No. _____

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, Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the Illinois Department of Children and Family Services ("DCFS") receives allegations made to the State telephone Hotline of child abuse or neglect, DCFS investigators implement "safety plans" at the outset of the ensuring investigations. The safety plans routinely require parents or children to leave their family home and/or have no contact or only restricted contact with each other from the very beginning of investigations until their conclusion.

This case is a class action brought by parents and other family members ("parents") affected by safety plans. The parents challenge the State's policies and practices giving rise to such plans.

The question presented is:

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 parents 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?

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellants below, are named plaintiffs Belinda Dupuy, Pilar Berman, Norman Berman, Pearce Konold, Jeff Dupuy, V. A., G. A., T. A., R. F., A. H., and K. S., on their own behalves and on behalf of a certified class of persons defined as follows (Order, March 22, 1999, as amended by Order April 19, 2004):

(a) all persons (unless excluded as class members under the last paragraph of this definition) who have been, are being or will be named as perpetrators of child abuse or neglect in "indicated reports" (as defined in the Abused and Neglected Child Reporting Act, 325 ILCS 5/3) placed in the Illinois "State Central Register" (the "SCR," referenced in 325 ILCS 5/7.7) on or after June 17, 1995;

(b) all persons (unless excluded as class members under the last paragraph of this definition) who were named as perpetrators of child abuse or neglect in "indicated reports" (as defined in the Abused and Neglected Child Reporting Act, 325 ILCS 5/3) placed in the Illinois "State Central Register" (the "SCR," referenced in 325 ILCS 5/7.7) prior to June 17, 1995 if, on or after that date, the Illinois Department of Children and Family Services ("DCFS") discloses or will disclose such reports (or any information in such reports) to persons outside the SCR (including persons employed by DCFS or its assigns) other than the perpetrator, or such reports (or the information in such reports) are or will be accessed by such persons outside the SCR.

(c) the custodial parent or guardian of a class member as defined in ¶(a) or (b) herein, if the class member is under 18 years of age.

The persons referred to as being "excluded as class members" in subparagraphs (a) and (b) of the class definition are persons named as perpetrators in

indicated reports: whose reports have been removed from the SCR pursuant to 325 ILCS 5/7.14; or who have been parties to a criminal proceeding under the Illinois Criminal Code or a civil proceeding under the Illinois Juvenile Court Act, and in such a proceeding, a court, in a final non-appealable order, has determined that such acts or omissions upon which the indicated report is based constitute child abuse or neglect.

(d) any person (except an "excluded alleged perpetrator" under the language following this paragraph) who, on or after June 17, 1995, has been named, in a report to the DCFS Child Abuse and Neglect Hotline, as a possible perpetrator of child abuse or neglect or whom DCFS, in a child abuse or neglect investigation conducted (in whole or in part) on or after June 17, 1995, has investigated, is investigating or will investigate as a possible perpetrator of child abuse or neglect (any such "possible perpetrator" being referred to herein as an "alleged perpetrator") who during the pendency of any DCFS investigation of child abuse or neglect, or thereafter, has been, is or will be required by DCFS, under threat of protective custody, to adhere to and/or carry out one or more of the following conditions, put forth in any DCFS protective plan, safety protection plan, safety plan or directive:

> (1) a condition prohibiting or restricting, physical and/or verbal contact between any such person and his or her biological or adopted child, or, if the alleged perpetrator is a child, a condition prohibiting contact between the alleged perpetrator and his or her parents or legal guardians or any other adult relatives who live with the alleged perpetrator; or

> (2) a condition prohibiting any such person's spouse, child, parent or legal guardian from residing in the home with him or her.

A person who is an "excluded alleged perpetrator" under ¶(d) of this class definition is any alleged perpetrator who is also a person who has been or is a party to a criminal proceeding under the Illinois Criminal Code or a civil proceeding under the Illinois Juvenile Court Act, or a civil proceeding under the Illinois Marriage and Dissolution of Marriage Act, or any other civil proceeding adjudicating familial interests, and as the result of such a proceeding, there is in effect a court order that imposes on him or her conditions that are the same as the conditions in, or includes within it the conditions that are described in or referenced in ¶¶ (d)(1) or (d)(2).

As petitioners do not include a nongovernmental corporation, no corporate disclosure statement is required.

Respondent, defendant-appellee below, is the Director of the Illinois Department of Children and Family Services in his official capacity. The director is currently Erwin McEwen. His predecessor in office, who was a party to the proceedings below, was Bryan Samuels.

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MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

CITATIONS OF OPINIONS AND ORDERS

The final decision and judgment of the Seventh Circuit as to which review is sought is reported at 495 F.3d 807 (7th Cir. 2007) and reprinted at App.1a-6a. An interlocutory decision and judgment of the Seventh Circuit, which would also be brought before this court for review if this petition is granted, is reported at 465 F.3d 757 (7th Cir. 2006) and reprinted at App.7a-19a. The cited Seventh Circuit 2007 decision and judgment affirmed district court orders, dated March 9, 2007 and February 26, 2007, that dismissed or noted the dismissal of plaintiffs' claims, which are unreported but are reprinted at App.20a and App.21a-23a. The cited 2006 decision and judgment of the Seventh Circuit nominally affirmed a district court injunction order in plaintiffs' favor, but ruled that plaintiffs were not entitled to any such relief. App.19a. That district court injunction order, which is unreported but reprinted at App.24a-28a, had implemented a district court memorandum opinion and order in plaintiffs' favor that is reported at 462 F.Supp.2d 859 (N.D. Ill. 2005) and reprinted at App.290a-101a. The order of the Seventh Circuit denying plaintiffs petition for rehearing, with a suggestion for rehearing en banc, of that court's cited 2007 decision and judgment is unreported but is reprinted at App.102a-103a.

