No. 07-1075

IN THE

Supreme Court of the United States

BELINDA DUPUY, *et al.*,

Petitioners,

v.

ERWIN MCEWEN, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CATO INSTITUTE, THE INSTITUTE FOR JUSTICE, AND THE GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When a State has only "mere suspicion" of child abuse or neglect, does it deprive the parents and their children of their rights under the Due Process Clause of the Fourteenth Amendment when it:

(a) secures safety plans either by direction or by telling a parent that if they refuse to agree to a plan, the State may take custody of the children and place them in foster care; and

(b) provides no opportunity to contest the plans?

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute, the Institute for Justice, and the Goldwater Institute, as *amici curiae*, respectfully request that this Court grant the petition for writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files *amicus* briefs with the courts. The instant case is of central concern to Cato because it raises vital questions about individual rights and the rule of law.

The Institute for Justice is a nonprofit, public interest legal center established in 1991 and committed to defending the essential foundations of a free society and securing greater protection for individual liberty. The Institute has a particular interest in protecting the natural right of parents to

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have been given timely notice of the filing of this brief, and letters of consent have been filed with the Clerk.

direct the upbringing and education of their children. Among the issues the Institute has litigated in this area are parental school choice and mandatory community service as a condition of public high school graduation. The Institute also filed an amicus brief supporting parental rights in *Troxel* v. *Granville*, 530 U.S. 57 (2000).

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advances public policies founded upon the principles of limited government, economic freedom and individual responsibility. A core purpose of the Goldwater Institute and its Center for Constitutional Litigation is the preservation of constitutional liberties, including family relationships.

STATEMENT OF THE CASE

Amici adopt the factual and procedural background set forth in the Petition.

This case presents fundamental questions regarding the State's ability to interfere with familial relations through a coercive means of inducing family members to abandon their homes and families. The court below erred in holding that the Petitioners "consented" to the waiver of their protected family rights. *Amici* contend that the Petitioners could not validly "consent" to the State of Illinois's ("State") offer of a non-statutory "Safety Plan" because the demand itself was unlawful under the unconstitutional conditions doctrine.

Under the Due Process Clause of the Fourteenth Amendment, governments may not infringe on

fundamental rights such as the right to family integrity without satisfying the requirements of due process. Under the unconstitutional conditions doctrine, the government cannot demand that citizens waive fundamental rights in circumstances where the government cannot lawfully command the same result directly. For instance, this Court has held that the government may not condition the receipt of benefits on "consent" to speech regulations when it cannot regulate the speech directly. *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). This doctrine enunciates a powerful and fundamental principle that the government may not pursue even potentially laudable goals through means that violate the Constitution.

Here, the State seeks to do indirectly what it has no authority to do directly. The State seeks to circumvent due process by coercing parents to "consent" to non-statutory "Safety Plans" that infringe on family rights by threatening that the parents' children may be removed and put into foster care. Whereas the State's child removal statute, which is not directly at issue here, requires officials to have "reason to believe" that a child is in imminent danger in order to remove that child from abusive parents with judicial approval, 325 Ill. Comp. Stat. 5/5; Pet. App. 15, the informal rules implementing the alternative "Safety Plan" procedure do not enunciate any minimum standard that officials must satisfy before demanding that parents "consent" to restrictions on their parental rights. Pet. App. 14-15. As the "Safety Plans" apply even in circumstances where the State cannot lawfully interfere with family integrity directly, the State violates the Constitution by coercing parents to waive their core familial rights to avoid threatened conduct that violates the Due

Process Clause. These "Safety Plans" also violate due process by placing unfettered discretion in the hands of state officials to interfere with core familial rights.

REASONS FOR GRANTING THE PETITION

I. FAMILY INTEGRITY IS A FUNDAMENTAL RIGHT THAT THE STATE MAY NOT ABRIDGE THROUGH ITS SAFETY PLAN PROCESS.

The Due Process Clause of the Fourteenth Amendment protects fundamental liberties such as family integrity. Here, the State's "Safety Plans" violate due process because they (i) result in the deprivation of familial rights without requiring the government to satisfy any minimum threshold to justify the removal of children from potentially abusive households, and (ii) do not provide procedural protections to ensure that parents' rights are not trammeled unlawfully and that state officials operate within the law. The "Safety Plans" also impermissibly vest state officials with unfettered and unreviewable discretion to infringe on parents' fundamental family rights.

