No. _____

In The
Supreme Court of the United States

COUNTY OF SAN DIEGO,

Petitioner,

v.

MARK MANN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When children in the County of San Diego are temporarily removed from their parents' care based on suspicion that they have been abused or neglected, they are placed in protective custody at Polinsky Children's Center, a residential emergency shelter operated by the County. There, they receive a 10-15 minute diagnostic medical examination by a pediatrician, to determine if they have any immediate medical needs and to protect other children from contagious disease. The parents are not notified and are not invited to attend the examination.

The questions presented are:

1. Does a parent claiming substantive due process violations need to demonstrate that the County's conduct "shocks the conscience" (as five Circuits have held), or do omissions by the County—i.e., the lack of obtaining parental notice and consent—alone result in municipal liability (as the Ninth Circuit held below)?

2. Are parental notice and consent (or a court order) prerequisites to a child's medical examination, even if (i) the exams are diagnostic and do not involve treatment decisions; and (ii) any investigatory purpose of the examinations is incidental to the primary purposes of protecting the child's health and preventing the spread of contagious disease?

3. In conducting its "special needs" balancing test under the Fourth Amendment, did the Ninth Circuit err by disregarding the government's interest in protecting the health of other children and Center staff?

PARTIES TO THE PROCEEDING

Mark Mann and Melissa Mann, and their four children, N.G.P.M., M.N.A.M., M.C.G.M, and N.E.H.M (by and through their Guardian ad litem, Bruce Paul) were plaintiffs in the district court and are respondents here. The County of San Diego was a defendant, and is now the petitioner.

The plaintiffs also erroneously sued the County of San Diego as "San Diego County Health and Human Services Agency" and "Polinsky Children's Center," and further named eleven individual defendants (Adrea E. Cisneros, Lisa J. Quadros, Angela Redmond, Gilbert Ferro, Debbie Bayliss, Leela Joseph, Nancy Graff, M.D., Noni Mationg, Kelly Monge, Sophia Sanchez, and Susan Solis). The claims against all defendants except the County of San Diego have been resolved and are not at issue here.

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PETITION FOR A WRIT OF CERTIORARI

The County of San Diego respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's decision is officially reported at 907 F.3d 1154 (9th Cir. 2018), and is reproduced in the Appendix ("App.") at 1-27. The County of San Diego timely petitioned the Ninth Circuit for rehearing and rehearing *en banc* on November 18, 2018. The Ninth Circuit's order of February 21, 2019 denying the County's petition is reproduced at App. 103-104.

The order of the United States District Court for the Southern District of California granting in part and denying in part defendants' motion for summary judgment, and granting in part and denying in part plaintiffs' motion for summary judgment, is reported at 147 F. Supp. 3d 1066 (S.D. Cal. 2015) and is reproduced at App. 28-80. The district court's order granting plaintiffs' motion for reconsideration of the summary judgment order is not officially reported. It is reproduced at App. 81-102.

STATEMENT OF JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Ninth Circuit

entered on October 31, 2018. The Ninth Circuit, on February 21, 2019, denied the County's timely petition for rehearing and rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background

In April 2010, three-year-old N.E.H.M. arrived at preschool with a four-inch by 1½-inch welt on her lower back. The preschool director noticed the wound. Concerned for the well-being of the young girl, the director called the County of San Diego's child abuse hotline.

Social workers with the County's child welfare agency investigated to determine if the Mann children were safe in their parents' care. The father, Mark Mann, admitted that he had caused the welt by striking his daughter with a large wooden spoon. County social workers observed similar marks on M.N.A.M. (who was also three years old), and Mr. Mann admitted to a practice of striking all four of his children.

The Mann parents consented to forensic medical examinations of the children, and brought them to a hospital for child abuse and neglect examinations. The physician confirmed that the injuries were not accidental. The San Diego Juvenile Court then issued an order to remove and temporarily place the children at the County's Polinsky Children's Center ("Polinsky").

Children admitted to Polinsky are provided intake medical examinations, as authorized by California statute,[1] and by a 2007 General Order of the Juvenile Court. These examinations serve three primary purposes. First, they identify any immediate

[1] *See* CAL. WELF. & INST. CODE §§ 305, 306, 324.5, 361.2, 369.

medical needs. Second, they protect the health of other children in the facility (as well as staff) from contagious diseases. Third, they establish a health baseline for future treatment and to protect against allegations of abuse by the staff.