JURISDICTION

The final decision and judgment of the Seventh Circuit as to which petitioners seek review was entered on July 31, 2007. App.1a-6a. An

interlocutory decision and judgment of the Seventh Circuit, which would also be brought before this court for review if this petition is granted (*Reece v. Georgia*, 350 U.S. 85, 87 (1955), *Urie v. Thompson*, 337 U.S. 163, 171-72 (1949)), was entered on October 3, 2006. App.7a-19a.

On October 15, 2007, the Seventh Circuit denied petitioners' petition for rehearing, with a suggestion for rehearing en banc of the court's cited 2007 decision and judgment. App.103-104a. On December 17, 2007, Justice Stevens entered an order extending the time within which to file a petition for certiorari in this matter to and including February 13, 2008.

This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, provides: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Plaintiffs' Complaint and the Proceedings Generally

In 1997, parents who had been reported for suspected child abuse or neglect filed this class action against the DCFS Director ("Director"). App.1a. Plaintiffs' complaint, which sought declaratory and injunctive relief, challenged a number of interrelated DCFS policies and practices, as violative of plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment. *Id.*; App.29a.

Plaintiffs' claims gave rise to two distinct proceedings.

In the first proceeding (*Dupuy I*), the district court found that DCFS used a "practically nominal" burden of proof in indicating accused persons as guilty of abuse in its investigations.[1] *Dupuy v. McDonald*, 141 F.Supp.2d 1090, 1140 (N.D. Ill. 2001), *subsequent injunction aff'd in part and rev'd in part*, 397 F.3d 493 (7th Cir. 2005). The district court also found a "staggering" 74.5% rate of error in the indicated reports DCFS investigators registered, as measured by the reversal rate for indicated finding appeals. 141 F.Supp.2d at 1136. The parties eventually settled *Dupuy I*.

The second proceeding (*Dupuy II*) concerned DCFS's safety plan policies and practices and gives rise to this petition.

B. The *Dupuy II* Proceeding

In 2002, the plaintiffs initiated a second class preliminary injunction proceeding; they challenged DCFS's imposition of safety plans upon families absent objectively reasonable suspicion of parental abuse or neglect and without affording them any process to challenge plans. App.30a, 74a, 83a. An estimated 10,000 Illinois families per year (since 1995) have had DCFS safety plans imposed upon them. App.40a. Virtually all safety plans require major changes respecting parents' custody, care and supervision of their children. App.41a. Commonly,

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[1] An "indicated" finding of abuse or neglect is a non-criminal administrative determination at the conclusion of child abuse or neglect investigation. *Dupuy I*, 141 F. Supp. 2d at 1093. When the accused parent is exonorated, the case is "unfounded." *Id.* Indicated findings are registered in the State Central Register (*id.*), and are used in licensing and employment screening decisions, among other things. *Id.* at 1139. Pursuant to the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. § 5106 (a) and (b)(2)(A)(i), states receive federal assistance to operate their child abuse and neglect reporting and determination systems.

safety plans require that fathers or mothers (or both) leave their homes, that children reside with relatives, or that relatives move into the family home and supervise all contact between parents and children. *Id.* Some safety plans provide for no contact between parents and children during the entire duration of the plans. *Id.*

Following a 22-day evidentiary hearing in *Dupuy II* in 2002 and 2003, the district court issued its findings of fact, describing in detail the challenged DCFS safety plan policies and practices, including their application to ten identified plaintiff families. App.29a-71a. DCFS has never challenged any of the district court's findings of fact.

1. The Development, Implementation and Terms of Safety Plans

In 1995, Illinois adopted a procedure, not embodied in any statute or formal regulation, for implementing safety plans in its investigations of Hotline calls. App.14a. The Hotline accepts telephone calls alleging a suspicion of child abuse or neglect from any person (including anonymous callers) and then assigns these calls for investigation. App.31a. Hotline call screeners do not investigate the merits of calls before assigning them to investigators in field offices. App.31-32a. Pursuant to a risk assessment procedure, known as the Child Engenderment Risk Assessment Protocol ("CERAP"), DCFS investigators, within 48 hours of DCFS's receipt of a Hotline call, are required to designate allegedly abused or neglected children as "safe" or "unsafe" by utilizing a series of check boxes on the CERAP form, App.34-38a, 45a. The 48-hour point when DCFS investigators are expected to complete the CERAP, marks the outset of the "initial investigation," *Dupuy I*, 141 F.Supp.2d at 1095. At this point, investigators are expected to have made a good faith attempt to see each alleged child victim,

but are not expected to have interviewed any witnesses. *Id.*

The CERAP check box form first requires investigators to determine if any "safety factor" is present. App.34-38a. To be checked "yes," no safety factor requires any particular "'level of evidence.'" App.36a. Several of the safety factors are to be checked "yes" whenever an "allegation" of a particular type has been made. App.36-37a. Nine of the 15 safety factors are to be checked "yes" if any household member's behavior raises a concern, even if that household member is not the parent. App.37a.

If a safety factor is checked "yes," then the CERAP instructs investigators to determine if any family strength or mitigating circumstance controls for that safety factor, though any particular strength or circumstance, even if present, may be deemed insufficient to control for a safety factor. App.38-39a. If investigators determine that any one safety factor is present but not controlled for, CERAP directs investigators to deem a child "unsafe." App.39a. Upon reaching this conclusion, to be made within 48 hours of DCFS's receipt of a Hotline call, App.39a, 45a, the CERAP policies direct investigators to implement safety plans to which the parent or parents "agree," or, if there is no agreement, to take the child from the parents and into State custody at that time, App. 39a, 40a, 43-44a. A parent must therefore decide whether to agree to or reject a safety plan "on the spot," at the outset of the investigation, *see* App. 39a, 40a, 54a, 56-57a, 58-59a, 62a, 64a, 65-66a, 68a, 60-70a, and rarely, if ever, do they have counsel or any adviser to assist them in making that decision, *id.*

DCFS subjected Professors M. and S., who both teach at a major Chicago-area university, to a safety plan after an anonymous Hotline call alleged Dr. S. had abused their eight-year old adoptive

daughter. App.67a. Under CERAP, DCFS determined that the anonymous allegation against Dr. S., without any evidence, provided sufficient basis to decide that his daughter was "unsafe". App.35a (*i.e.*, factor #10); App.36a ("no level of evidence" needed to check a factor "yes"). Indeed, shortly after receiving the Hotline call, DCFS dispatched an investigator to the S. home who demanded that Dr. S. vacate his home immediately. App.68a. The investigator communicated to Dr. S. that, if he did not leave himself, DCFS would take their daughter into foster care. *Id*. Dr. S. complied. *Id*. In the ensuing investigation, DCFS never secured credible evidence supporting the anonymous Hotline call. App.68a.