A. Family Integrity Is A Fundamental Right.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." As this Court has explained, the Due Process Clause protects the fundamental liberties of private citizens from undue interference by the government. "[T]he Due Process Clause, like its forebear in the Magna Carta, was "'intended to secure the individual from the arbitrary exercise of the powers of government.'"" *Daniels* v. *Williams*, 474

U.S. 327, 331 (1986) (internal citations omitted). Due process "requir[es] the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.'" *Id.*

The family lies at the heart of civilization, and protecting its privacy and integrity from undue state interference is essential to the maintenance of a free society. Although "the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) (citing *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)), this Court has "'long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 499 (1977) (quoting *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974)). *Accord Loving* v. *Virginia*, 388 U.S. 1, 7 (1967), and *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In *Moore*, this Court explained:

> the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

431 U.S. at 503-04 (footnote omitted). See also *Michael H.,* 491 U.S. at 123 (noting the "historic respect – indeed, sanctity . . . traditionally accorded to the relationships that develop within the unitary family.").

Thus, in *Meyer* v. *Nebraska*, this Court determined that *liberty* "denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. 390, 399 (1923). *Accord Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972). As a plurality of this Court has more recently explained, the "liberty interest at issue . . . – 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*, 530 U.S. at 65 (O'Connor, J.). Similarly, in *Meyer*, this Court explained that "this [family] liberty may not be interfered with, under the guise of protecting the public interest" and held that parents have a fundamental right to control the education of their children. 262 U.S. at 399-400. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . . [for which reason this Court has] respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (internal citation omitted). Therefore "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel,* 530 U.S. at 66 (plurality opinion).

B. Family Integrity May Not Be Abridged Without Due Process.

Due process requires that the State provide adequate procedures and safeguards against the erroneous or arbitrary infringement of protected liberties. Although the right of family and

childrearing is fundamental, this Court has recognized that "the rights of parenthood," like other rights, are not "beyond limitation." *Prince*, 321 U.S. at 166. See *Stanley* v. *Illinois*, 405 U.S. 645, 649 (1972) (recognizing the "State's right – indeed, duty – to protect minor children through a judicial determination of their interests in a neglect proceeding.") The State's ability to interfere with family integrity is likewise constrained by the Constitution:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel, 530 U.S. at 68-69 (plurality opinion).

In short, the government may not abridge family integrity without first meeting the high threshold imposed by the Constitution. "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore*, 431 U.S. at 499. In *Stanley*, this Court cautioned that the interest of "a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." 405 U.S. at 651. Where the "issue at stake is the dismemberment of [a] family," the convenience to a government of a presumption against parental fitness of unwed fathers is "insufficient to justify refusing a father a hearing" prior to deprivation of custody. *Id.* at 658. Thus:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . . Even where blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.

Santosky v. *Kramer*, 455 U.S. 745, 753 (1982).

Further, to justify interfering with families, the State must provide procedural mechanisms that satisfy the requirements of due process. *Id.* The "nature of the process due in parental rights termination proceedings turns on a balancing of the 'three distinct factors' specified in *Mathews* v. *Eldridge*." *Id.* at 754. In *Mathews*, this Court explained that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." 424 U.S. 319, 332 (1976). It is fundamental to procedural due process that individuals who are "'condemned to suffer grievous loss of any kind'" must be afforded "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333.

Procedural due process is "flexible," *id.* at 334, but it involves three essential factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; [and third,] the Government's interest, including the function involved and the fiscal and administrative burdens that the

> additional or substitute procedural requirement would entail.

Id. at 335.