The afternoon of their arrival, a nurse took the Mann children's vital signs and checked for lice. The next morning, a physician performed a more detailed intake assessment, comparable to a standard "well-child" examination. The examinations involved the familiar assessment of the children's general physical well-being (*e.g.*, eyes, ears, nose, mouth, teeth, heart, and lungs), a brief inspection of the children's external genitalia, a TB test, and a pinprick blood sample. *See* AMERICAN ACADEMY OF PEDIATRICS, HEALTH CARE OF YOUNG CHILDREN IN FOSTER CARE, 109 PEDIATRICS 536, 538 (2002) (recommending comprehensive health assessment of children entering foster care, including full-body examination).[2]

The exams lasted 10-15 minutes, and there is no evidence that they were upsetting to the children. The next day, the children were released to the custody of their grandmother, who temporarily moved into the Mann family home.

Mr. and Mrs. Mann were not notified of the examinations and did not ask to attend.

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[2] Available at https://pediatrics.aappublications.org/content/pediatrics/109/3/536.full.pdf.

In July 2010, following a trial, the juvenile court found that Mr. Mann had inflicted physical harm on his children, and that his discipline was excessive. The court found, however, that there was not a substantial risk of future physical harm. Nonetheless, the juvenile court dismissed the County's dependency petition.

B. Proceedings Below

On April 7, 2011, the Manns filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the Southern District of California, alleging, *inter alia*, *Monell* claims against the County. They raised other claims and named other defendants, but neither are relevant here.

The Manns did not allege that the medical examinations were themselves unlawful. Rather, they claimed that the examinations could not lawfully proceed absent notice and consent (or, alternatively, a court order). Specifically, the Mann parents claimed violations of their familial association rights under the Fourteenth Amendment. The Mann children claimed violations of their Fourth Amendment rights.

The parties filed cross-motions for summary judgment, and the district court, through two orders, found that the County had a policy or practice of excluding parents from the medical exams (App. 101), and that the exclusion violated the Fourteenth Amendment (App. 62, 101). The district court found, however, that the Constitution did not require the County to obtain

parental consent or a court order prior to conducting an exam (App. 48-49).

The parties cross-appealed, and on October 31, 2018, the Ninth Circuit panel held that the exams violated the Fourteenth Amendment and the Fourth Amendment. The Court's analysis rested on two premises. First, the Court found that the exams implicated the right to familial association, which includes the "right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents. . . ." App. 12, citing *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000), and *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Second, the Court found that the exams included "investigatory purposes," thus triggering parental notice and consent requirements under Ninth Circuit precedent. App. 12-13, citing *Wallis*, 202 F.3d at 1141.

As to the parents' Fourteenth Amendment substantive due process claims, the Court further held:

> We reject the County's argument that we must also apply a "shocks the conscience" standard to Mark and Melissa's Fourteenth Amendment substantive due process claim under *Monell*. . . . The County's deliberate adoption of its policy or practice establishes that the municipality acted culpably. . . . Our inquiry ends there.

App. 19-20. As to the children's Fourth Amendment claims, the Ninth Circuit held that the County's

interest in protecting children's health was insufficient to justify the examinations.

The County petitioned for rehearing. On February 21, 2019, the panel denied the petition for rehearing and the Ninth Circuit denied the petition for rehearing *en banc*. App. 103-04.

C. Related Cases

While the *Mann* case was pending, the County settled a second case involving a challenge to the Polinsky examinations by a different family. *See Swartwood v. Cnty. of San Diego*, 84 F. Supp. 3d 1093 (S.D. Cal. 2014). As part of a settlement in that action, the County began permitting parental presence at examinations upon request, and developed procedures for obtaining Juvenile Court orders when parents withheld consent.

The constitutionality of the Polinsky exams remains an important issue, and continues to be actively litigated in an additional case, *D.C. v. Cnty. of San Diego*, Southern District of California, Case No. 3:15-cv-01868-MMA-NLS. The *D.C.* case was filed as a putative class action on behalf of a class of 37,000 children that spans twenty years. An appeal of the district court's denial of class certification (2017 WL 5177028) is currently before the Ninth Circuit. *See D.C. v. Cnty. of San Diego*, Ninth Circuit Docket No. 18-55853.