As typified by the Dr. S. case, DCFS investigators do not inform parents of the reasons for the safety plan demand, including the safety factors DCFS finds present or the reasons it has concluded that a child is "unsafe." App.44a. Nor does DCFS ever give the CERAP determination form to parents. *Id*.

DCFS often presents its safety plan only to the child's "primary caregiver" rather than to the person accused or abuse or neglect. App.42a. For example, an anonymous person reported seeing James Redlin, a high school science teacher, tickle his six-year old son on a train. App.53a. After a Hotline call, a DCFS investigator called Susan Redlin, James's wife, and demanded a safety plan that required Susan, who is wheelchair bound, to provide 24-hour supervision of all contact between her husband and her son. App.54a. Another DCFS investigator telephoned pre-school teacher Stacey DeLaFont after DCFS received a Hotline call concerning alleged abuse of a pre-school child by her husband Patrick, also a teacher in the same pre-school. App.58a. The investigator demanded that Mrs. DeLaFont evict her husband Patrick from their home, even though the DeLaFonts' own children were not the subjects of

any accusation. App.58-60a. DCFS did not confer with Patrick for more than a week after he left his home, and when an investigator did meet with him, she did not allow him to return home. App. 59a. As in the S. and Redlin cases, the allegations against Patrick DeLaFont eventually were "unfounded," though not until he had lived apart from his family for 11 months. App. 60-61a.

In creating safety plans, it is sometimes "'impossible … for the Department to obtain . . . express agreement to the plan [by a parent or parents].'" App. 46a (ellipses in original). Also, DCFS sometimes presents safety plan conditions as oral directives as to which no written agreement is requested (as in the DeLaFont case, App.58a, 59a), and it treats "mere action in conformity with a DCFS request" as "agreement" to a safety plan. App.45a.

Because DCFS often presents safety plans to only one parent, in many cases, only one parent "sign[s] the safety plan form." App.42a. That form contains preprinted standard language stating that "failure to agree to the plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home." App.43a. The form contains no information about the evidence required to take children into protective custody or the legal procedure for challenging such a removal. App.42-43a, 44a.

DCFS Supervisor Beckelman told Stacey DeLaFont that if her husband Patrick remained in the home, contrary to the safety plan, "Beckelman would remove the children from the home." App.59a. DCFS Investigator Abernathy told child care provider Christine Parikh that "'if [her husband] Jimmy did not move out of the house and cease all contact with the minor children living in his home,

the children would be taken into DCFS custody." App.62a.

"[V]irtually every parent or caretaker confronted with a safety plan [whom DCFS asks to sign such a plan] ends up signing it." App.43a. Although, since 1995, an estimated 10,000 families per year were subject to safety plans (App.40a), DCFS has never "identified a single family that… chose to reject the plan." App.93a. "Nearly every class member witness who signed a safety plan testified that the investigator simply presented a proposed plan for his/her signature with little or no discussion of the plan terms or alternatives." App.40a.

Most investigations (approximately two-thirds) end with a DCFS determination that the allegations are unfounded. App.31a. DCFS Child Protection Manager Anne Gold acknowledged at the trial that "'for the cases that end up getting unfounded in [her] office, the likelihood that [DCFS] would have grounds for . . . [taking] custody [of a child if the parent did not agree to a safety plan] . . . is about zero." App.45a.

Safety plans generally continue throughout an investigation. App.49a. DCFS has 60 days to complete investigations, but may extend the time and often does, App. 32a (*citing Dupuy I*, 141 F.Supp.2d at 1106-1130), so that safety plans remain in effect for many families for several months or more. Safety plans may continue in some cases after the investigation is over and even if the allegations are unfounded. App.49a. The safety plan for the DeLaFont family remained in effect for 11 months (App.58a, 61a), and the plan for the D. family remained in effect for 18 months, App.69-70a.

The district court concluded that class members whose lives are disrupted by safety plans which require family members to live outside the home or which restrict contact between family

members suffer "irreparable harm." App.99a. For example, while Susan Redlin was wheelchair bound, her family's safety plan required her to supervise all of her son's interactions with his father James; because of the great difficulty of transporting Susan outside the home, this plan effectively consigned the family members to being "'prisoners' in their own home" for the plan's three-month duration. App.53-55a. The DeLaFont family's plan required Patrick DeLaFont to leave his home and have no contact with his children (although there were no allegations regarding mistreatment of them); DCFS later relaxed this requirement to permit him to see his children at church on Sunday. App.58-59a. The D. family's safety plan first required 16-year-old E.D. to remain outside his own home. App.69a. Weeks later, however, DCFS modified the plan to permit E. D. to return home, provided that he have "no contact with younger children." App.70a. "In addition, [the plan required] Mrs. D. . . . to remain 'awake at night when the rest of the family is sleeping, in order to supervise [E. D.] at night.'" *Id.*

"DCFS has no procedure authorizing those subject to a safety plan to contest it in any way." App.49a.

