RECORD NO. 18-1066

In The
United States Court of Appeals
For The Tenth Circuit

JANE DOE; I.B.,

***Plaintiffs – Appellants*,**

v

APRIL WOODARD, in her individual capacity; CHRISTINA NEWBILL, in her individual capacity; SHIRLEY RHODUS, in her individual capacity; RICHARD BENGTSSON, in his individual capacity; EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS,

***Defendants – Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO - DENVER NO. 1:15-CV-01165-KLM THE HONORABLE KRISTEN L. MIX

BRIEF OF *AMICI CURIAE* PARENTAL RIGHTS FOUNDATION, NATIONAL CENTER FOR HOUSING AND CHILD WELFARE, NATIONAL COALITION FOR CHILD PROTECTION REFORM, PARENT GUIDANCE CENTER AND MARK FREEMAN, ESQ. IN SUPPORT OF APPELLANT AND SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Parental Rights Foundation, National Center for Housing and Child Welfare, National Coalition for Child Protection Reform, and Parent Guidance Center are all nonprofit corporations. None of them have any parent corporations, nor is there any publicly held company that owns 10% or more of the amici's stock.

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INTEREST OF AMICI CURIAE

Parental Rights Foundation is a national, non-profit, non-partisan advocacy organization with members in the United States and across the globe. We believe that one blessing of liberty is the freedom of parents to raise their children without undue government interference. We seek to preserve that liberty by educating those in government and the public at large on the importance of parental rights in civil society. Our affiliated organization Parentalrights.org works with federal and state lawmakers to amend existing child welfare laws to keep families together whenever possible, with the goal of passing a Parental Rights Amendment to the Constitution that will ensure the protection of parental rights for all Americans as a fundamental right. Parental Rights Foundation was founded out of a concern about the lack of legal protection for parental rights in our country. The United States Supreme Court has repeatedly held that parents have a fundamental right to direct the care, custody, and control of their children, most recently in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000). Yet parents continue to encounter obstacles in exercising

those rights—in schools, in hospitals, in their communities, and in the family court system.

The National Center for Housing and Child Welfare was formed in 2008 to be a national leader in addressing the intersecting subsistence needs of families coming to the attention of child welfare authorities, especially their housing needs. Studies have shown that 30% of children in the child welfare system could go home if their families had adequate housing. In 2018, the Center initiated the Redleaf Family Advocacy Institute, led by its new Legal Director Diane Redleaf to expand its advocacy for front-end reforms of the child protection system including investigative reforms and changes in child-removal policies, out of the belief that the subsistence needs of families are best met by other public programs and community supports, not child protection intervention. Among the many projects of the new Institute is support for amicus briefing on issues that address constitutional limitations on the unfettered discretion of child protection investigators, including issues of child search and seizure. Ms. Redleaf coordinated friend-of-the-court briefing in

Camreta v. Greene, 593 U.S. 692 (2011), cited herein, before the United States Supreme Court.

Amicus Curiae National Coalition for Child Protection Reform (NCCPR) is an organization of professionals from the fields of law, psychology, social work, and journalism who are dedicated to improving child welfare systems through public education and advocacy. NCCPR is a tax-exempt non-profit organization founded at a 1991 conference at Harvard Law School. NCCPR is incorporated in Massachusetts and headquartered in Alexandria, Virginia.

Mark D. Freeman, Esq. is a private attorney who represents parents and caretakers in family and criminal court who have been falsely accused of child abuse. Mr. Freeman has represented dozens of falsely accused innocent parents and caregivers where he is licensed to practice law in Pennsylvania and New Jersey, and has represented falsely accused innocent parents and caregivers in Canada and *pro hac vice* in Massachusetts, New York, Virginia, Oklahoma, Tennessee and Florida. Mr. Freeman has filed civil rights lawsuits and collected monetary judgments

against five different Pennsylvania county child protection agencies for violating the Constitutional due process rights of parents. Mr. Freeman's lawsuits were specifically cited by Pennsylvania's Department of Public Welfare as the precipitating reason it changed its policy regarding safety plans in 2014 to require a due process hearing within 72 hours any time a safety plan was implemented that altered a parent's right to the custody of his or her children. Mr. Freeman continues to diligently represent falsely accused innocent parents and caretakers and to vindicate the constitutional rights of all parents to procedural and substantive due process, particularly in the context of allegations of abuse that are used to deprive or alter the fundamental right of parents to the care, custody and control of their children.