REASONS FOR GRANTING THE PETITION

In 2017 alone, approximately 3.5 million children in the United States were reportedly subject to abuse or neglect. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT (2017) p. 12. The County of San Diego, like cities and counties across the country, assumes responsibility for the well-being of many such children. This includes statutory[3] and constitutional obligations to provide children in its custody with medical care. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). Providing such care is a critical responsibility, given that many children placed in protective custody have suffered from a lack of medical care throughout childhood.

Specifically, when children in San Diego County are removed from their parents' care based on suspicions of abuse or neglect, many are brought to Polinsky. There, they are given a routine "well-child" physical examination by a pediatrician. These exams have uncovered numerous major medical conditions that had gone undiagnosed for years. These exams have saved children's lives.

The Ninth Circuit, however, has found that the Polinsky exams violate parents' substantive due process rights under the Fourteenth Amendment. The holding

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[3] 42 U.S.C. § 622(b)(15)(A)(i)-(ii) (conditioning funding on states' oversight and coordination of health care services); DEP'T SOC. SERVS. REG. 31-137.214 (requiring county child welfare agency to "ensur[e] the child's medical needs are met."), available at http://www.cdss.ca.gov/Portals/9/Regs/cws2.pdf?ver=2019-01-29-130849-707.

was erroneous and based on an incorrect legal standard: the Ninth Circuit held that substantive due process violations can occur even in the absence of official conduct that "shocks the conscience." That is not the law of this Court, and the Ninth Circuit now stands in conflict with at least five other Circuits.

The Ninth Circuit likewise found that the examinations violate the Fourth Amendment, because the children's privacy interests outweighed the government's interest in protecting the children's health. That, too, was error. The court disregarded other legitimate government interests, including protection of *other* children and staff at Polinsky from the spread of contagious disease. The County explains below.

I. THE NINTH CIRCUIT'S DECISION TO FOREGO THE "SHOCKS THE CONSCIENCE" REQUIREMENT IS INCONSISTENT WITH THIS COURT'S PRECEDENT, AND CONFLICTS WITH FIVE OTHER CIRCUITS

A. The "Shocks The Conscience" Standard Is A Fixture Of This Court's Substantive Due Process Jurisprudence.

As this Court held in 1998, "for half of a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("*Lewis*"). The requirement has its roots in *Rochin v. California*, 342 U.S. 165, 172-73 (1952). There, this Court found that police officers' forced stomach-pumping of a suspect to retrieve evidence "shocked the conscience"

and thus violated substantive due process. The requirement has since been reaffirmed by this Court time and time again, in context after context. *See Breithaupt v. Abram*, 352 U.S. 432, 435-37 (1957) (due process violated only if conduct "shocks the conscience, and [is] so brutal and offensive that it did not comport with traditional ideas of fair play and decency"; no violation because "a blood test taken by a skilled technician is not such conduct that shocks the conscience"); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (due process violated only if conduct shocks the conscience or "affords brutality the cloak of law"); *Lewis*, 523 U.S. at 848 (high-speed police chase that resulted in death of motorcycle passenger did not shock the conscience); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128 (1992) (failure to train employees and failure to warn them of harm was not "conscience shocking"). *See also U.S. v. Salerno*, 481 U.S. 739, 746 (1987) (citing "shock the conscience" requirement with approval).

The "shocks the conscience" requirement is a defining feature of substantive due process jurisprudence. Without it, the concept of substantive due process would leave "judges at large" (*Rochin*, 342 U.S. at 172), and the Fourteenth Amendment would be "demoted to . . . a font of tort law" (*Lewis*, 523 U.S. at 847 n.8). That is not the role of the Constitution. *See Daniels v. Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to

regulate liability for injuries that attend living together in society.").

As shown below, the Ninth Circuit departed from this established principle, and now stands in conflict with this Court and five other Circuits.

B. Five Circuits Recognize That The "Shocks The Conscience" Standard Applies In Familial Association Cases.

The Tenth Circuit, on facts substantially identical to those facing the Ninth Circuit below, reached precisely the opposite result. *See Doe v. Woodard*, 912 F.3d 1278, 1301 (10th Cir. 2019) (internal citations omitted), *petition for cert. filed*, 2019 WL 1126159 (Jan. 3, 2019) (No. 18-1173) (seeking *certiorari* on other grounds). In *Woodard*, as here, a caseworker examined a preschool student, after preschool personnel observed bruising on the young child's body. *Id.* at 1285. The caseworker, as the Polinsky doctor did here, conducted a visual examination (and went further, too, photographing the child's private areas and partially unclothed body). *Id.* The search, as is allegedly the case here, was pursuant to a "well-established county-wide policy or custom." *Id.* at 1286. Moreover, the search, as is the case here, did not include notice to the parents, consent, or a warrant. *Id.* at 1285.