2. The District Court's Conclusions and Its Injunction Order

The safety plan form tells parents that if they did not agree to a safety plan, DCFS "may" take custody of their children. App.92a. The district court found that although this "language may not by itself constitute a threat of actual removal" (*id.*), "most class member witnesses testified at the hearing that . . . the investigator affirmatively threatened to take away Plaintiffs' children unless they agreed to a safety plan," App.93a. After considering the safety plan form together with "investigator[s'] [statements] affirmatively threaten[ing] to take away Plaintiffs' children unless

they agreed to a safety plan," the district court found that DCFS made "threat[s] sufficient to deem the family's agreement [to safety plans] coerced." *Id.* In support of this finding of fact, the district court stated that "[s]ignificantly, [DCFS] has not identified a single family that, faced with such an express or implied threat of protective custody, chose to reject the plan." *Id*.

The district court held that plans remaining in effect for longer than a "brief" duration would violate due process. App.94a. Subsequently, the district court entered a preliminary injunction order that established an informal process for review of safety plans after ten working days, exclusive of weekends. App.27a.

The parents appealed on the ground that the relief order was inadequate. App.2a, 7a. DCFS did not cross-appeal. *Id*.

3. The Seventh Circuit's Interlocutory Decision

DCFS's principal defense on appeal was the same as it presented to the district court: parents voluntarily agreed to every plan that DCFS had ever implemented, or would ever implement. *See* App.27a (district court notes DCFS's "consistent position" that safety plans are "voluntary").

On October 3, 2006, the Seventh Circuit affirmed the district court's injunction order, but only because DCFS had not cross-appealed (App.19a); effectively, it reversed that order, *id*.

The Seventh Circuit acknowledged that safety plans involved the imposition of "restrictions," such as requiring the child or parent to leave the home, and that these restrictions involved "curtailments of parental rights" that were "invasive enough to count as deprivations of liberty, thus triggering the right to a hearing." App.13a. But it denied the State's

imposed restrictions effected constitutionally cognizable deprivations on the ground that all "safety plan[s are] voluntary." App. 15a. "Critically," the court said, "the decision to agree to the safety plan is optional with the parents" (App.13a), since "[t]he state does not force a safety plan on the parents; it merely offers it," App.14a. The Seventh Circuit concluded that DCFS need not afford plaintiffs any due process protections. *Id*. It held that the State could "offer" safety plans upon "mere suspicion" of abuse and neglect, which the court defined as "some inarticulable hunch," App.15a. It held as well that the plaintiffs were not entitled to a hearing to contest safety plans to which they had voluntarily agreed. App.14a.

The Seventh Circuit recognized that DCFS secures safety plans by telling parents that "in lieu of [DCFS] immediately removing the child," the parent has the "option" to "leave the house" or stay away from the child unless a "designated family member is present." App.13a. But it held that there is nothing "forbidden" or "objectionable" (App.15a) about a state official making a threat (*e.g.*, taking custody of children from their parents) to "coerce[e] an agreement" unless the coercion used to secure that agreement itself employs an "illegal means." App. 17a. The only example the Seventh Circuit offered of "illegal means" were threats that involved "*knowing*" misrepresentations, App.17a (emphasis in original); *accord*, App. 19a.

The Seventh Circuit termed safety plans a "boon to parents" (App. 17a), and stated that it could not understand how parents are "made worse off by being offered a safety plan." App.16a. It elaborated: "It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini?" *Id*.

4. The District Court's Dismissal Order, and the Seventh Circuit's Final Decision

On remand, DCFS moved for summary judgment. In the briefing accompanying that motion, the parents conceded that they could not establish that DCFS implemented safety plans by the "illegal means" of knowing misrepresentations. App.2a. They explained their concession, in part, by noting that DCFS policy provides for implementation of safety plans right at the outset of its "initial investigation," 141 F.Supp.2d at 1093, of the Hotline call allegations and before conducting any meaningful investigation, *see* pp. 4-5, *supra*. Because DCFS investigators have little or no evidence when they secure safety plans, they are not in a position to *mis*represent the evidence.

The district court granted judgment to DCFS and dismissed the plaintiffs' safety plan claims. App.21a, 22-23a. Plaintiffs appealed. The Seventh Circuit, however, affirmed the dismissal based on its interlocutory decision, observing that plaintiffs presented the same arguments as in their earlier appeal. App.3a. The Seventh Circuit thereby incorporated its earlier interlocutory ruling into its final decision. For this reason, plaintiffs refer in this petition to the Seventh Circuit's two rulings as a single decision.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

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). Accordingly, the Third Circuit has held that respect for families' fundamental liberty interests forbids a State from requiring a

parent to live apart from his children except upon "*reasonable and articulable evidence* giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Croft v. Westmoreland County Children & Health Servs.*, 103 F. 3d 1123, 1126-27 (3d Cir. 1997) (emphasis added). The Third Circuit also has held that this evidentiary requirement is not obviated by offering parents a "choice" of having their children taken into foster care or leaving their home. Such a "choice" is "blatantly coercive," *id.* at 1125 n.1, and the resulting exercise of that "choice" is therefore not voluntary, *id.* at 1125.

The Seventh Circuit, in the decision below, created a conflict with this precedent. DCFS has a policy and practice of telling parents that the State may take their children into custody and place them into foster care if they do not agree to "safety plans" that require separation from or substantial restrictions on contact with their children. Yet the Seventh Circuit held that the due process clause *permits* Illinois to effect safety plans based on "mere suspicion" of abuse or neglect (App.15a), which it described as "some inarticulable hunch," *id.* It also held that all safety plans are voluntary. *Id.* The Seventh Circuit's decision therefore conflicts with *Croft*, twice over. *See* § II, *infra*.

The Seventh Circuit's decision also contravenes this Court's precedents.

