No.

In The
Supreme Court of the United States

SARA DEES,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it necessary, in order to prove a claim under 42 U.S.C. § 1983 for violation of the Fourteenth Amendment concerning a parent's liberty interest in the care, custody, control, and management of her child, for the plaintiff to prove that she lost custody of that child?

More specifically:

Do government authorities violate a parent's Fourteenth Amendment liberty interest in the care, custody, control, and management of their children when they seize and interview a child at school in violation of the child's Fourth Amendment rights?

PARTIES TO PROCEEDING AND RELATED CASES

The names of all parties to the proceeding in this Court appear on the cover.

The proceedings in other courts directly related to this case are as follows:

- *Dees v. County of San Diego*, No. 3:14-cv-0189-BEN-DHB, U.S. District Court for the Southern District of California. Judgment entered February 17, 2017. Order Granting Motion for Judgment as a Matter of Law entered October 10, 2017.
- *Dees v. County of San Diego*, Nos. 17-56621 and 17-56710, U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 27, 2020. Rehearing denied August 19, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sara Dees respectfully petitions for a writ of *certiorari* to review an order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion below (Pet.App. 1a) is published at 960 F.3d 1145.

Plaintiffs-Appellees-Petitioner Sara Dees timely petitioned the Ninth Circuit for rehearing and *en banc* review on July 27, 2020.

The Ninth Circuit's Order denying rehearing or *en banc* review dated August 19, 2020 is reproduced at Pet.App. 26a.

JURISDICTION

On August 19, 2020, the Ninth Circuit denied Plaintiffs' timely petition for rehearing and rehearing *en banc*. The United States Supreme Court issued its March 19, 2020 Order 589 U.S. extending deadlines by 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution states:

> 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.

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STATEMENT OF THE CASE

A. Factual Background

This case involves the blended Dees family consisting of Robert Dees ("Robert") and Sara Dees, Robert's two children, Ka. and Ky. Dees, and Sara's two children, L.G. and G.G.

At the time of the events that are the subject of this action, L.G. was 9 years old. L.G. has anxiety and ADHD (diagnosed since third grade) and has autism. Because of these disorders, changes in L.G.'s routine can lead to a "melt-down" or panic attack.

On February 7, 2013, a report was made to the County of San Diego's Health and Human Services Agency's hotline concerning Ka. Dees. Caitlin McCann was assigned to investigate this referral. McCann interviewed all members of the blended family, and conducted other investigation. During the course of her investigation, McCann never learned any information beyond what she learned during her initial, February 7, 2013 interviews.

Importantly, McCann did not uncover any information during her investigation that Sara Dees was anything other than an exceptional mother. In fact, there were never allegations against Sara at any time during the investigation.

On or about February 13, 2013, McCann's supervisor told McCann to wrap up her investigation and close it. McCann admits that at the close of the day on February 25, 2013, she had absolutely no information to lead her to believe that L.G. was in any danger whatsoever.

Nevertheless, on February 26, 2013, McCann went to L.G.'s school to **re-interview** L.G. McCann knew that Sara was protective of her children and did not want her children to be interviewed without an attorney present. Sara had also told McCann that L.G. had anxiety and ADHD and could be easily set off or agitated, and that she didn't want L.G. to be upset because of her special needs.

Despite this knowledge, McCann did not call Sara before she went to the school or ask her permission to interview L.G., although she knew it was likely Sara would be present at the school. Nor

did she call L.G.'s father, Al, to ask for his permission. As McCann testified: "I had an open investigation. My policy allows me to interview children" at school.

On March 7, 2013, McCann closed her investigation. At no point during the investigation were there allegations against Sara, and McCann's investigation showed there was no basis for the allegation.

B. Proceedings Below

Plaintiffs' Complaint was filed on January 27, 2014. In the Complaint, Plaintiffs asserted claims against the County of San Diego and its social workers McCann, and her supervisors Srisuda Walsh and Gloria Escamilla-Huidor, for Violation of Constitutional Rights under 42 USC 1983 and *Monell* claims, among others.