In contrast to the Ninth Circuit—which "reject[ed] the County's argument that [it] must also apply a 'shocks the conscience' standard" (App. 19)—the Tenth Circuit followed *Lewis* and found that a "shocks the

conscience" requirement attached. *Woodard*, 912 F.3d at 1300. As a consequence, the Tenth Circuit found no substantive due process violation.

Specifically, the court found insufficient the parents' allegations regarding control of medical treatment:

> To be conscience-shocking, [the] behavior had to be so arbitrary to be as an instrument of oppression, egregious, outrageous, and so brutal and offensive that it runs afoul of traditional ideas of fair play and decency. The allegations did not allege this level of severity. They did not allege interference with Ms. Doe's control of I.B.'s medical treatment other than Ms. Woodard's performing an initial examination to determine whether I.B. had been abused. To the extent this was a 'medical decision,' it hardly rose to the level of what precedent requires for shocks the conscience.

Id. at 1301 (internal citations omitted). The parents' familial association allegations were likewise inadequate:

> The Does argue in their brief that their complaint should be read to allege that [the social worker] intended to separate I.B. from her mother to conduct an examination without the mother present. But even if the complaint could be read this way, it still needed to allege an intended deprivation or suspension of the parent-child relationship that shocks the conscience. . . . [T]he search happened during school hours when I.B.'s mother would not

> otherwise have been with her. To the extent I.B. was separated from her mother during a time when she would have wanted her mother to be present, this is a far cry from the substantial separation required in other cases.

Id. at 1302 (internal citations omitted). *See also Halley v. Huckaby*, 902 F.3d 1136, 1155-56 (10th Cir. 2018) ("[F]amilial association claims are grounded in the shocks-the-conscience approach to substantive due process claims challenging executive action.").

The Circuit conflict is unambiguous.[4] The Ninth Circuit below found a substantive due process violation because it ignored the "shocks the conscience" requirement. The Tenth Circuit, because it adhered to the "shocks the conscience" requirement, unanimously found no substantive due process violation.

The Third Circuit's decision in *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999), likewise conflicts with the Ninth Circuit's decision below. In *Miller*, two preschool students reported that their mother had struck them, and preschool employees contacted the Department of Human Services. *Id.* at 371. The social worker arranged for a medical examination, and

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[4] At least one Circuit Court has specifically noted the existence of a conflict regarding the "shocks the conscience" requirement. *See Dawson v. Bd. of Cnty. Comm'rs of Jefferson Cnty., Colo.*, 732 Fed. App'x 624, 635 (10th Cir. 2018) ("The parties in this case disagree about how courts apply the 'rights' approach and the 'shocks the conscience' approach. They are not the only ones. The Supreme Court has vacillated to and fro. And the circuits have adopted varying approaches.").

excluded the parent from the area outside the examination room. *Id.* at 377. Although the examination was inconclusive, the social worker nonetheless sought a restraining order. *Id.* at 371. The Court found no substantive due process violation, citing the high bar set by the "shocks the conscience" standard. Specifically, the Court held that liability would attach only if executive action was "so ill-conceived or malicious that it shock[ed] the conscience." *Id.* at 375. This requirement, the Court emphasized, "must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed shocks the conscience." *Id.* at 375-76. Applying the requirement, the Third Circuit found no substantive due process violation. *Id.* at 377.

Additional Third Circuit decisions are in accord. *See B.S. v. Somerset Cnty.*, 704 F.3d 250, 267-68 (3d Cir. 2013) (applying "shocks the conscience" requirement to social worker's removal of a child); *Mulholland v. Gov't Cnty. of Berks, Pa.*, 706 F.3d 227, 241 (3d Cir. 2013) (same); *Nicini v. Morra*, 212 F.3d 798, 812 (3d Cir. 2000) (in case involving placement of child into abusive foster home, "the relevant inquiry is whether the defendant's conduct 'shocks the conscience' ").[5]