In securing safety plans based upon a "mere suspicion" of parental abuse or neglect—a policy and practice the Seventh Circuit approved—DCFS essentially puts parents to a "bet the children" choice: either they must "agree" to the DCFS-devised plan restricting parents' and children's contact with each other or run the risk that the State will take the children into State custody. However, under this Court's decisions, which dictate that the State may not constitutionally restrict parents'

liberty interests in the care and custody of their children when there is no *evidence* of parental wrongdoing, the Due Process Clause prohibits putting the parents to such a choice. *See* § III, *infra*. Furthermore, the Seventh Circuit's suggestion that the agonizing choice at the center of this case – between leaving one's family or having one's children taken into State custody – is no different than choosing between a "Martini" or a "Manhattan" at a cocktail party (App. 16a), trivializes the family's fundamental liberty interests. It ignores the "momentum for respect" (*Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citation omitted)), that this Court has repeatedly accorded the parental liberty interest in raising children.

The Seventh Circuit's holdings that all safety plans are voluntary and that the State need not provide any process to contest plans impairing parents' fundamental liberty interests also cannot be reconciled with the Court's decisions. *See* §§ IV-V, *infra*.

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE THIRD CIRCUIT'S DECISION IN *CROFT*

In *Croft*, a caller to a child protection Hotline "informed" the county that Dr. Croft "was sexually abusing his [four-year old] daughter." 103 F.3d at 1124. Upon meeting with Dr. Croft and his wife, the investigator told Dr. Croft that "unless he left his home and separated himself from his daughter until the investigation was complete, she would take the daughter from their home that night and place her in foster care." *Id*. "Faced with this dilemma, Dr. Croft complied with her ultimatum and left his home, wife, and daughter." *Id*. at 1125.

Croft and the Seventh Circuit's decision create a circuit split on two issues.

1. According to *Croft*, the due process clause requires "reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse" (*id.* at 1126), before the State employs means to separate parents from their children – such as presenting the "choice" it required Dr. Croft to make, or the identical choice that DCFS requires parents here to make when it proffers safety plans to them. *Croft* held that substantive due process requires reasonable and articulable evidence to proffer that "choice." *Id.* In contrast, the Seventh Circuit held that DCFS can separate parents from their children by requiring parents to "choose" between proffered safety plans or risk having their children taken into State custody based upon a "mere suspicion" of wrongdoing. App.15a.

Straining to distinguish *Croft*, the Seventh Circuit said that the "threat" (App. 18a) to place the child in foster care if Dr. Croft "didn't leave the family home immediately" was "not grounded in proper legal authority." *Id.* The suggestion is that DCFS's threats to take custody of children if parents refuse safety plans *are* grounded in such authority. Yet, as the Seventh Circuit conceded, "mere suspicion" of abuse or neglect "is *not* a statutory ground [in Illinois] for actually removing a child from his parents' custody." App.15a (emphasis added). The Seventh Circuit's attempt to distinguish *Croft* therefore fails under its own concession that "mere suspicion" is no more "proper legal authority" for Illinois to threaten taking custody of a child than it was for Pennsylvania to do so. *See Croft*, 103 F.3d at 1126.

2. The second split concerns whether a State's threats to take a child into State custody if the parent does not leave the home are unconstitutionally coercive, as *Croft* held, or, by contrast, whether parents' acquiescence to such threats is always voluntary, as the Seventh Circuit

held. In *Croft*, the investigator told Dr. Croft that "unless he left his home and separated himself from his daughter until the investigation was complete, she would take the daughter from their home that night and place her in foster care." The Third Circuit called this statement an "ultimatum." 103 F.3d at 1125. The Third Circuit "explicitly reject[ed]" the defendants' characterization of Dr. Croft's "choice" to leave his home and his wife and his daughter as "voluntary," stating that the investigator's ultimatum was "blatantly coercive" and that attempts to portray the Dr. Croft's decision as "voluntary" were "not well-taken." *Id*. at 1125, n.1.

The district court likewise found that "investigators affirmatively threatened to take away Plaintiffs' children unless they agreed to a safety plan." App.93a. And the record is replete with specific examples of just such threats, which are indistinguishable from the one that the county child welfare authorities directed to Dr. Croft, *see* pp. 6-7, *supra* (citing examples from record). Yet, in conflict with the Third Circuit in *Croft*, the Seventh Circuit held that parents' choices to accept safety the plans here, exacted by such threats, are always voluntary.

III. THE SEVENTH CIRCUIT'S DECISION ALLOWING DCFS TO "OFFER" SAFETY PLANS UPON "MERE SUSPICION" CONFLICTS WITH THIS COURT'S DECISIONS

In *Troxel v. Granville*, 530 U.S. 57 (2000), this Court reiterated 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." *Id*. at 65. *Accord, M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("[c]hoices about marriage, family life, and the upbringing of children are among the associational rights that this Court has ranked as 'of basic importance in our society'") (citation omitted).

In *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), this Court stated that "[w]e have little doubt that the Due Process Clause would be offended '[i]f a State were to *attempt to force* the breakup of a natural family, over the objections of the parents and their children, *without some showing of unfitness* and for the sole reason that to do so was thought to be in the children's best interest'" (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J. concurring in judgment)) (emphasis added). Yet, the Seventh Circuit held that "mere suspicion," which it defined as some "inarticulable hunch" (App.15a), suffices for the State to "offer . . . a safety plan" (App. 16a), which restricts the family's choice to remain together.

When DCFS investigators present safety plans to parents, they are not required to have evidence establishing an *objectively reasonable* suspicion of wrongdoing. And rarely do they have such evidence, since DCFS proffers safety plans at the outset of its investigation, following a Hotline call as to which there has been no meaningful investigation. *See* pp. 4-5, *supra*. Indeed, DCFS never secures credible *evidence* in most cases, given that it ultimately determines two-thirds of the Hotline allegations to be unfounded. App. 31a.