This Court has recognzied that family integrity requires especially strong protection against government interference. For example, in *Santosky*, this Court struck down New York's "preponderance of the evidence" standard in parental rights termination proceedings because of the substantial risk of error. As the Court explained, "'[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss."'" *Santosky*, 455 U.S. at 758 (quoting *Goldberg* v. *Kelly*, 397 U.S. 254, 262-63 (1970)). This Court noted "that a natural parent's 'desire for and right to the "companionship, care, custody, and management of his or her children"' is '"plain beyond the need for multiple citation,"' and thus parents have a "commanding" interest in the accuracy of a decision and require the application of an elevated standard of proof. *Id.* at 758.

C. The "Safety Plans" Do Not Satisfy Due Process.

The proceess provided by the Illinois Department of Child and Family Services ("DCFS") is constitutionally inadequate under these cases. As discussed above, the State cannot permanently separate parents and children absent compliance with due process. It follows that the State cannot justify the removal of children from their homes on a more than *de minimis* basis without affording private citizens at least some fair process. Here, the court below acknowledged that the curtailment of parental liberty caused by the "Safety Plans" implicated due

process concerns. Pet. App. 13. Application of the *Mathews* v. *Eldridge* factors demonstrates that the non-statutory "Safety Plan" procedures are constitutionally inadequate in these circumstances.

First, the parents' protected interest here is commanding. Although petitioners do not face the prospect, at this point, that the State will permanently terminate their parental rights, they do face a significant interruption of their right to the "companionship, care, custody, and management" of their children, which this Court has repeatedly recognized as a fundamental right. Pet. App. 14. See, *e.g.*, *Troxel*, 530 U.S. at 67-68 (plurality opinion) (non-custodial visitation over parental objection infringes upon the parental right to make decisions concerning child-rearing.).

Second, the "Safety Plan" procedure creates a grave risk that parents will suffer an erroneous deprivation. Ordinarily, Illinois permits State agents to remove "at risk" children forcibly once the State has satisfied a minimum threshold of proof, and the removal of a child subjects the State's action to judicial scrutiny within a short period of time. Specifically, under its child-removal statute, Illinois may forcibly remove a child from its home, absent prior judicial authorization, only if (1) it has "reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety; and (2) there is not time to apply for a court order . . . for temporary custody of the child." 325 Ill. Comp. Stat. 5/5. After removing a child without prior judicial authorization, the statute requires the State to "promptly initiate proceedings . . . for the continued temporary custody of the child." *Id.*

By contrast, the non-statutory "Safety Plan" procedure at issue in this case offers no check on the State's authority to infringe on family integrity. Under this procedure, Illinois DCFS may offer parents the possibility of a "Safety Plan" when officials have "mere suspicion" of child abuse (notably, a lower standard than is applied for the removal of children).[2] In such situations, the State demands that parents choose between (1) consenting to a "Safety Plan" under which the State will impose restrictions short of permanent removal of children from home pending completion of an investigation, which is not time-delimited, or (2) rejecting the "Safety Plan" and risking that the State will make good on its threats to forcibly remove the children to foster care.

Once subjected to unsubstantiated accusations of neglect or abuse, parents under the Illinois system are presented with a Hobson's choice that leaves no possibility of preserving their constitutionally-protected autonomy over their children. To make matters worse, the State's agents are not required to justify the basis for the "Safety Plan" when requiring parents to make a choice, ensuring that parents cannot meaningfully evaluate whether DCFS can satisfy the legal requirement to remove children. Moreover, as the district court below concluded, the State has "no procedure authorizing those subject to a safety plan to contest it in any way." Pet. App. 50.

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[2] As the district court below explained, the "plans" vary in their scope, and they may require one parent to leave the house where the child is living, preventing a parent from being in the presence of the child unless he or she is supervised by designated parent or other "safety person" to be in the presence of the child at all times, or even sending the child to live with relatives. Pet. App. 54-73.

Thus, the State need not articulate *any* justification to parents or to the judiciary in order to infringe on family integrity through the "Safety Plan" process. Consequently, these "Safety Plans" fail the second factor of the *Mathews* test because they create an enormous risk that the State will erroneously deprive citizens of their fundamental rights after parents, coerced by the State, "waive" those rights under the threat of an even greater deprivation.