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[5] Variations on the "shocks the conscience" requirement abound. In a 2003 decision, the Third Circuit opined in dicta that a substantive due process plaintiff had alternate routes for proving liability: "While the 'shocks the conscience' standard applies to tortious conduct challenged under the Fourteenth Amendment, it does not exhaust the category of protections under the Supreme Court's due process jurisprudence, or eliminate more categorical protection for 'fundamental rights' as defined by the tradition and

At least three other Circuits have likewise imposed a "shocks the conscience" requirement in the child welfare context. *See Southerland v. City of New York*, 680 F.3d 127, 152 (2d Cir. 2012) ("[T]he interference with the plaintiff's protected right must be so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it even were it accompanied by full procedural protection.") (citations omitted); *Martin v. Saint Mary's Dep't of Soc. Servs.*, 346 F.3d 502, 512 (4th Cir. 2003) (applying "shocks the conscience" requirement to pre-hearing removal from parental custody); *B.A.B., Jr. v. Bd. of Educ. of City of St. Louis*, 698 F.3d 1037, 1040 (8th Cir. 2012) (no substantive due process violation where school nurse vaccinated a child over the mother's objection – "However inappropriate it may have been to override [the mother's] refusal to consent, this was not conscience-shocking behavior by a public school nurse."); *Fitzgerald v. Williamson*, 787 F.2d 403, 407-08 (8th Cir. 1986) (applying the requirement to the actions of caseworkers in arranging a psychological examination and reducing parental visitation rights; no substantive due process violation found).

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experience of the nation." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003). Ultimately, the *Dubbs* court did not decide the Fourteenth Amendment issue, instead opting to proceed under a Fourth Amendment analysis. *Id.* at 1203. And while *Dubbs* (in its dicta) suggested a disjunctive framework, other Circuits have applied a conjunctive framework, requiring plaintiff to prove *both* a fundamental right and conduct that shocks the conscience. *See Christensen v. Cnty. of Boone*, 483 F.3d 454, 461-65 (7th Cir. 2007); *Flowers v. City of Minneapolis*, 478 F.3d 869, 871-72 (8th Cir. 2007).

C. The Ninth Circuit's Decision Below Stands In Conflict With This Court's Teachings And With The Decisions Of Five Circuits.

Historically, the Ninth Circuit has recognized that substantive due process claims require a plaintiff to prove conduct that shocks the conscience, including in cases implicating familial relationships. *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071 (9th Cir. 2011), is illustrative. There, officers arrested a man for unlawfully selling tickets to a fair. His children were with him, so the officers walked the children to their mother who was in a car parked nearby. The Court found that the case was not close. Because the conduct did not shock the conscience, there was no substantive due process violation based on the right to family integrity. *Id.* at 1079-80. Other Ninth Circuit familial rights cases likewise applied the "shocks the conscience" requirement. *See Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1154-55 (9th Cir. 2012) (in case involving the right of a mother to control images of her deceased child, government conduct must shock the conscience); *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2009) (in child custody case, plaintiff must show "conscience shocking behavior" by the government).

In the decision below, however, the Ninth Circuit departed from its own precedent. Specifically, it found that the "shocks the conscience" requirement did not attach, because the case involved a policy or practice of failing to notify parents of the Polinsky exams. Given the existence of a "policy or practice," the Ninth Circuit

reasoned, plaintiffs need only show that they acted with "the state of mind required to prove the underlying violation." App. 19, citing *Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1185-86 (9th Cir. 2002), *overruled on other grounds by Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). As the Ninth Circuit would have it, this means that the County's deliberate adoption of its policy or practice was alone sufficient to establish substantive due process liability. App. 19.

That is not the law. A plaintiff alleging a substantive due process violation cannot circumvent the *Rochin–Lewis* line of cases simply by proceeding on a *Monell* policy or practice theory. Rather, he or she still must establish that the "municipal action was taken with the requisite degree of culpability." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 405-06 (1997) ("*Bryan Cnty.*"). In substantive due process claims such as this, the "shocks the conscience" culpability requirement applies.

To be sure, the requisite level of culpability for substantive due process violations varies with the context. Here, the County was not making split second decisions, so the "shocks the conscience" requirement will not be at its most onerous. *Cf. Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (applying "malicious and sadistic" standard to prison use-of-force cases). At a minimum, though, plaintiffs alleging substantive due process violations must demonstrate at least recklessness or deliberate indifference to a constitutional

right.[6] *See Lewis*, 523 U.S. at 853 ("[T]he Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."). These are standards with real teeth. *Id.* (finding that deliberate indifference applies when "extended opportunities to do better are teamed with a protracted failure even to care"). *See also Bryan Cnty.*, 520 U.S. at 410 (deliberate indifference "is a stringent standard of fault. . . . A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.").