DCFS's safety plan practices, which the Seventh Circuit approved, do precisely what *Quillion* says the Due Process Clause forbids. Indeed, DCFS's "offers" – that parents and children separate or restrict their contact with each other or risk having the children taken into State custody -- are more than mere "*attempt[s]*" to "force the breakup of a natural family." *Quillion*, 434 U.S. at 255 (emphasis added). They are practices that invariably *succeed* in forcing such family breakups, since no parents reject plans. App.93a. Moreover, *Quillion* establishes that the Due Process Clause affords no authorization to make such "offers" (App. 14a) at all absent *evidence* of parental wrongdoing: when *Quillion* says that, to

force the breakup of the natural family, a "showing of unfitness" (434 U.S. at 255) is required, that "showing" anticipates *evidence of* wrongdoing, not simply an "inarticulable hunch" (App.15a) of wrongdoing, the standard the Seventh Circuit approved. *Accord, Troxel*, 530 U. S. at 68 (invalidating state law permitting judges to override parent's limitations on grandparent visits that the judge believed not to be in the best interests of children, when "*no court ha[d] found . . . [the parent] unfit*") (emphasis added).

The Seventh Circuit characterizes each safety plan "offer" as affording an "option" to parents: to agree to a safety plan (and its prohibitions and restrictions on family life) or to refuse to agree and thereby risk having children taken into foster care. App. 13a. But *M.L.B.* characterizes "*[c]hoices* about marriage, family life, and the upbringing of children [as] among the associational rights this Court has ranked as 'of basic importance in our society,'" 519 U.S. at 116 (citation omitted) (emphasis added). *Washington v. Glucksburg,* 521 U.S. 702, 720 (1997), in turn, says that the "substantive component" of the Due Process Clause "provides heightened protection against *governmental interference* with [these] fundamental rights and liberty interests") (emphasis added). *And see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("the custody, care and nurture of the child reside *first with the parents*, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder*") (emphasis added). It follows that when DCFS, absent evidence of parental wrongdoing, substitutes its *own* judgment for that of the parents as to the "option[s]" (App.13a) that are in the "best interests of the[] children," *Troxel*, 530 U.S. at 68, it preempts the parents' authority as decision makers in violation of their fundamental liberty interests. Further, when DCFS proffers to parents choices between just two "options," both of which would severely

"curtail[]" (App.13a) parents' association with their children, DCFS impairs parents' fundamental liberty interests.

The Seventh Circuit analogizes the State's "offers" of safety plans to plea bargains. App.14a. But a State may not proffer a "choice" to a criminal suspect of pleading guilty to lesser offense or facing trial on a greater one, unless it *first* establishes "probable cause" to believe the suspect has committed the greater offense. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). In contrast, DCFS needs no evidence of wrongdoing to proffer safety plans to parents, but only an "inarticulable hunch" (App.15a) of it. If the Seventh Circuit's analogy were apt, DCFS could not proffer safety plans absent reasonable suspicion of abuse or neglect.

When a person is offered a "Martini or a Manhattan" (App.16a), he always retains the option of declining both drinks. Though it has no evidence of parental wrongdoing, DCFS does not offer parents the option of no restrictions on their family life when it "offers" safety plans.

IV. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS DEFINING WHEN AGREEMENTS ARE COERCED OR, IN CONTRAST, VOLUNTARY

The Seventh Circuit held that safety plans agreements are voluntary, so that DCFS need not afford parents due process protections that involuntarily-imposed plans would require. But DCFS secures some safety plans not by signed agreement but by oral directives that a parent is to leave the home. App.45a, 58-59a. Such directives are not "voluntary" agreements.

In rejecting the parents' contention that plan agreements are often coerced, that Seventh Circuit held that "coercion is objectionable" only if the State

uses "illegal means . . . to obtain" safety plans. App.15a. The only example the Seventh Circuit offered of such "illegal means" was a knowingly false representation. App.17a. It concluded that because DCFS does not employ such misrepresentations or other "illegal means" of coercion, safety plans are voluntary. App.15a.

Even on its own terms, the Seventh Circuit's determination that all safety plans are voluntary is dubious. For, as it acknowledged, DCFS investigators routinely imply to parents that DCFS has "lawful grounds" to take custody of their children when it has no such grounds, but only "mere suspicion" (App.14a-16a) of wrongdoing. Such DCFS representations about "lawful grounds" *are* therefore *misrepresentations*.

Under this Court's decisions, coercion does not require a showing of "illegal means," so the Seventh Circuit's conclusion that safety plans are never coerced is incorrect. *See* § IV.A, *infra*. Moreover, its related determination that safety plans are voluntary contradicts the well-established "totality of the circumstances" test for voluntariness that this Court's decisions establish. *See* § IV.B, *infra*.

A. The Seventh Circuit's Decision Conflicts with this Court's Decisions Defining Coercion or Duress

Numerous decisions of this Court establish when illegal means are used to secure an agreement or action, such means may vitiate the voluntariness of the agreement or action. *E.g.*, *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960). Yet this Court's decisions also establish that the government may be deemed to have coerced agreements from its citizens even when it does *not* employ "illegal means" to secure them. The Seventh Circuit cites no authority for its view that the *singular* test for

adjudging whether the State has "coerced" an agreement is whether it has used "illegal means."