Parent Guidance Center, a 501(c)(3) organization, has been advocating for parents involved in child welfare systems since 2004. It supports families by directly interacting with parents during their CPS cases at all stages, by training and consulting with attorneys who represent CPS parents, by providing legislative advocacy to inform the decision-

makers about how their laws and policies really affect families, and by participating in meaningful discussion about the difference between policy and practice in the system. It gives a voice to the Forgotten Stakeholder: Parents. Parent Guidance Center believes that a system that allows children to suffer a form of abuse and trauma in order to punish their parents is repugnant.

All parties have consented to the filing of amicus briefs. See attached Amici Consent Letter.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

The Supreme Court has recognized that the interest of parents "in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*,

530 U.S. 57, 65 (2000)(internal punctuation removed). Importantly, this interest in protecting familial integrity and parental control is aligned with the interest of the state, since "The government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents." *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).

ARGUMENT

I. Child Welfare Investigations Can Harm Children and Families

A. Investigations can be traumatic, life-altering events.

Federal courts often fail to realize the harm that child welfare investigations can cause to innocent children, and research shows that the state, in its effort to investigate child abuse and neglect, can often cause more harm than good. In her seminal article on the effect of child welfare investigations, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 441 (2005), Doriane Coleman claimed that, "[T]he majority of

intrusions on family privacy do not directly benefit the children involved, and in many instances actually cause them demonstrable harm." Almost a decade later, Teri Dobbins Baxter found that "research has shown that investigations, particularly those that are unnecessarily intrusive or that separate children from their caregivers, can be traumatic and psychologically harmful to the children as well as damaging to the family as a whole." *Constitutional Limits on the Right of Government Investigators to Interview and Examine Alleged Victims of Child Abuse or Neglect*, 21 Wm. & Mary Bill of Rts. J. 125 (2012).

Unnecessary investigations and unduly harmful ones would be moderated by application of the Fourth Amendment requirement for a warrant prior to seizing the children for interviewing them without their parent's knowledge or consent, examining them, or photographing them. Yet child protection authorities often resist the modest steps required of law enforcement authorities, whether by making a blanket argument that the Fourth Amendment does not apply to child welfare investigations (a position now rejected across the country), or through seeking to apply the

"special needs exception" to any case involving child protection concerns. Josh Gupta-Kagan asserts that viewing the Fourth Amendment as allowing a special needs exception in child protection investigations "permits significant invasions of children's and families' privacy at home and elsewhere, implicating fundamental constitutional rights without consideration of the severity or credibility of allegations." *Beyond Law Enforcement: Camreta v. Greene*, *Child Protection Investigations and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 Tul. L. Rev. 353, 357 (2012).

Some child welfare investigations are "relatively narrow in scope, initially including only a private discussion with the child." Coleman, *supra* at 438. But many investigations quickly escalate to include strip searches, photographs of nude children (as in this case), intrusive questionnaires that go far beyond the initial allegations, and even vaginal/anal exams. See, e.g., *Franz v. Lytle*, 997 F.2d 784, 785 (10th Cir. 1993), where a state actor conducting a child welfare investigation forced the child to:

> Remov[e] her pants, laying her down on the floor, and spreading her legs apart as ordered. Kneeling over Ashley,

> Officer Lytle then touched her vaginal area in several places 'checking for any soreness or swelling,' and Ashley's reaction to his touch, asking her if the places he pressed hurt.

In *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000), the exams "included internal body cavity examination of the children, vaginal and anal. Dr. Spencer also took photographs of both the inside and the outside of Lauren's vagina and rectum and Jessie's rectum. These examinations were conducted on Jessie's third birthday."

