C.A. Nos. 17-56621, 17-56710

In The
United States Court of Appeals
For The Ninth Circuit

SARA DEES; L.G., a minor by and through her Guardian Ad Litem, Robert Schiebelhut; G.G., a minor by and through her Guardian Ad Litem, Robert Schiebelhut,

***Plaintiffs - Appellees*,**

v.

COUNTY OF SAN DIEGO,

Defendant - Appellant.

ON APPEAL FROM THE UNITED STATE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA THE HONORABLE ROGER T. BENITEZ, CASE NO. 3 :14-cv-00189-BEN-DHB

BRIEF OF *AMICUS CURIAE* PARENTAL RIGHTS FOUNDATION IN SUPPORT OF PLAINTIFFS/APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Parental Rights Foundation is a nonprofit corporation. It has no parent corporation and no stock.

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INTEREST OF AMICUS CURIAE

Parental Rights Foundation is a national, nonprofit, non-partisan organization with supporters in all fifty states.

Parental Rights Foundation is concerned about the unintended harms to innocent children caused by routine government overreach that is often supported and encouraged by flawed, though well-intended, government policy. To protect children, Parental Rights Foundation seeks to preserve the liberty of parents to nurture, care for, and educate their children without undue government interference. To this end, Parental Rights Foundation educates those in government and the public at large on the importance of parental rights in civil society with the goal of improving child welfare laws to keep families together whenever possible and minimize harm to children.

Child welfare investigators serve a challenging and important function of government in protecting children from abuse and neglect, but government has an equally important interest in protecting the privacy and dignity of children and families, especially those innocent children who are not the subject of a child abuse and neglect investigation, as in this case.

Parental Rights Foundation was founded in response to the erosion of legal protections 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*.[1] Yet parents continue to encounter obstacles in exercising those rights—in schools, in hospitals, in their communities, and in the family court system. As is demonstrated in this case, government policy can lead government agents to take investigative measures that ignore the reservations of parents under the misguided belief that such actions are necessary to protect children. As a result, children regularly suffer harm that could be avoided if law and policy reflected in practice the constitutional protection mandated in principle for parental decisions concerning their child's welfare.

PARTICULAR FACTS OF INTEREST TO AMICUS

Parental Rights Foundation relies on the factual assertions of Plaintiffs/Appellees' Petition for Panel Rehearing and Rehearing En Banc. But the following particular facts demonstrate the relevance and importance of Parental Rights Foundation's interest.

Sara Dees' nine-year-old daughter, L.G., was pulled out of her school routine and interviewed by a child welfare investigator against Sara's known wishes even though L.G. was not the subject of a child welfare investigation and "had never been suspected of being abused or neglected."[2] Even more concerning,

[1] *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000).
[2] Pl./Appellees Pet. For Panel Reh'g And Reh'g En Banc. 1 (Jul. 27, 2020) ECF# 11766889.

the investigator, Caitlin McCann, had already interviewed L.G. once in conjunction with another investigation and admitted that "she had no evidence whatsoever that L.G. was in any danger."[3] But the County of San Diego's policy recommends that child welfare investigators "interview children at school anytime they wish, so long as there is an 'open referral.'"[4] So McCann conducted the interview anyway, choosing to defy Sara Dees' express wishes.

McCann's decision to interview L.G. at school without even contacting L.G.'s parent (who was also at school) is one example of how flawed government policy leads to routine government overreach into the family. Yet, this Court's panel ruled that Sara Dees and L.G.'s claim must fail because Sara never "'actually lost' control over the child."[5]

Parental Rights Foundation has filed amicus briefs in other similarly situated cases that threaten to undermine parental liberty in an attempt to raise awareness of the potential harms of child welfare investigations, including briefs in the Tenth Circuit Court of Appeals (*Doe v. Woodard)* and Supreme Court (*I.B. v.* Woodard) in the past two years.[6]

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[3] Pl./Appellees Pet. 2.
[4] Pl./Appellees Pet. 2.
[5] *Dees v. County of San Diego*, 960 F.3d 1145, 1153 (9th Cir. 2020).
[6] *Doe v. Woodard*, 912 F.3d 1278 (2019). The US Supreme Court denied certiorari in *I.B. v. Woodard*, 2019 U.S. LEXIS 3409.

Parents' right to protect their children from harm—that is protected by the Fourteenth Amendment to the U.S. Constitution—would be undermined if this Court's decision stands.

On July 28, 2020 Donnie Cox, counsel for plaintiffs/appellees, consented to the filing of this Amicus brief. On August 5, 2020, Amicus contacted counsel for defendant/appellant via email requesting consent to file. Amicus has not yet received consent. So Amicus files this brief along with an accompanying motion seeking this Court's leave to do so, pursuant to Federal Rule of Appellate Procedure 29(b).