In *Steffel v. Thompson*, 415 U.S. 452 (1974), police told Steffel that if he did not stop handbilling, he would be arrested under a trespass statute. *Id.* at 455. Steffel left to avoid arrest and did not return, but brought an action seeking a judgment that the trespass statute was unconstitutional. *Id.* at 454-55. In *MedImmunine v. Genentech*, 127 S. Ct. 764 (2007), this Court discussed whether Steffel's nominally "'voluntary' refusal to distribute handbills" had been "coerc[ed]." 127 S. Ct. at 775 n.12. This Court held that Steffel's conduct had been coerced because of the "penalties for . . . trespass [with which Steffel was] threatened" – even though the risk to Steffel was uncertain. *Id.* *See* 415 U.S. at 456 (he "*might be* arrested") (emphasis added), *id.* at 515-16 (if charged, he might be acquitted). Similarly, in *Terrace v. Thompson*, 263 U.S. 197 (1923), the State threatened the plaintiff landowner with forfeiture of the leasehold interest in a farm if he leased it to an alien in violation of a state statute. *Id.* at 211-12. As *MedImmune* explained, the landowner's nominally voluntary action in "simply not doing what he claimed the right to do (enter into a lease . . .)" was "effectively coerced," 127 S. Ct. at 772 (citing *Terrace*, 263 U.S. at 215-16), because of the "genuine threat of enforcement" of the statute. *Id.* Moreover, as in *Steffel*, it was uncertain whether, even if the landowner in *Terrace* had leased the farmland to an alien, the landowner would suffer the threatened forfeiture, since the state statute might be determined invalid in state civil or criminal proceedings to enforce it, *see Terrace*, 263 U.S. at 215.

Steffel and *Terrace* establish that the seriousness of the threatened harm if citizens do not acquiesce to the State's demands or requests may oblige the conclusion that their acquiescence has been coerced. More specifically, the "coercion

principle," *MedImmune*, 127 S. Ct. at 775 n.12, grounding both decisions does not turn on whether the State uses "illegal means" to secure acquiescence, *or* that the "consequences" threatened are "illegal" *or* certain. *Accord id.* ("We find the threat of treble damages [by respondent] and loss of 80% of petitioner's business . . . coercive . . . . [T]he *consequences of* the threatened action in this case [are determinative].) (emphasis added). *See Frost v. R.R. Comm'n*, 271 U.S. 583, 593 (1926) ("constitutional guarantees . . . are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lack none of the elements of compulsion").[2]

The seriousness of the harm that DCFS threatens if the parents do not agree to the DCFS safety plans—the State taking custody of the children and placing them in foster care—is far more serious than the "modest penalties for misdeameanor trespass" in *Steffel* that the *MedImmune* Court considered "coercive," 127 S. Ct. at 775 n.12.

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[2] This Court's constitutional and federal common law duress jurisprudence is rooted in the state common law. *See Dickerson v. United States*, 530 U.S. 428, 422 (2000). State Supreme Court common law duress decisions, but not the Seventh Circuit's decision, therefore are in line with the cases like *Steffel, Terrace, MedImmune and Frost*. *See Haston v. Crowson*, 808 So.2d 17, 22 (Ala. 2001) ("the doctrine of . . . duress [applies when] . . . unjustified demand are made, under such circumstances that the victim has little choice but to accede thereto") *Capps v. Georgia Pac. Corp.*, 253 Ore. 248, 253, 453 P.2d 935, 938 (1969) (choice of signing release or facing expensive litigation to recover money owned presents claim of duress, citing with approval Restatement (Second) of Contracts 938 § 492 (1932) for the rule that "[d]uress . . . means . . . any wrongful threat of one person . . . that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement").

Moreover, while the Seventh Circuit noted that the safety plan form "just notifies the parents of the lawful measures that *may ensue*," App.16a (emphasis added), those "measures" (the State taking custody of children) are no more uncertain than were the threatened consequences in *Steffel* and *Terrace*.

Further, the Seventh Circuit did not question that, out of tens of thousands of parents to whom DCFS has "offered" plans, not one has ever refused a plan. *See* App. 93a. Accordingly, the Seventh Circuit's contention that parents have only "to thumb their nose at the offer [of safety plans]" (App. 15a) does not describe parents' actual understanding of their options. *See*, *e.g.*, App. 62a. Indeed, that no parents ever actually thumb their noses at safety plans suggests that most, if not all of them, view DCFS as very likely if not certain to carry out its threats to take custody of the children if they do not agree to the plans. And, while the threat of serious harm, of itself, may make a threat coercive, *see* cases cited in § IV.A. *supra*, the apparent likelihood or certainty of such harm makes the threat even more coercive. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22, 32 (1990) (where tax payer is certain of tax penalty for late payments, timely payments are exacted "under duress"). More importantly, even if parents deem the risk slight, duress remains, for no reasonable parent would refuse a safety plan and thereby "bet their children" that DCFS would not take custody of the children from them, *see* § III, *supra*.

B. The Seventh Circuit's Decision Conflicts with this Court's Decisions Defining a "Totality of All the Surrounding Circumstances" Test for Voluntariness

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court held that whether an individual's agreement or consent is a *voluntary* waiver of a protected liberty interest is to be determined by the

"totality of all the surrounding circumstances," *id.* at 226, and that the government has the burden of proving consent. *Id.* at 222. *See Dickerson*, 530 U.S. at 433 (reaffirming continuing vitality of "totality of all the surrounding circumstances" as the applicable "due process . . . test" for voluntariness).

Under *Schneckloth*, a threat of serious harm may be a "circumstance" that, by itself, vitiates the voluntariness of agreements the State secures. *See* cases cited in § III.A *supra*. But coercive threats are just one of many "circumstances" that may do so. Others include: (a) unequal bargaining power between the parties (*D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972)); (b) a party's "lack of education" or "low intelligence" (*Schneckloth*, 412 U.S. at 226); (c) a party's lack of sufficient information to make an informed decision (*id.*); (d) the time pressure on a party to agree, and a party's lack of access to counsel or advisers to decide whether to agree (*Lynumn v. Illinois*, 372 U.S. 528, 534 (1963)); (e) "the characteristics of the accused," such as the "possibly vulnerable subjective state of the person who consents," (*Schneckloth*, 412 U.S. at 229).

The absence of any one or more "circumstance(s)" does not dictate that an agreement is "voluntary." *See Florida v. Bostick*, 501 U.S. 429, 437, 439 (1991) (lower court erred in resting its conclusion that there was no seizure "on a single fact–that the encounter took place on a bus–rather than on the totality of the circumstances").