The Ninth Circuit erroneously relieved plaintiffs of their burden of proving the requisite culpability. It did not require them to prove conduct that "shocks the conscience." It did not require evidence of recklessness or deliberate indifference. Rather, it found that an *omission*—i.e., the practice of declining to provide notice before a routine medical examination—taken alone, was sufficient to establish liability. App. 19-20 ("The County's deliberate adoption of its policy or practice 'establishes the municipality acted culpably.' "). Contrary to the cautionary teachings of *Rochin–Lewis*, the Ninth Circuit adopted a substantive due process standard that teeters on the edge of strict liability.

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[6] Notably, this minimum requirement of deliberate indifference would attach even if the "shocks the conscience" requirement did *not* apply, as a *Monell* plaintiff challenging municipal inaction or omissions must demonstrate at least deliberate indifference. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 390-92 (1989).

That decision was erroneous, and is contrary to the decisions of five Circuits. This Court should exercise its supervisory power here.

II. THE DECISION SUFFERS FROM ADDITIONAL DEFECTS THAT WARRANT REVIEW

A. The Ninth Circuit's Decision Rewrites The Law Of Substantive Due Process By Holding That Virtually All Examinations Of Children Trigger Notice And Consent Obligations.

In holding that the Polinsky examinations may proceed only after parental notification and consent (or a court order), the Ninth Circuit rewrites the law of substantive due process in two ways. First, its prior precedent, grounded in this Court's *Parham* decision, held only that "the right to family association includes the right of parents to make *important medical decisions* for their children. . . ." App. 12 (emphasis supplied). *See Wallis*, 202 F.3d at 1141. *Parham*, in turn, involved a particularly weighty medical decision—whether to place a child in institutional care. *Parham*, 442 U.S. at 601-02.

The court below, however, went far further than *Wallis* and *Parham*. The Polinsky examinations do not involve "important medical decisions." They are diagnostic. To the extent that the examinations reveal any need for medical decisions, parental notice and consent are required by state law. *See* CAL. WELF. & INST. CODE § 369(a). By holding that parental notice

and consent are required even for routine diagnostic examinations that do not include medical decisions, the Ninth Circuit significantly expanded substantive due process protections, and disregarded this Court's admonishment in *Lewis* to exercise restraint. *See Lewis*, 523 U.S. at 848 ("[T]he Fourteenth Amendment is not a font of tort law to be superimposed upon whatever systems may already be administered by the States."), citing *Daniels v. Williams*, 474 U.S. 327, 333 (1986).

Second, prior Ninth Circuit precedent, and that of other Circuits, imposed parental notice and consent requirements only when examinations are "undertaken for investigative purposes." *Wallis*, 202 F.3d at 1141. *See also Van Emrik v. Chemung Cnty. Dep't of Soc. Servs.*, 911 F.2d 863, 867 (2d Cir. 1990).

Polinsky examinations are not undertaken to aid law enforcement investigations. Rather, they serve primarily to protect the health of the child, other children, and Polinsky staff. Any investigatory purpose of the examinations is incidental and subsidiary to these primary purposes. *Cf. In re M.C.*, 199 Cal. App. 4th 784, 812-13 (2011) (the purpose of the dependency process "is to protect the child, rather than prosecute the parent").

The Ninth Circuit noted that the Polinsky doctors are mandatory reporters, and as a consequence, they are required by state law to notify law enforcement if they observe signs of child abuse. As such, the court reasoned, the examinations qualify as investigatory,

and carry a parental notice and consent obligation. App. 14. That logic proves far too much. If mandatory reporting status were alone sufficient, then every medical exam would constitute an investigation. CAL. PENAL CODE § 1165.7(a)(21)) (all doctors are mandatory reporters). Public school nurses (*id.*), teachers (§ 1165.7(a)(1)), and day care providers (§ 1165.7(a)(10)) would need to be wary of examining any injuries that they observed. Firefighters (§ 1165.7(a)(20)) and paramedics (§ 1165.7(a)(22)), too, would need to tread lightly in examining children with injuries, for fear of Fourth Amendment liability.

The Ninth Circuit's decision is erroneous, and warrants this Court's review.

