No. 18-1465

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

There is no compelling reason for this Court to review the Petition for Writ of Certiorari filed by the County of San Diego in this matter.

First, the County acknowledges and admits that it has voluntarily changed its policies and procedures regarding the challenged medical examinations to protect the constitutional rights of children and their parents. This voluntary change is not only an admission that its policies were unconstitutional, but indicates that the claimed governmental interests in conducting these examinations in the absence of constitutional safeguards were overstated.

Second, the Ninth Circuit's order is entirely consistent with decisions by the Courts of Appeals in other Circuits, consistent with decisions by this Court, and fully consistent with almost 20 years of authority by the Ninth Circuit, as well as the District Court for the Southern District of California. The County of San Diego's Petition mischaracterizes both the law and the facts governing this dispute in an attempt to present a reason for review.

The County's Petition should be denied.

STATEMENT OF THE CASE

The County's recitation of the factual background of this case is replete with misstatements and material omissions. The true facts, in brief, are recited below.

On April 5, 2010, while he was caring for his children, Mark Mann found his 4-year-old daughter, N.E.H.M., standing in a pool of soapy water on the bathroom sink which was approximately 3 feet above the floor. The children had been told not to climb onto the sink because of the danger of falling. Mark placed N.E.H.M. on the floor, intending to give her a quick swat on the bottom with a wooden spoon.[1] N.E.H.M. twisted out of Mark's grip, and the swat landed on her lower back, leaving a small red mark. The mark was neither a "welt" nor a "wound," as characterized by the County.

The following day, the director of the Mann children's preschool observed the red mark on N.E.H.M. She contacted Mark Mann, who acknowledged the events from the night before. As a mandated reporter, the director contacted the County of San Diego's Health and Human Services Agency in Mark Mann's presence, indicating his cooperation. During the next two days Mark and Melissa Mann met with and cooperated fully with the agency's investigation. This cooperation included taking all four of their children to be examined by the County's expert in child abuse. This doctor found a forehead bruise on one of the children, which he believed to be most likely caused by accidental child play, and described a "mark" on N.E.H.M.'s

[1] This technique had been recommended to the Manns by a child behaviorist as an effective method for disciplining their children.

lower back to be consistent with Mark's explanation of spanking N.E.H.M. with a spoon for discipline.

Although the Manns had cooperated fully with the County's investigation, the County social workers assigned to the case prepared a falsified Protective Custody Warrant Application and Detention Report *which deleted all mention of the parents' cooperation* – including their cooperation with having their children examined by the child abuse expert. The falsified reports were in retaliation for complaints by Mrs. Mann to the supervising social worker about the caseworker's handling of the matter.

Based on the falsified Warrant Application and Detention Report, which characterized the parents as uncooperative, confrontational and hostile with respect to the County's investigation, and omitted exculpatory information of that cooperation, the Juvenile Court ordered the children be removed from their parents' custody.[2] [3]

After their wrongful removal, the children were brought by caseworkers to the County's Polinsky Children's Center. Upon arrival, a nurse took their vital signs and performed an evaluation for matters such as lice or fever and to determine if any health issues

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[2] On summary judgment, the District Court held the falsified reports violated Plaintiffs' constitutional rights and the removal would not have occurred had the social workers submitted the true facts to the Juvenile Court. The County and its social workers settled these claims.

[3] The Juvenile Court ultimately found the allegations of abuse against Mark Mann were "not true."

existed. As emphasized by the Ninth Circuit in its decision, *the intake assessment performed by the nurse is not challenged by Plaintiffs in this action.* Appendix, pg. 6 fn. 3 and pg. 24, fn. 15.

After this initial assessment, the children were admitted to Polinsky, where they were released into the general population at the facility. Pursuant to County policy, the children were to be examined by a doctor 24-48 hours after they entered the general population of the facility.