The Seventh Circuit's default, in terms of the "totality of all the surrounding circumstances" test that *Schneckloth* prescribes, is that, in adjudging that the safety plans are always voluntary, it considered but a *single* "circumstance": whether DCFS had employed "illegal means," such as knowing misrepresentations (App.2a, 19a), to secure safety plans. Such an analysis is erroneous on its

own terms. *See* § III.A., *supra*. But, precisely because the Seventh Circuit considered only this single circumstance, it also cannot be squared with *Schneckloth* and its companion decisions cited in this section. The district court made many findings, not questioned by the Seventh Circuit, of "surrounding circumstances" *apart from* the threats that the Seventh Circuit erroneously dismissed as *not* unconstitutionally coercive, that would have supported a conclusion that many, if not substantially all, safety plans are involuntary.[3] Moreover, the court of appeals applied its "single circumstance analysis" to some cases where there was no safety plan agreement with the parents but only a directive, or where such an agreement was with one of the parents only, *see* p. 7, *supra* (citing to district court findings, also not questioned by court of appeals). In these cases, without any agreements between a parent and DCFS, there can be no *voluntary* agreement. *See also Georgia v. Randolph*, 547 U.S. 103, 114-17 (2006) (wife has "no recognized authority in law or social practice" to consent to police search of marital home, when her husband objects to search).

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3 *See* App.40a, 43a, 44a, (re: parents and DCFS have unequal bargaining power: "[n]early every class member witness who signed a safety plan testified that the investigator simply presented a proposed plan for his/her signature"; "virtually every parent or caretaker confronted with a safety plan ends of signing it"; "little or no discussion of the plan terms or alternatives"); *id*. (re: lack of information: DCFS gives parents no information permitting them to make an informed choice; "families [do not] receive a copy of the CERAP Safety Determination Form, which details the underlying basis for the safety plan"); App.54a, 62a, 65a (re: "characteristics of the accused," including the "possibly vulnerable subjective state of the person who consents:" *e.g.*, "frantic" mother (Christine Parikh); disabled mother and family left "prisoners" (Redlins); mother with history of bipolar disorder and depression (Debra C.)).

V. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING PROCEDURAL DUE PROCESS FOR PERSONS DEPRIVED OF LIBERTY INTERESTS

The Seventh Circuit acknowledged that if safety plans involuntarily separate parents from their children, or impose significant restrictions on their contact with each other, then DCFS is constitutionally required to afford the parents some process to contest the plans. App.13a. Numerous decisions of this Court confirm this conclusion. *See*, *e.g.*, *Reno v. Flores*, 507 U.S. 292, 306-07 (1993); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). The Seventh Circuit nevertheless rejected plaintiffs' procedural due process claim based solely on its determination that all safety plaintiffs are voluntary. App.13a; App.14a ("There is no right to a hearing when . . . . [t]he State does not force a safety plan on the parents."). Because this determination is erroneous, *see* § IV *supra*, the Seventh Circuit's corresponding rejection of the parents' procedural due process claim is erroneous as well.

Critically, the Seventh Circuit misstated the procedural due process claim the parents advanced when it said that they sought "a hearing *before* they are offered the option of agreeing to . . . a [safety] plan." App.14a (emphasis added). The parents never made any such plea. Throughout the litigation, the parents maintained that the Due Process Clause permits procedural protections to be afforded *after* a safety plan is imposed so long as the post-deprivation process is prompt and meaningful. The parents' argument in the Seventh Circuit thus was that the district court erred in affording them constitutionally inadequate *post-deprivation* process to contest the *imposition* of safety plans. In advancing this limited argument, the parents drew upon the decisions of this Court that establish that, even when the State threatens to impose constitutionally cognizable

deprivations, it need not provide pre-deprivation process when exigent circumstances require quick action or it would otherwise be impractical to provide pre-deprivation process. *E.g.*, *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Barry v. Barchi*, 443 U.S. 55, 66 (1979). Such exigent circumstances are certainly present in cases in which DCFS claims reasonable suspicion of wrongdoing, based on evidence that a parent has abused or neglected a child. Whether DCFS in fact has the requisite evidence would be the usual issue at any post-deprivation hearing, making such a hearing analogous to a post-arrest probable cause hearing in the criminal process.

The Seventh Circuit said that a "safety plan seems a sensible . . . solution" (App. 17a-18a), suggesting that what the court (incorrectly) describes as the parents' plea for *pre-deprivation* process, if approved, would seriously jeopardize DCFS's efforts to "protect [ ] [children] against abuse and neglect," *id*. at App. 18a. But as explained, the parents pressed no such plea, and the district court, citing DCFS's own experts, concluded that "it would not be difficult for DCFS to develop a simple and inexpensive procedure for Plaintiffs to seek review of safety plans [after the plan has been in effect]." App.96a.

The Seventh Circuit held "the offer of a [safety plan] settlement no more impairs those [procedural due process] rights than a prosecutor's offer to accept a guilty plea impairs the defendant's right to trial by jury." App.14a. But that analogy illuminates the error in the Seventh Circuit's analysis. A criminal defendant's agreement to a plea offer, incident to entry of a guilty plea, comes after the State's negotiations with the defendant's counsel (defendant's representation by counsel being constitutionally assured), with reasonable time afforded the defendant to consider the merits of the plea offer in light of the evidence. Moreover, *before* the trial judge accepts a defendant's guilty plea on

which the plea agreement is conditioned, the judge is required to ensure that the defendant understands and knowingly intends to waive *all the procedural rights* (*e.g.*, a right to trial by jury) that he would have if he refused the plea offer and put the government to its burden. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). In contrast, parents proffered a safety plan must decide immediately whether to accept or reject the plan and rarely, if ever, do they have the advice of counsel or any adviser to assist them in making this decision. *See* pp. 4-5, *supra*. Nor does DCFS have any procedures in place under which a neutral person even inquires whether parents' agreements to the plans were knowing and voluntary ones. *See* App.49a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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