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 the brief, and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Amicus Parental Rights Foundation has observed the damage caused to families by unconstitutional investigations and examinations performed by child-welfare investigators. Both our experience and significant scholarly research show that government interviews and other investigative examinations can cause severe, though unintended, emotional and psychological harm to a child.

Plaintiff/Appellees' Petition for Panel Rehearing and Rehearing En Banc present this court with an opportunity to prevent erosion of the legal protections for parental liberty that shield children from harmful government overreach. This court should grant the petition and rehear this case.

ARGUMENT

I. Child-welfare investigations can be traumatic, life-altering events that harm children.

Research shows that the state, in its effort to investigate child abuse and neglect, can cause more harm than good. In her seminal article on the effect of child welfare investigations, Professor Doriane Coleman concludes that "the majority of intrusions on family privacy do not directly benefit the children involved, and in many instances actually cause them demonstrable harm."[7] This Court specifically acknowledged this risk outlined by Professor Coleman in *Greene v. Camreta*, noting that "parents have an exceedingly strong interest in directing the upbringing of their children, as well as in protecting both themselves and their children from the embarrassment and social stigmatization attached to child abuse investigations."[8]

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[7] Doriane Coleman, *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).

[8] *Greene v. Camreta*, 588 F.3d 1011, at 1015-1016 (9th Cir. 2009).

Professor Coleman is joined by other scholars in documenting the harm caused by child-welfare investigations. Professor Teri Dobbins Baxter found that research on child-welfare investigations demonstrates "that separat[ing] children from their caregivers, can be traumatic and psychologically harmful to the children as well as damaging to the family as a whole."[9] And another commentator wrote that same year (2012) that "children, of course, have a strong interest in being free from abuse. But they also have a strong interest in being free from intrusive traumatic questioning by strangers."[10] As Professor Coleman concludes, "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."[11]

Some child welfare investigations begin relatively narrow in scope. But they can quickly escalate to include strip searches, photographs of nude children, intrusive questionnaires that go far beyond the initial allegations, and even vaginal/anal exams, as this Court has observed in *Calabretta v. Floyd*, *Wallis v.*

[9] Teri Dobbins Baxter, *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).
[10] Jennifer Kwapisz, *Fourth Amendment Implications of Interviewing Suspected Victims of Abuse in School*, 86 ST. JOHN'S L. REV. 963, 965 (Fall 2012).
[11] Coleman, *supra* note 7, at 515.

Spencer, and *Greene v. Camreta*.[12] The more extreme examples of government overreach underscore the importance of respecting the liberty of parents to protect their child from harm. But Professor Coleman illuminates that "even mundane abuse and neglect reports investigated by officials acting in good faith can result in deeply intrusive state action that touches upon aspects of privacy that the culture and law typically have considered fundamental."[13] Professor Coleman refers to 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."[14] Dr. Maisha Hamilton-Bennett, a Chicago psychologist points out specifically how even seemingly non-intrusive interviews can be harmful: "We learn how to trust by trusting our parents to take care of us no matter what."[15] Child interviews and examinations conducted against a parent's wishes can negatively affect this bond of trust between children and parents.

The harmful implications of social service investigations have not been lost on courts. In *Wallis v. Spencer*, this Court took up a case where a three-year old

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[12] *E.g.*, *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999); *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000); *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009).
[13] Coleman, *supra* note 7, at 415.
[14] Coleman, *supra* at 520.
[15] Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare*, Basic Civitas (2002), 239.

and five-year old were subjected to an "internal body cavity examination of the children, vaginal and anal," including photographs of their private areas.[16] Following the Supreme Court's 1985 holding in *New Jersey v. T.L.O.*, 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,"[17] this Court held that "children have a corresponding right to the love, comfort, and reassurance of their parents while they are undergoing medical procedures, including examinations – particularly those, such as here, that are invasive or upsetting."[18]

Similarly, the Fifth Circuit examined an investigation where a six-year old child "subsequently experienced frequent nightmares involving the incident, and exhibited anxiety responses, for which she underwent counseling. The symptoms persisted for about six months."[19] And six years later, the Fifth Circuit recognized that child welfare investigations can cause "trauma" to the child, especially if the child is subjected to multiple interviews or investigations.[20] Children know that

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[16] *Wallis v. Spencer*, 202 F.3d 1126, 1135 (9th Cir. 2000).
[17] *New Jersey v. T.L.O.*, 469 U.S. 325, 337-338 (1985).
[18] *Wallis*, 202 F.3d at 1142.
[19] *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 399 (5th Cir. 2002).
[20] *Gates v. Tex. Dep't of Protective & Regulatory Servs*., 537 F.3d 404, 413 (5th Cir. 2008).

they are being singled out and interviewed, and this can imply to them that an authority figure thinks they have done something wrong.