The investigators in *Camreta v. Greene*, 563 U.S. 692 (2011), "chose to interview S.G. at her school, during the school day, and without contacting her mother first, and—at least as alleged by S.G.—chose to keep S.G. in a room with him until she agreed that her father had molested her." Gupta-Kagan, *supra* at 371. While the Supreme Court determined that S.G.'s claims were moot after she left the state of Oregon and was nearly 18 years old, the harm she experienced during the investigation was undisputed. See *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009). Indeed, she too was later strip-searched following the two hours of questioning she

experienced, and her claims as to the strip search were sustained. *Id.* at 1037.

Often, it does not matter what the original report was, nor what the reporter's veracity and basis of knowledge was – the investigator will "search every room of the home and interview all children and adults in that home," Gupta-Kagan, *supra* at 370, whether or not she has probable cause. And many of these interviews and exams are done without the consent or even knowledge of the child's parent, as in this case.

B. Most child welfare investigations are closed without finding abuse or neglect.

Courts must carefully examine claims of social worker misconduct as governed by the Fourth Amendment. State social workers conduct millions of child welfare investigations every year, and most of these investigations end with the children being found not to be victims.

The numbers are staggering. In 2002, there were approximately 1.8 million child welfare investigations nationwide. Only twenty-eight percent of the children "were ultimately found to be victims of abuse or neglect." Coleman, *supra* at 417. More recent numbers are even more staggering.

According to official government statistics, in 2014-2016, child welfare investigations now occur more than 4 million times a year, and actual victims range from 17% to 19%.[1] Most investigations end with no administrative finding that the child has suffered abuse or neglect.[2]

In other words, for every family investigated and found to be neglectful or abusive, four other families are disrupted by an investigation that finds no victim.

C. Minority families bear the brunt of most child welfare investigations.

This burden of over-reaching investigation falls most heavily on minority communities. "[P]oor and minority children are significantly overrepresented in the child welfare system." Coleman, *supra* at 513. As an

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[1] U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. (2018). Child maltreatment 2016. Available from https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment.

[2] "Perhaps even more of these investigations should close without findings of abuse or neglect. The United States Court of Appeals for the Second Circuit has described administrative findings of abuse or neglect as 'at best imperfect,' noting that three-quarters of administrative challenges succeed in reversing such findings." Gupta-Kagan, *supra* at 362.

example, data from the Children's Bureau of the U.S. Department of Health and Human Services for 2016 show that while African-American children in Colorado represent only 16.0% of the general child population, they make up 25.2% of the children in a "substantiated" case of child "maltreatment," a disproportionality ratio of 2.08:1. A number of states are making promising strides toward equality, while others still show disproportionality even higher than in Colorado. According to the same 2016 data, nationally the ratio remains at 1.51:1. *Disproportionality of Minority Children in Colorado Welfare Investigations*, Parental Rights Foundation (2018) (available upon request from Parental Rights Foundation www.parentalrightsfoundation.org).

Stephanie Smith Ledesma argues that this disproportionality is because "The majority of state actors represent the dominant culture; therefore it stands to reason that many of 'the professionals in the system are by and large well-educated, middle class, and predominately white.' Many parents accused of maltreatment and their children are racial minorities, and almost all are exceedingly poor and lack formal education."

The Vanishing of the African-American Family: "Reasonable Efforts" and its Connection to the Disproportionality of the Child Welfare System, 9 Charleston L. Rev. 29 (2014).

Dorothy Roberts points out that this phenomenon takes place even if the investigator is of the same minority race as the victim family. This is because "[t]hey evaluate problem behavior by the extent it deviates from this parenting ideal. The model for many caseworkers is a white, middle-class family composed of married parents and their children." Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare*, Basic Civitas (2002), 59.

A 2007 report from the U.S Government Accountability Office attributes such disproportionality to "racial bias." Yet regardless of its cause, the data speak for themselves: minority children are at the center of a greatly disproportionate number of child welfare investigations.