B. The Ninth Circuit Erred In Its Fourth Amendment "Special Needs" Analysis By Disregarding Government Interests And Overstating The Privacy Interests.

Because the Polinsky exams serve special needs beyond law enforcement, their constitutionality under the Fourth Amendment should be determined under the "special needs" balancing test. This test requires courts to weigh the individual's privacy interest against the government's interests. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). Where the government has multiple interests, all such interests must be considered.

Here, the children's privacy interest was modest. While the children were in protective custody, the

County acted in a role of *parens patriae*, and the children's expectation of privacy was diminished. *Parham*, 442 U.S. at 603. Moreover, the examinations at issue were brief, routine, and non-invasive. They did include a full-body examination (as recommended by the American Academy of Pediatrics), but they were no more invasive than other routine and necessary child-care practices at Polinsky—such as diaper changes, bathing, and dressing for bed.

As the children's interest was modest, the County's burden was light. But the Ninth Circuit tipped the scales by disregarding two government interests: protection of the health and safety of other children, and protection of the health and safety of Polinsky staff. Specifically, a key goal of the Polinsky examination is to find out if the child has any contagious diseases. Yet the Ninth Circuit assigned these legitimate interests *no* weight at all: "[T]he County provides *no other interest* beyond the health of the child that would make the need to conduct the search more immediate such that providing notice and obtaining consent would impede the provision of necessary services." App. 24 (emphasis supplied).[7]

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[7] The Ninth Circuit also undervalued the government interest in promptly assessing the health of the child, which is a *compelling* interest. Children have a constitutional right to adequate care (*Youngberg v. Romeo*, 457 U.S. 307, 315 (1982)), and agencies that fail to provide such care promptly do so at their peril. *Consider B.K. by next friend Tinsley v. Snyder*, ___ F.3d ___, 2019 WL 1868287, *3 (9th Cir. April 26, 2019) (affirming order granting certification of class of children in Arizona's protective custody; plaintiff alleged violation of due process right "to reasonably

The County had multiple legitimate reasons to conduct the Polinsky examinations as quickly as possible. The Ninth Circuit should have considered all of them, and this Court's supervisory power is warranted.

C. The Decision Will Sow Confusion, Encourage Litigation, And Complicate The Role Of Foster Parents.

Although the case below involved a single medical examination—the physician's intake examination that occurs within 24-48 hours of arrival at Polinsky—the plaintiffs' bar will argue that the Ninth Circuit created a rule of general application, seizing upon the following language: "A parent's due process right to notice and consent is not dependent on the particular procedures involved in the examination, or the environment in which the examinations occur, or whether the procedure is invasive. . . ." App 16.

This language will create an inordinate threat of liability for local governments across the Circuit.[8] Provision of medical care by local governments is not limited to initial diagnostic examinations. Rather, medical care is an ongoing obligation for the duration of a child's out-of-home placement, which can range from

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prompt early and periodic screening, diagnostic, and treatment services").

[8] The better reading of this language is that the Ninth Circuit was rejecting restrictions on notice and consent *as to the examination at issue* (i.e., the initial intake examination in an emergency shelter). Absent clarification by this Court, however, litigation is a virtual certainty.

days to years. DEP'T SOC. SERVS. REG. 31-405.24.[9] Indeed, the children should receive medical care even after successful placement of a child in a foster home. *Id.* 31-401.41 (authorizing foster parents to consent to ordinary medical treatment, such as physical examinations, immunizations, and x-rays). The burden of arranging for parental presence at all such examinations would be monumental.[10]

To hold that parents retain an ongoing constitutional right to be present at routine medical examinations—even after foster parents have stepped in to provide the "love, comfort, and reassurance" that animates the familial right to be present (*Wallis*, 202 F.3d at 1142)—would unnecessarily burden local governments, complicate the role of foster parents, and needlessly delay medical care for thousands of children in foster care throughout the Circuit.

CONCLUSION

The Ninth Circuit decision conflicts with the teachings of this Court, and conflicts with the decisions of at least five other Circuits. Additionally, it will sow

[9] Available at http://www.cdss.ca.gov/Portals/9/Regs/cws3.pdf?ver=2019-01-29-130851-340.

[10] There are over 50,000 foster children in California alone. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 2010-2014: REPORT TO CONGRESS (2017) p. 10 (noting that 54,797 children are in foster care in California alone).

confusion and lead to further litigation. *Certiorari* should be granted to resolve these issues.

Respectfully submitted,

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