Third, in the absence of some articulable and reasonable evidence of malfeasance, the State's undoubted interest in protecting children from abuse or neglect cannot outweigh the parents' fundamental right to family integrity. See *Meyer*, 262 U.S. at 399-400. Indeed, as noted above, the State already has an alternative procedure in place to remove children from abusive homes on an emergency basis, and this process requires the articulation of evidence and subsequent judicial scrutiny. 325 Ill. Comp. Stat. 5/5. Therefore, there is no reasonable practical, legal, or administrative hurdle preventing the State from affording appropriate due process to parents.

In sum, the court below allowed the State to intrude on a fundamental right protected by the Due Process Clause without affording adequate – or any – procedural protections. Instead, due process requires the State (i) to articulate objectively reasonable evidence of abuse or neglect to justify having threatened parents with removal, and (ii) to satisfy some periodic judicial scrutiny to guard against abuse of the Safety Plan program.

D. The "Safety Plans" Violate Due Process By Vesting Unfettered Discretion In State Officials.

The "Safety Plans" also violate due process by vesting unfettered and unreviewable discretion in the hands of state officials to interfere with fundamental familial rights. Through its "Safety Plans," the State empowers its officials to impose restrictions on parents' fundamental rights without (1) any apparent check to govern the agent's authority to impose the mechanism in the first instance, or (2) any procedure by which the agent's decisions could be subjected to judicial scrutiny after the fact.

The Constitution provides a bulwark against arbitrary and unlawful government action. See *Bank of Columbia* v. *Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (an individual should be secure from "the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice"); *Dent* v. *West Virginia*, 129 U.S. 114, 124 (1889) ("The great purpose of the [due process] requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."). Due process imposes limits on the discretion of government officials to act, especially where fundamental rights are at stake.

These limitations proceed on the assumption that (i) an official who is accountable will act more prudently, and (ii) a parent who has an appeal to a body independent of the controversy has protection against a government official's passion, obstinacy, irrational conduct, or incompetence. These principles are widely applicable, and judicial review of governmental action therefore is necessary in circumstances ranging from denial of government

benefits to restraints on constitutionally-protected speech. See *Goldberg* v. *Kelly*, 397 U.S. 254, 266-69 (1970) (holding that when public assistance payments are to be discontinued, due process requires a pretermination evidentiary hearing). Thus, "'unbridled discretion in the hands of a government official or agency'" is an "evil[] that will not be tolerated." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225 (1990) (O'Connor, J.). An ordinance that "'makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'" *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 151 (1969) (citation omitted). Consequently, an official's "uncontrolled discretion" over "freedoms which the Constitution guarantees" is unacceptable. *Staub* v. *City of Baxley*, 355 U.S. 313, 322 (1958).

An analogous burden exists here because the State has vested unfettered discretion in its officials to intrude on fundamental rights through the non-statutory "Safety Plan" procedure. On a "'mere suspicion'" of abuse or neglect, Pet. App. 14-15 – which can be based on nothing more than an anonymous tip – State officials are empowered to determine whether a family shows signs of any of fifteen "safety factors" (including an undefined "other" factor). *Id.* at 35-36 & n.1. State officials are not required to meet any specific threshold of evidence for any of the factors, *Id.* at 37, and there are no apparent objective criteria governing the assessments. *Id.* at 39-40. Further, it is unclear whether there are any limits on the plans' duration, *id.* at 47-48, and, as noted above, no judicial recourse has been afforded to parents. *Id.* at 49-50. The

"Safety Plan" regime thus is onerous and menacing. Indeed, it is so intimidating that, out of the tens of thousands of people who have been affected by the plans, virtually every parent has "consented." *Id.* at 44.

Consequently, the non-statutory "Safety Plan" program violates due process and the rule of law by placing absolute, unfettered, and unreviewable power in the hands of State officials to infringe on fundamental rights. Such unchecked power violates fundamental tenets of due process, and cannot coexist with a system of limited government and the rule of law.