The day after the Mann children were brought to Polinsky, examined by the nurse, and placed with other children and staff in the Polinsky facilities, Polinsky's Medical Director Nancy Graff, M.D. performed investigatory forensic physical examinations on each of the Mann children. The examinations included a full physical examination, which included 22 physical examination items that were checked off on an examination form. The examinations required the children to completely undress, and included an examination of the child's genitalia and rectum. The examination of the girls also included an inspection of their hymen to determine whether it remained intact.

To perform the genital exam, Dr. Graff asked the children to drop their legs into a "frog leg" position. (For girls, she would then separate the labia with her fingers to inspect the hymen.) This exam necessarily required Dr. Graff to touch the children's private parts, including the vagina and the anus. Polinsky's records confirm 6-year-old N.G.P.M. was subjected to this

vaginal examination, M.C.G.M.'s exam included a vaginal and anal exam (with the hymen exam "deferred"), and M.N.A.M.'s exam included inspecting his penis and anus. Dr. Graff could not perform the vaginal and anal exam on N.E.H.M. because she was "too squirmy," but did conduct the rest of the examination, which required N.E.H.M. to undress. In addition, the children were each subjected to blood tests, which included a skin test for tuberculosis (involving a subdermal injection), an HGB test (where blood was taken from the child's finger). Moreover, although there were no allegations of drug use, urine samples were taken from all of the children to screen for drug exposure.

Melissa and Mark Mann were not aware of and not present for these medical procedures, and did not provide consent for them before they were performed. They learned of the exams shortly after the children were released from Polinsky, when 6-year-old N.G.P.M. told her mother that somebody at Polinsky touched her private parts. N.G.P.M. demonstrated how she was required to get into the frog-leg position by lying on the floor with her legs spread, touching her vagina, and then turning over and reaching back and spreading her butt cheeks to touch her anus.

County policy required that the above-described examination of the genitalia, anus, and hymen be performed on all children within 24 to 48 hours of entering Polinsky, *even if there were no allegations of sexual abuse.* Dr. Graff testified that during these examinations, she would closely examine all children for any evidence of physical or sexual abuse, looking for

"obvious findings that might suggest that the children have been" abused, and attempting to investigate whether or not physical or sexual abuse or neglect did, in fact, occur. Dr. Graff would also document and photograph any evidence of physical or sexual abuse she found during her examination.

In addition to the physical examinations, blood tests were performed on all children entering Polinsky for the first time, and urine drug screens were performed on all children under the age of 8 to look for drug exposure. There were *never* any allegations that the Mann children had been sexually abused or exposed to drugs.

It is undisputed that under County policy, parents were not notified their children were going to be examined (or that urine and blood tests were to be performed), nor was parental consent sought or required to conduct these medical procedures, including the examinations. Additionally, County policy barred all parents from attending the medical examinations of their children, *even if they were non-offending parents*.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Plaintiffs do not dispute the statutory and constitutional obligations of the County to provide basic human needs to children in its care and custody, including medical care. But the County cannot ignore the constitutional rights of children and their parents

in performing these obligations. In its decision, the Ninth Circuit simply confirmed the decisions by multiple courts of the Southern District of California, extending back to the 2004 decision in *Parkes v. County of San Diego*, 345 F.Supp.2d 1071 (S.D.Cal.2004), that the examinations conducted at Polinsky violate the constitutional rights of children and their parents. *See*, *also, Swartwood v. County of San Diego*, 84 F.Supp.3d 1093 (S.D.Cal.2014); *Reynolds v. County of San Diego*, 224 F.Supp.3d 1034 (S.D.Cal.2016), *reversed on other grounds by Reynolds v. Bryson*, 716 Fed.Appx. 668 (9th Cir.2018).

There is no conflict between the Ninth Circuit's decision in this case and any other decision by the Ninth Circuit, other Circuits, or this Court.

Moreover, the County, in the face of overwhelming District Court decisions, has already changed the policies and procedures at issue.