Even-handed application of the warrant requirement would benefit families who currently are disproportionately subjected to intrusive investigations.

D. Child welfare investigations harm children.

Child welfare investigations, especially that involve strip searches such as the one in this case, are harmful to children in several ways. "First, the investigations undermine the fundamental values of privacy, dignity, personal security, and mobility that are protected by the Fourth Amendment." Coleman, *supra* at 419. The Supreme Court has held that the "search of a child's person ... no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." *New Jersey v. T.L.O.*, 469 U.S. 325, 337-338 (1985).

Even social workers understand the heightened risks posed by strip searches. The National Association of Social Workers pointed out in its amicus brief in *Safford Unified School Dist. #1 v. Redding*, 557 U.S. 364 (2009), "Even for adults, a strip search is a demeaning and distasteful procedure that requires a high level of justification. For children and adolescents, it is far more significant." Coleman notes that "the scientific evidence is strong that children, even babies, have the ability to develop – and indeed most healthy children do develop – a strong sense of bodily security, intimacy,

and privacy." Coleman, *supra* at 515. That was certainly the case in this matter, where I.B. told her mother, "Mommy, do you remember when the woman with white hair came to my school? I hope she doesn't come again, because I don't like it when she takes all my clothes off." Aplt. App. Vol. I at 17.

Strip searches can bring emotional and psychological damage to children as well. In *Wallis*, *supra*, "Lauren was very upset by the procedures [which included a vaginal exam] and asked for her parents." In *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 399 (5th Cir. 2002), the plaintiff child "subsequently experienced frequent nightmares involving the incident, and exhibited anxiety responses, for which she underwent counseling. The symptoms persisted for about six months." Courts have recognized that strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." (*Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993); "thoroughly degrading and frightening" (*Justice v. City of*

Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992); and "an embarrassing and humiliating experience." (*Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982)).

Steven F. Shatz's excellent article *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991), revealed that "[p]sychological experts have also testified that victims often suffered post-search symptoms including 'sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions,' and that some victims have been moved to attempt suicide." Coleman also lists studies that found "as a result of the investigation, family members, including children, suffer from a range of responses including trauma, anxiety, fear, shame, guilt, stigmatization, powerlessness, self-doubt, depression, and isolation." Coleman, *supra* at 520.

The Fifth Circuit has recognized that child welfare investigations can cause "trauma" to the child, especially if the child is subjected to multiple interviews or investigations. *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 413 (5th Cir. 2008). Children know that they are being

singled out and interviewed, and this can imply to them that an authority figure thinks they have done something wrong. This is especially the case in situations like *Camreta v. Greene*, where an investigator and armed police officers, both male, kept a nine-year-old girl in a room for questioning, without any familiar adult present for one to two hours. They also gave her – through their intrusive questions about alleged sexual activity – a lesson in sexual education that her own parents had never taught her. This poorly performed interview of a child can be traumatic. As counsel for the child told the Supreme Court in oral argument, "when a child is asked, interrogated about whether or not her father touches her inappropriately, that's not a neutral action. Whether or not she has been abused, that causes trauma to the child." Transcript of Oral Argument at 39, *Camreta v. Greene*, *supra* (2011), cited in Gupta-Kagan, *supra* at 375.

Dr. Maisha Hamilton-Bennett, a Chicago psychologist, points out, "We learn how to trust by trusting our parents to take care of us no matter what." Roberts, *supra* at 239. Strip searches that are done against the

parents' wishes or without their knowledge can negatively affect this bond of trust between children and parents.