II. THE STATE'S "SAFETY PLANS" IMPOSE AN UNCONSTITUTIONAL CONDITION THAT IMPROPERLY INFRINGES ON FAMILY INTEGRITY.

Contrary to the ruling below, the State's "Safety Plans" cannot be upheld on the theory that parents have consented to the deprivation of their fundamental familial rights. The unlawful character of the Safety Plans invalidates any "consent" that the State may have obtained. Because the government may not directly interfere with fundamental rights without first satisfying due process, it may not obtain that result indirectly by threatening parents with an unconstitutional deprivation of their rights unless they agree to abide by a "Safety Plan." Through its "Safety Plans," the State seeks to impose a condition on private citizens that abridges family integrity even though the State may have no lawful authority to do so directly. Consequently, consent obtained by the State does not insulate the "Safety Plan" system from review under the Due Process Clause.

A. The Unconstitutional Conditions Doctrine Prohibits The Government From Accomplishing Indirectly What It May Not Lawfully Command Directly.

This Court has explained that states "may not seek to achieve an unlawful end either directly or indirectly." *Elrod* v. *Burns*, 427 U.S. 347, 359 n.13 (1976); *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958) (the State may not "produce a result which the State could not command directly"). Applying that principle, this Court has held that the Constitution forbids the government from inducing private citizens to waive or abate protected rights in circumstances where the government could not lawfully do so directly. See, *e.g.*, *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (state committed a taking where agency conditioned building permit on grant of public easement); *Elrod*, 427 U.S. at 359-60 (public employment may not be conditioned on support for political party); *Sindermann*, 408 U.S. at 597 (government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests").

The unconstitutional conditions doctrine restricts the government from bargaining with its citizens so as to ensure that sovereign power is not abused improperly to coerce private individuals into waiving fundamental liberties. *United States* v. *Oliveras*, 905 F.2d 623, 627 n.7 (2d Cir. 1990) (per curiam) ("[t]he key proposition of the unconstitutional condition doctrine is that the government may not do indirectly what it cannot do directly."); see also Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 15-25 (1988).

This doctrine has been applied to protect a wide variety of property and other rights. For instance, in a long series of First Amendment decisions, this Court has recognized that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972). The government thus violates the First Amendment when it conditions the receipt of benefits on an individual's agreement to a restriction on his or her speech, belief, religious, or association rights. See, *e.g.*, *Bd. of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 674-75 (1996) (termination of government contractors); *Elrod*, 427 U.S. at 359-60 (conditioning public employment on supporting political party); *Sindermann*, 408 U.S. at 597-98 (denial of tenure); *United Pub. Workers of Am. (CIO)* v. *Mitchell*, 330 U.S. 75, 100 (1947) (denial of public employment).[3]

Moreover, in *Nollan*, this Court held that a state agency violated the Takings Clause when it conditioned the award of a building permit on the property owner's grant of an easement to the government. *Nollan*, 483 U.S. at 831. Because an uncompensated taking would have occurred had the government directly required the property owner to grant the easement, the government could not secure that same result indirectly. *Id.* These principles are likewise applicable to other rights protected by the Constitution. For example, public employees do not waive their Fourth Amendment rights merely by

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[3] *See also Speiser*, 357 U.S. at 526 (denial of tax exemptions); *Sherbert* v. *Verner*, 374 U.S. 398, 404-05 (1963) (unemployment benefits); *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n.6 (1969) (welfare payments), *overruled on other grounds by Edelman* v. *Jordan*, 415 U.S. 651 (1974).

accepting a government job. *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665, 672 n.2 (1989) (citing *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion)).[4]

Further, the lower courts have recognized that the right against self-incrimination may be violated when an "acceptance of responsibility" sentencing reduction is conditioned on admitting conduct beyond the specific conduct of the offense for which a person was convicted. *Oliveras*, 905 F.2d at 628 ("[t]o require a defendant to accept responsibility for crimes other than those to which he has pled guilty or of which he has been found guilty in effect forces defendants to choose between incriminating themselves as to conduct for which they have not been immunized or forfeiting substantial reductions in their sentences to which they would otherwise be entitled to consideration."). See *United States* v. *Saunders*, 973

