dependent on court discretion, which is reviewable on appeal under the abuse of discretion standard. (*Michael G. v. Superior Court, supra*, 69 Cal.App.5th at p. 1140; *In re J.E.. supra*, 3 Cal.App.5th at p. 567.) Given

the parents' fundamental liberty interests at issue, greater deference and protection is warranted. (*Lassiter v. Department of Social Services of Durham County, N. C., supra*, 452 U.S. at p. 27.)

Furthermore, case law applying section 352 has fashioned additional factors to consider, which include "'the likelihood of success of further reunification services,' in determining whether a continuance is in the minor's best interests." (*In re J.E., supra*, 3 Cal.App.5th at p. 567; *Mark N. v. Superior Court, supra*, 60 Cal.App.4th at p. 1017; *In re Dino E.* (1992) 6 Cal.App.4th 1779-1780.) However, not only does that impose a more onerous burden than required by section 352, "[t]o incorporate an assessment of the likelihood of reunification in reviewing a reasonable services finding would be unfair to a parent who did not receive court-ordered services tailored to mitigate risk to the child and allow the child's safe return to the care of his parent." (*In re M.F.* (2019) 32 Cal.App.5th 1, 18.)

Accordingly, should this Court affirm section 352 as a remedy at the 18-month review, Father humbly submits that parents deprived of reasonable services should not unfairly bear the burden of demonstrating a likelihood of success of further reunification services. And given the parents' fundamental liberty interests at issue, a deprivation of reasonable services in the period preceding the 18-month review should constitute

"extraordinary circumstances" that militate in favor of an extension of services. (*In re D.N., supra*, 56 Cal.App.5th at p. 762.)

Additionally, "[d]uring the reunification period, the focus is on preservation of the family if possible," and "[i]t is only after proper termination of reunification services that the focus becomes providing the child with a safe, permanent home." (*In re M.S., supra*, 41 Cal.App.5th at p. 593.) Thus, until the proper termination of services, both the parent and the child share an interest in reunifying. (*Ibid.*) For this reason, it should be presumed that a continuance of reunification efforts pursuant to section 352 with the proper provision of family reunification services is not contrary to the interests of the child. (§ 352, subd. (a)(1).)

G. The Child's Interest in Timeliness and Finality Does Not Outweigh The Family's Need for Reasonable Family Reunification Services in the 18-Month Review Period.

As noted by Justice Liu of this Court, the issue presented herein "lies 'at the crosshairs of competing policy objectives,' namely the goal of 'family preservation and protect[ing] parental rights' on the one hand, and the 'child's need for stability and security within a definitive time frame' on the other." (*T.J. v. Superior Court, supra*, 21 Cal.App.5th at p. 1253, quoting *J.C. v. Superior Court* (Aug.23, 2017, S243357) Statement Respecting Denial of Review By Liu, J. (J.C.) [2017 Cal. Lexis 6576, at p.11].)

Without question, timeliness and finality are significant considerations at the 18-month review. "Nowhere is timeliness more important than in a dependency proceeding where a delay of months may seem like 'forever' to a young child." (*In re A.R.*, *supra*, 11 Cal.5th at p. 234, internal citation omitted.) "There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' ... especially when such uncertainty is prolonged." (*Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, 513–514; *In re Sade C.* (1996) 13 Cal.4th 952, 998.) In recognizing this "pointed and concrete" harm, this Court just last year "emphatically agree[d] that dependent children have a critical interest in avoiding unnecessary delays to their long-term placement." (*In re A.R.*, *supra*, 11 Cal.4th at 249.)

The Legislature has "recognized that, in order to prevent children from spending their lives in the uncertainty of foster care, there must be a limitation on the length of time a child has to wait for a parent to become adequate." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 308.) However, "[w]hile the Legislature was concerned with reducing delays in arriving at a permanent resolution of the child's placement," courts have determined that "the Legislature did not intend[] a speedy resolution of the case to override all other concerns including 'the preservation of the family whenever

possible' especially given the lengths to which the Legislature went to try to assure adequate reunification services were provided to the family." (*In re Daniel G., supra, 25* Cal.App.4th at p. 1214; *Patricia W. v. Superior Court* (2016) 244 Cal.App.4th 397, 430; *In re Elizabeth R., supra*, 35 Cal.App.4th at 1794.)

Even in termination proceedings where finality is a critically important interest, "it is not the only interest at stake. Children and parents alike also have an interest in ensuring that the parent-child relationship is not erroneously abridged." (*In re A.R., supra*, 11 Cal.5th at p. 249, internal citation omitted.) Thus, while "[o]ur state's dependency statutory scheme imposes strict requirements to resolve cases expeditiously. It also requires due process for all parties, including parents." (*In re James Q., supra,* 81 Cal.App.4th at pp. 267–268.)

Furthermore, it should not be presumed that the child's interest in timeliness and finality outweighs his or her interest in ensuring fair and accurate decision-making affecting fundamental liberty interests, or that the child's interests conflict with those of his or her parents. Although "each child has a compelling interest to live free from abuse and neglect in a stable, permanent placement with an emotionally committed caregiver," they, "too, have a compelling independent interest in belonging to their natural family." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 222–223.)

As should be expected, a parent and child have a recognized "interest in each other's care and companionship" (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 419) and "share an interest in avoiding erroneous termination." (*Santosky v. Kramer*, *supra*, 455 U.S. 745, 765 [rejecting court's assumption that termination of the natural parents' rights invariably will benefit the child].)

While a child's interest in permanency must be balanced against the interests of his or her parents, there should be no presumption that those interests lie on opposing sides of the scale where reasonable services were not adequately provided to the family. Strict adherence to statutory time limits should not be made at the expense of a child's compelling interest in belonging to her natural family, her right to the care and companionship of her parents, and to accurate decisions that affect her family.

CONCLUSION

On balance, interests of parents and children heavily weigh in favor of requiring a finding of reasonable services as a prerequisite to terminating reunification services and scheduling the section 366.26 hearing. A remedy that equitably responds to such a significant deprivation not only ensures due process and fundamental fairness, it promotes the timely and adequate provision of services which in turn may encourage expediency in achieving permanency. Requiring adequate reunification services also ensures more

informed and accurate decisions on whether to continue or abandon reunification efforts at the critical 18-month review, and serves to "constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents." (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 256.) For all of the foregoing reasons, this Court should determine that the statutory scheme governing the 18-month review requires that parents receive reasonable services in the preceding period as a precondition to any order terminating reunification services and scheduling of the section 366.26 hearing.

Dated: March 11, 2022

Respectfully submitted,

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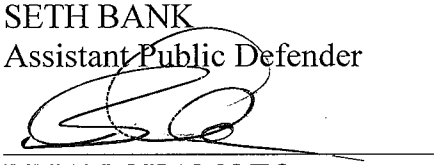

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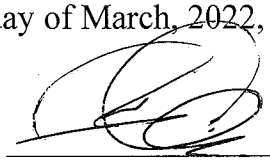

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