THE NINTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THAT OF ALL CIRCUITS AND THIS COURT REGARDING POLICY-BASED VIOLATIONS OF THE RIGHT TO FAMILIAL ASSOCIATION

The County contends that in order to find that the policies, procedures, customs and/or practices of a governmental entity violate the substantive due process rights of an individual, a court must also find official conduct that "shocks the conscience." This argument,

which the County raised *for the very first time* on appeal,[4] is contrary to the very decisions the County cites to support its claim. The Ninth Circuit correctly rejected the County's argument.

A. The Ninth Circuit's Decision is Consistent with Decisions by This Court

Plaintiffs' "direct" *Monell* claim, based on the County's undisputed policy and practice of conducting medical procedures, including examinations, without court order, exigency, or parental notice, consent or presence, does not require more than a showing that the County's *deliberate adoption* of its policy or practice establishes that it acted culpably. *See*, *e.g.*, *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 398 (1997); *Gibson v. Cty. of Washoe, Nev.*, 290 F.3d 1175, 1185-86 (9th Cir.2002), *overruled on other grounds by Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir.2016).

This is fully consistent with the decisions of this Court cited by the County. In *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992), this Court held that the guarantee of due process is applied to *deliberate* decisions by governments to deprive a person of life, liberty or property. *Id*. at 127 fn. 10. *See*, *also*, *County of Lewis v. Sacramento*, 523 U.S. 833 (1998) [the "core

[4] Since the County had never raised this argument in the district court proceedings, the Ninth Circuit could have declined to even address this question. *See*, *e.g.*, *U.S. v. Spilotro*, 800 F.2d 959, 963 (9th Cir.1986).

of the concept" of due process is protection against arbitrary government action, including deliberate decisions by policymakers. *Id*. at 845, 849.]

In *U.S. v. Salerno*, 481 U.S. 739 (1987), this Court stated that substantive due process can either "prevent the government from engaging in conduct that 'shocks the conscience,'" or ***prevent the government from interfering with rights "implicit in the concept of ordered liberty."*** *Id*. at 746 (emphasis added). In substantive due process claims against entities, the court must determine whether the municipality's "interest in community safety" can outweigh an individual's liberty interest – not whether its conduct "shocks the conscience." *Id*. at 748, 751.

There is no dispute that the County adopted the policies and procedures that were at issue in this case; and continued to conduct the medical procedures, including examinations, for almost 20 years after their constitutionality was first questioned.

As discussed below, the Ninth Circuit properly found that the medical procedures, including examinations, violated the parents' right to make medical decisions for their children and right to familial association – both fundamental rights under the Fourteenth Amendment. *See*, *e.g.*, *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

B. The Ninth Circuit's Decision is Consistent with That of Other Circuits

The County argues that the decision by the Ninth Circuit is contrary to decisions in the Second, Third, Fourth, Eighth, and Tenth Circuits. Yet none of the decisions cited supports this proposition. In fact, several of the cited decisions show the consistency of the Ninth Circuit's holding.

Most of the decisions cited by the County involve claims against governmental officials only, wherein there is no discussion whatsoever concerning a *Monell* claim. This is true of *Southerland v. City of New York*, 680 F.3d 127 (2d Cir.2012), *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir.1999), *Nicini v. Morra*, 212 F.3d 798 (3d Cir.2000), *Martin v. Saint Mary's Dept. of Social Services*, 346 F.3d 502 (4th Cir.2003), *Fitzgerald v. Williamson*, 787 F.2d 403 (8th Cir.1986), *Doe v. Woodard*, 912 F.3d 1278 (10th Cir.2019), and *Halley v. Huckaby*, 902 F.3d 1136 (10th Cir.2018).

B.A.B., Jr. v. Board of Educ. of City of St. Louis, 698 F.3d 1037 (8th Cir.2012) involved a *Monell* claim based on failure to train, which is also not at issue in this case.

Thus, only two of the cases cited by the County even address a policy-based *Monell* claim for violation of the right to familial association and/or right to make medical decisions. Both of these cases support rather than distinguish, the Ninth Circuit's decision in this case.