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[4] Similarly, the Ninth Circuit has held that a criminal suspect who was released on his own recognizance before trial did not validly consent to random drug testing, even though it was an express condition of his pre-trial release. *United States* v. *Scott*, 450 F.3d 863, 866-68 (9th Cir. 2006). The Eleventh Circuit has found that a city may not compel individuals to submit to searches in order to participate in protests, despite the city's claim that the searches were "voluntary" because the protesters were required to submit to searches only if they chose to participate in the protest. *Bourgeois* v. *Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004). *See also O'Connor* v. *Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) (school board may have violated teacher's privacy interests when demanding release of those records as a condition to returning to work); *R.S.W.W.* v. *City of Keego Harbor*, 397 F.3d 427, 434-36 (6th Cir. 2005) (city violated due process when conditioning liquor license on restrictions which city had no authority to demand, noting that the Unconstitutional Conditions doctrine "should equally apply to prohibit the government from conditioning benefits on a citizen's agreement to surrender due process rights").

F.2d 1354, 1363 n.1 (7th Cir. 1992) (noting conflict among circuits).

Thus, a government may demand the waiver of important rights in exchange for the receipt of benefits only if it could abridge those rights directly. For instance, in *Rumsfeld* v. *Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006), this Court affirmed the constitutionality of the Solomon Amendment only after determining that Congress could directly require campus access for military recruiters under the Constitution. *Id.* at 57-58. In *United States* v. *Knights*, 534 U.S. 112, 118 n.4 (2001), this Court held that conditioning parole on assent to future searches did not violate Due Process, and thus did not reflect an unconstitutional condition, even though the government admitted that the unconstitutional conditions doctrine set "a limitation on what a probationer may validly consent to in a probation order." *Id.* at 118 n.4.

B. The "Safety Plans" Violate The Unconstitutional Conditions Doctrine.

These principles apply equally to an individual's fundamental right of family integrity. As such, the State may not bargain with individuals to give up their rights to avoid the imposition of an unconstitutional deprivation.

To allow the State to infringe on family integrity through the imposition of "Safety Plans" in circumstances where the State could not lawfully interfere directly undermines the due process protections applicable to family rights. If a government could circumvent constitutional limitations simply by indirectly coercing private citizens into "waiving" their rights, then the fundamental rights protected by the Constitution would be no stronger

than the will of a private citizen to defy the state's threats with regard to the fate of his or her children. Indeed, under the ruling below, the story of King Solomon would need to be rewritten so that the mother who agreed to give up her infant to avoid the awful consequence offered by King Solomon should be held to her "choice" because she consented and thus was no worse off from being offered that "choice." Pet. App. 16. The uncon-stitutional conditions doctrine, however, protects private citizens from facing this Hobson's choice by establishing limits on the state's ability to coerce its citizens.

According to the court below, this case involves a simple negotiation between the government and private citizens: through its "Safety Plan" procedure, the State offers not to remove children from their parents immediately or permanently in exchange for the parents' consent to the State's intrusion into their family integrity. Pet. App. 14. But the Safety Plans do not require the State to justify the statutory or due process standards for removing children from abusive homes. Nor do the Safety Plans provide any procedural due process protections (or any judicial scrutiny at all) after the deprivation has occurred. *Id.* at 50.

If the State may not directly infringe on a protected right, it may not accomplish the same result indirectly simply by threatening to remove those liberties. The State of Illinois may not constitution-ally impose limitations on family integrity absent due process. It thus may not impose "Safety Plans" that seek the waiver of those rights unless, at a minimum, it satisfies due process by (1) obtaining sufficient good cause to warrant the invasion of a fundamental right, and (2) providing a procedural avenue for verifying and challenging the plans. Yet the "Safety Plans"

neither require the State to ascertain sufficient evidence to intrude on family integrity prior to making demands of parents, nor provide for any procedural protections whatsoever.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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