More than 20 years ago, in *Calabretta v. Floyd*, this Court recognized that interference with the parent-child relationship is harmful to a child's wellbeing.[21] There, an investigator coerced her way into the family home, interviewed a child, and strip-searched another child. No children were removed, yet this Court held that the investigator's actions stripped the mother of her "dignity and authority in relation to her own children in her own home."[22]

Despite this Court's precedent, interviews and examinations are regularly carried out without the knowledge or consent of the child's parent in some cases and against the known wishes of the parent in others, as in this case. According to Professor Coleman, based on her conversation with a California official, "[i]nterviews with and examinations of children may be conducted at school or away from the family home to assure, to the extent possible, that parents will not interfere."[23]

As an example, the investigators in *Camreta v. Greene* "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

[21] *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999).
[22] *Calebretta*, 189 F.3d at 820.
[23] Coleman, *supra* note 7, at 438.

agreed that her father had molested her."[24] 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.[25] 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 was harmful. 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."[26] Parents are well positioned to limit superfluous interviews that may harm their child.

II. Minority families are disproportionally harmed by child welfare investigations.

The burden of over-reaching investigation falls most heavily on minority communities. According to Professor Coleman, "poor and minority children are

[24] Josh Gupta-Kagan, *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 (2012), at 371.
[25] See *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009).
[26] Transcript of Oral Argument at 39, *Camreta v. Greene*, *supra* (2011), cited in Gupta-Kagan, *supra* at 375.

significantly overrepresented in the child welfare system."[27] As an 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 California represent only 5.2% of the general child population, they make up 13.6% of the children in a "substantiated" case of child "maltreatment," a disproportionality ratio of 2.60:1. A number of states are making promising strides toward equality, while others still show disproportionality even higher than in California. According to the same 2016 data, nationally the ratio remains at 1.51:1.[28]

Stephanie Smith Ledesma, a law professor and child welfare attorney, argues that this disproportionality is because "[t]he 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."[29]

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[27] Coleman, *supra* note 7, at 513.
[28] *Disproportionality of Minority Children in California Child Welfare Investigations*, Parental Rights Foundation (2018)(available upon request from Parental Rights Foundation www.parentalrightsfoundation.org).
[29] Stephanie Smith Ledesma, *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, a professor and renowned author, points out in her book *Shattered Bonds: The Color of Child Welfare* that this phenomenon takes place even if the investigator is of the same minority race as the victim family. She asserts this is because investigators "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."[30] Yet regardless of its cause, the data speaks for itself: minority children are at the center of a greatly disproportionate number of child welfare investigations.

III. Fourteenth Amendment protection shields children from harmful government overreach.

The Supreme Court has consistently recognized a family's right to be left alone unless there is good evidence of abuse or neglect and has required that courts begin by viewing parents as fit.[31] Indeed, as pointed out by Sara Dees, "the Supreme Court has recognized a wide-reaching liberty interest of parents in the companionship, care, custody, and management of their children."[32]

Child welfare investigators do not take so sanguine a view, in spite of the evidence that more than four-fifths of the children they investigate are not

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[30] Roberts, *Shattered Bonds*, 59.
[31] *See e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *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").
[32] Pl./Appellees Pet. 10.

victims.[33] Instead, in reliance on flawed policy, they may insist on subjecting children to an interview or examination without immediate scrutiny of their decision. Professor Roberts correctly points out that "[i]t 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."[34]

The powerlessness felt by parents is exacerbated by investigators who expect cooperation – and this cooperation, as another lawyer and commentator says, "is coded language for the birth parent doing whatever the social worker wants her to do."[35]

Fourteenth Amendment protection serves as a shield, protecting the most vulnerable from unnecessary harm by protecting the liberty interests of parents. Unnecessary investigations and unduly harmful ones would be moderated by clear recognition that a parent's consent is required prior to interviewing, examining, or photographing children who are not the subject of a child welfare investigation.

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[33] U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, Child maltreatment 2018 (2020), *available at* https://www.acf.hhs.gov/cb/resource/child-maltreatment-2018 (accessed August 3, 2020).
[34] Roberts, *Shattered Bonds*, 55.
[35] Zach Strassburger, *Medical Decision Making for Youth in the Foster Care System*, 49 J. MARSHALL L. REV. 1103, 1120 (2016).

CONCLUSION

Research shows that child welfare investigations can harm children, families, and parents. This Court should send a strong message to state actors and government policymakers throughout the Ninth Circuit that children need to be protected from abuse by child welfare investigators by ensuring that longstanding constitutional protections for families are respected.

The petition for rehearing should be granted.

Respectfully submitted this 6th day of August, 2020,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 29-2(c)(2). The brief is 2,988 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: August 6, 2020

/s James R. Mason III
Counsel for Amicus Curiae
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of August, 2020, I caused this Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s James R. Mason III
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