In *B.S. v. Somerset County*, 704 F.3d 250 (3d Cir.2013), a mother asserted claims against a child welfare agency and two of its employees, alleging they violated her Fourteenth Amendment substantive and procedural due process rights when they secured and effectuated the transfer of custody of her daughter to the child's father. The court held on summary judgment that the social worker's actions were not conscience-shocking.

As to the *Monell* claim, the court held that the mother's claim for violation of her right to substantive due process "focuses entirely on Eller's conduct, alleging that her 'concoct[ion] [of] facts' and 'manipulation of evidence' to effectuate Daughter's removal was so egregious that it 'shocks the conscience.' Because Mother provides no evidence that the County had a policy or custom endorsing such behavior, if it occurred, we agree with the District Court that the County is entitled to summary judgment on the substantive due process claim as well." *Id*. at 276 (citation to record omitted).

Here, by contrast, it is unrefuted that the County had a policy or custom endorsing and creating the constitutional violations. Thus, this case is entirely consistent with the Ninth Circuit's ruling.

The other case cited by the County which addressed a *Monell* claim is the unpublished Tenth Circuit decision in *Dawson v. Board of County Commissioners of Jefferson County, Colorado*, 723 Fed.Appx. 624 (10th Cir.2018). In this case, Dawson brought an action against Jefferson County challenging Jefferson

County's policies which he claimed resulted in a 3-day delay in his pretrial release. Nowhere in this decision did the Court determine that Dawson was required to show that the County's actions shocked the conscience in order to prove his claim. Indeed, the Court's primary focus was on whether Dawson had asserted a violation of a fundamental right.

Notably, in two of the Tenth Circuit cases cited by the County that address only claims against individual government actors, the Circuit court explained the differentiation between claims against individual government actors and claims against the governmental entities themselves. Where it is alleged that the government entity itself infringed upon a fundamental right – like that before this Court in this case – it is considered a challenge to "legislative" action, and does not require "conscience-shocking" behavior. Only where the claim is against an individual actor (i.e. "executive action") is it required that the conduct shock the conscience. *See Halley v. Huckaby, supra*, 902 F.3d at 1153. In *Halley*, the Tenth Circuit noted that cases involving the right to familial association fell within this two-pronged framework, with claims against individual government actors requiring a finding that their actions shocked the conscience, and claims regarding policies requiring a finding that the government has infringed on a fundamental right. *Id*. at 1153-1155. *See*, *also, Doe v. Woodard, supra*, 912 F.3d at 1300.

The Ninth Circuit's decision in this case is thus entirely consistent with the holdings by other circuits.

There is no basis for this Court to grant the County's Petition.

C. The Ninth Circuit's Decision is Consistent with Its Own Decisions

The decision by the Ninth Circuit in this case is further entirely consistent with its prior decision in the same area of the law. There was no holding in *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir.2000) that the examinations must "shock the conscience" for the policies and procedures authorizing those examinations to be found unconstitutional.

In *Wallis*, the Ninth Circuit held the right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state. 202 F.3d at 1141, citing *Parham v. J.R., supra*. The Court further held parents have a fundamental right arising from the liberty interest in family association to be with their children while they are receiving medical attention, and children have a corresponding right to the love, comfort, and reassurance of their parents while undergoing medical procedures, including examinations. *Id*. at 1142. In both instances the policy at issue violated those rights.

Nowhere in the Ninth Circuit's decision did the Court discuss the need to find "conscience shocking" behavior. *Wallis*, at 1141-1142. That is because the deliberate decision by policymakers to conduct these

constitutionally violative examinations was sufficient to state the Fourteenth Amendment claim under the law.