E. Child welfare investigations harm families.

Besides the harm to the child, unwarranted child welfare investigations cause problems for the entire family. First of all, "the stigma of being officially identified with criminal child abuse … is inherent in most child maltreatment investigations. Despite its prevalence in the society, the label 'child abuser' or 'neglectful parent' carries with it profound negative connotations." Coleman, *supra* at 497. Parents – especially those who are dedicated to doing the best for their children – often view even the investigation as shameful, since it "implies almost by definition that the authorities believe the parent involved may be a particularly bad mother or father…" *Id.* at 498. In one investigation, the family "lived in constant fear that [the investigating social worker] or one of her associates would come to [their] home and re-move [their] children," including watching for strange vehicles, not letting their children play

outside, and even putting blankets over the windows. *Doe v. Heck*, 327 F.3d 492, fn. 10 (7th Cir. 2003).

Secondly, "even the more subtle 'family-friendly' approaches to interventions adopted by some CPS agencies can be pervasively destructive of the values ensconced in the Fourth Amendment, and consequently of the children's and the family's well-being." Coleman, *supra* at 509. American jurisprudence, mindful of the important rights that families have to be left alone unless there is good evidence of abuse or neglect, has required that courts begin by viewing parents as fit (*see Parham v. J.R.*, 442 U.S. 584, 604 (1979), citing the "traditional presumption that the parents act in the best interests of their child.")

Child welfare investigators do not take so sanguine a view, in spite of the evidence that four-fifths of the children they investigate are not victims. Instead, "It is only after the caseworker investigates a report of child maltreatment, determines whether it is valid, and decides what to do about it that all these critical judgments face any sort of adversarial challenge or judicial review." Roberts, *supra* at 55. Diane Redleaf, counsel for amicus

National Center for Housing and Child Welfare here, has pointed out that "This is akin to allowing a police officer to investigate, charge, find guilt, and issue a sentence without ever appearing before a judge or jury." *Id.* at 55-56.

The powerlessness felt by parents is exacerbated by investigators who expect cooperation – and this cooperation "is coded language for the birth parent doing whatever the social worker wants her to do." Zach Strassburger, *Medical Decision Making for Youth in the Foster Care System*, 49 J. Marshall L. Rev. 1103, 1120 (2016). Because child welfare investigations are inherently coercive, it is vital that a neutral magistrate be involved in determining the necessity for the search. The Supreme Court has explained that warrants protect privacy in two ways: involving a neutral magistrate to find probable cause, and limiting the scope for a search. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2181 (2016); *see also* Justice Stevens' dissent in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 331 (1978) ("The essential function of the traditional warrant requirement is the interposition of a neutral magistrate between the citizen and the presumably zealous law

enforcement officer so that there might be an objective determination of probable cause.")

CONCLUSION

Research shows that child welfare investigations can harm children, families, and parents. Abusing children by unnecessary strip searches and nude photographs is unacceptable. This Court should send a strong message to state actors throughout the Tenth Circuit that children need to be protected from abuse by child welfare investigators.

Respectfully submitted,

April 18, 2018

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CERTIFICATE OF VIRUS SCAN

I hereby certify that:

1. All required privacy redactions have been made.

2. Paper copies of the Brief of Amici Curiae have been submitted to the court and the ECF submission is an exact copy of the brief.

3. The Brief of Amici Curiae has been scanned for viruses using [Webroot Secure Anywhere, Version v9.0.9.78, updated August 2, 2016], and according to the program is free of viruses.

Dated: April 18, 2018

/s/ Darren A. Jones
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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(g)(1) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

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Dated: April 18, 2018

/s/ Darren A. Jones
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of April, 2018, I caused this Brief of Amici Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 18th day of April, 2018, I caused the required number of bound copies of the foregoing Brief of Amici Curiae to be filed, via UPS Next Day Air, with the Clerk of this Court.

/s/ Darren A. Jones
Counsel for Amici Curiae

ATTACHMENT

April 12, 2018

Elisabeth Shumaker, Clerk of the Court
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RE: Consent for Amicus Curiae Briefs in *Doe, et al v. Woodard, et al*, No. 18-1066

Dear Ms. Shumaker:

Pursuant to Federal Rule of Civil Procedure 29(a)(2), all parties in this matter hereby consent to the filing of amicus curiae briefs in support of either or of neither party.

Sincerely,

Jessica E. Ross

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