The County has not cited a single Ninth Circuit case in support of its argument that this Court must find the examinations themselves to be "conscience shocking" in order to find the County's policies and practices authorizing the examinations are constitutionally violative. In fact, all of the authority cited by the County deals exclusively with the actions of *individual* government actors. *See*, *e.g.*, *Brittain v. Hansen*, 451 F.3d 982 (9th Cir.2006), *Marsh v. County of San Diego*, 680 F.3d 1148 (9th Cir.2012), and *Rosenbaum v. Washoe County*, 663 F.3d 1071 (9th Cir.2011).

In determining that the County violated Fourteenth Amendment rights in this case, the Ninth Circuit carefully weighed the County's "interest in community safety" with Plaintiffs' liberty interests, and rightly found that the balance favored Plaintiffs' liberty interests, dismissing the County's argument that the examinations were "minimally intrusive." Instead, the Ninth Circuit rightly found the County routinely subjected children to "*objectively intimate and potentially upsetting procedures.*" Appendix 23 (*emphasis supplied*). This is exactly the type of analysis required and expected by decades of Supreme Court and Ninth Circuit law and law by other Circuits. There is nothing inconsistent in the Ninth Circuit's decision in this case.

THE NINTH CIRCUIT'S DECISION DOES NOT "REWRITE" THE LAW CONCERNING SUBSTANTIVE DUE PROCESS

The County's alternative challenge to the Ninth Circuit's decision is that the medical procedures, including examinations, performed at Polinsky do not implicate a fundamental right because they are not conducted for "investigative purposes" and do not involve "important medical decisions."

In this case, the Mann children, who were all 6 or younger, were unlawfully (through a fraudulent and invalid application for removal) taken by strangers from their parents, and brought to an institutional facility where upon their entrance they were checked for emergency medical needs and contagious diseases. Then *the next day*, according to County policy, they were taken to a medical unit where they were undressed and examined and inspected by an unknown doctor, who forced them into a frog leg position so she could palpate and inspect their genitals. The stated purpose was to look for signs of physical abuse, sexual abuse, and neglect. This is not a "routine pediatric examination." Its investigatory purpose is clear and absolute.

The County also argues the Polinsky exams do not involve the need to make medical decisions. Yet this is an important aspect of all medical examinations recognized by the Ninth Circuit and by the American Association of Pediatricians, which recommends parents be

present at examinations of their children, in part, so they may provide health history and participate in health care decisions, as well as provide comfort to their child.

The examinations conducted at Polinksy are, by their very nature, potentially traumatic. (See Appendix, pg. 16, fn. 10, citing to Presidential Task Force report concluding that vaginal examinations may be particularly traumatic for young girls when their parents are not present.) They are not "routine pediatric examinations," but are conducted to search for signs and symptoms of abuse and neglect. The Ninth Circuit was correct in finding that Constitutional safeguards of parental consent, court order or exigency, and the opportunity for parental presence, must be afforded.

The County's argument that the Ninth Circuit's decision will impact every medical exam is without basis. As to firefighters and paramedics, it is certain that any examinations they would be conducting on a child would be due to exigent circumstances, including assessing the medical needs of the child. Similarly, if such exigent circumstances exist, public school nurses, teachers, and day care providers would also avoid liability for conducting an unclothed examination of a child. Here the Polinsky examinations were routinely performed after the child's admission to the facility, "irrespective of any medical emergency or need to preserve evidence." Appendix 17.

Since the medical procedures, including examinations, in this case clearly impact fundamental constitutional rights, the County's Petition should be denied.

THE NINTH CIRCUIT PROPERLY BALANCED THE CHILDREN'S RIGHT TO PRIVACY VS. THE CLAIMED GOVERNMENTAL INTERESTS IN ITS SPECIAL NEEDS ANALYSIS

The County claims that in the Ninth Circuit's analysis of the constitutionality of the medical procedures, including examinations, under the "special needs" balancing test, the court overstated the children's right to privacy and ignored several governmental interests.

First, the County's claim that the children had a diminished right to privacy simply because they were in the custody of the County is without merit. There is ample authority that children have a legitimate expectation of privacy in not being subjected to a medical examination without their parents' consent. *See*, *e.g.*, *Yin v. State of California*, 95 F.3d 864, 870 (9th Cir.1996); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) [in which this Court held that the act of drawing blood or conducting a urinalysis, even if the blood or urine is not subsequently analyzed for the presence of illegal drugs, implicates the Fourth Amendment]; *Birchfield v. North Dakota*, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016) [warrantless blood draws to test for blood alcohol content of suspected drunk drivers

violates those arrestees' Fourth Amendment rights.] The County has not cited a single case to support its proposition that the privacy rights of the children were "diminished" because they had been *unlawfully* removed from their parents' custody by the County.[5]

The County's second claim is that the Ninth Circuit did not consider the governmental interests claimed by the County. This is not the case. The Ninth Circuit started its discussion on the special needs balancing by indicating that the County had cited governmental interests such as "safeguarding the health of the child and other children at Polinsky." Appendix 21. The Court concludes by stating that the County "has not demonstrated that the 'nature and immediacy' of its interest outweighs the children's privacy interests." Appendix 21. The Court specifically addresses the initial intake assessment upon their entry to the facility, which "serves to treat the children's immediate needs and address potential dangers to other children at Polinsky," stating "it is less evident how the search at issue does so." Appendix 24 (see, also, Appendix 6 fn. 3).

Clearly, the Ninth Circuit took into consideration the health of the other children in its balancing analysis, since it expressly referred to that stated concern. It is just as apparent that the Ninth Circuit considered

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[5] In fact, this case clearly illustrates the danger of such a proposition. Here, the removal and detention of the children was completely unjustified. But for the unconstitutional removal of the children from their parents, no examination would have occurred.

the other governmental interests claimed by the County, even if it did not expressly comment upon them. "And the 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 medical services." Appendix 24.

The Ninth Circuit's decision that these other interests did not outweigh the child's right to privacy is based on a clear understanding of the facts. Since a nursing assessment is done immediately after intake, during which the child is checked for lice, fever, and other obvious signs of disease, following which the children are released into the general population of the facility, the County's claim that it is concerned about the health of the other children and its workers is fallacious and completely contrary to its practices.[6]

The Ninth Circuit properly found that none of the governmental interests cited by the County outweigh the constitutional rights of parents and their children. There is no reason for this Court to review this decision.

[6] Nor does the County explain the inconsistency in its argument whereby it places children in the general population of Polinsky *before* the examinations.

THERE IS NO CONCERN FOR WIDESPREAD MUNICIPAL LIABILITY

The true reason for the County's attempt to have this Court review the Ninth Circuit decision is to try to insulate governmental entities like the County from liability for policies which ignore the constitutional protections and rights of children and their parents. This is not a valid basis for review.

The County contends that the decision by the Ninth Circuit will necessarily apply to all provision of medical care by local governments, including medical care provided during out-of-home placement and while in foster care. First, as stated previously and acknowledged by the Ninth Circuit, the Manns are not contesting the initial entry intake assessments, just the subsequent examinations which are conducted 24-48 hours after the children are admitted to the facility. Furthermore, this argument ignores that continuing medical care can be performed pursuant to court order following one or more hearings at which the parents have been given notice and have an opportunity to be heard. Under California law, these hearings must occur within 72 hours of the removal of the child. Indeed, immediately after the quote the County cites, out of context, the Ninth Circuit expressly recognizes that the law provides for the provision of medical care in emergency medical situations and where there is a reasonable concern material physical evidence might dissipate. Appendix 17. The Ninth Circuit also recognizes that medical examinations such as the Polinsky examinations would be lawful when performed with

judicial authorization (upon notice to the parents and an opportunity to be heard). Appendix 12. It is those clear exceptions which provide the needed guidance to the County while protecting the constitutional rights of children and parents.

There is thus no danger of unnecessarily burdening local governments and foster parents where the issue involves either emergency or continuing medical care to be provided to children.

CONCLUSION

Based on the foregoing, this Court should deny the County's Petition for Writ of Certiorari.

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