Following a 5-day jury trial, on February 13, 2017, a jury found that McCann did not violate the Fourth Amendment rights of the minor plaintiffs or Sara's Fourteenth Amendment rights when she conducted the school interviews. On February 17, 2017, the District Court entered judgment in favor of Defendants pursuant to the jury's verdict.

On March 6, 2017, Plaintiffs filed a Motion for Judgment as a Matter of Law and/or Motion for New Trial. In this motion, Plaintiffs claimed that no reasonable jury would have a legally sufficient evidentiary basis to find for the County on the *Monell* claim arising out of the unlawful and unconstitutional interview of minor Plaintiff L.G. by Defendant McCann. Plaintiffs further claimed that the verdict on

the *Monell* claim was against the clear weight of the evidence.

On October 10, 2017, the District Court granted Plaintiffs' renewed Motion for Judgment as a Matter of Law. Concerning Sara's Fourteenth Amendment claim, the District Court held McCann's school interview of L.G. interfered with Sara's familial rights under the Fourteenth Amendment. (Pet.App.28a)

The parties filed cross-appeals following the District Court's October 10, 2017 order. On May 27, 2020, a three-judge panel from the Ninth Circuit Court of Appeals entered its Opinion on the parties' cross-appeals. (Pet.App. 1a)

As relevant to this Petition, the Ninth Circuit held that, "to establish a Fourteenth Amendment claim based on a minor being separated from his or her parents, plaintiffs must establish that an actual loss of custody occurred; the mere threat of separation or being subject to investigation, without more, is insufficient." Accordingly, the panel held Sara's Fourteenth Amendment claim regarding the school seizure was barred. (Pet.App. 1a)

On July 27, 2020, Plaintiffs filed a Petition for Panel Rehearing and Rehearing En Banc. That Petition was denied on August 19, 2020. (Pet.App. 26a)

C. The Ninth Circuit's Decision

The panel noted that after the parties had fully briefed their appeals, the Ninth Circuit issued its decision in *Capp v. County of San Diego*, 940 F.3d

1046 (9th Cir.2019). In *Capp*, the panel noted, the father of two children who were seized and interviewed during a child abuse investigation brought a Fourteenth Amendment claim, alleging the County placed him on a child abuse monitoring list and encouraged his ex-wife to withhold the children from him while she sought custody in family court. The panel noted that, with respect to the father's Fourteenth Amendment claim, the Ninth Circuit panel deciding the *Capp* decision stated,

> Plaintiffs do not allege that Capp *actually lost* custody of his children as a result of Defendants' alleged misconduct. Capp might have been subjected to an investigation by the Agency, but that alone is not cognizable as a violation of the liberty interest in familial relations." *Capp*, at 1060 (emphasis added).

(Pet.App. 11a)

The panel also cited the recent Ninth Circuit decision in *Mann v. County of San Diego*, 907 F.3d 1154 (9th Cir.2018), *cert. denied* 140 S.Ct. 143 (2019), wherein the court held the parents of children who were subjected to "invasive medical examinations" after being removed from their parents' custody had viable Fourteenth Amendment rights for the County's failure to provide parental notice or to obtain consent for the examinations.

The panel concluded its discussion of these cases by stating:

> Reading *Capp* and *Mann* together, our Court requires that, to establish a Fourteenth Amendment claim based on a minor being separated from his or her parents, plaintiffs must establish that an actual loss of custody occurred; the mere threat of separation or being subject to an investigation, without more, is insufficient.

(Pet.App.11a)

With this sweeping declaration, the panel held Sara Dees had no Fourteenth Amendment right related to the seizure of her daughter at school because "*Capp* plainly holds that a cause of action does not lie where the social worker is accused of seizing a child and the parent has not 'actually lost' control over the child." (Pet.App.12a)

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REASONS WHY THIS PETITION SHOULD BE GRANTED

The Ninth Circuit's decision that a parent may only claim a violation of the Fourteenth Amendment liberty interest in the care, custody and control of his or her child if government action causes the parent to actually lose custody of the child contradicts over a century of jurisprudence relating to this fundamental liberty interest.

In accordance with Rule 10 of the United States Supreme Court, this case should be reviewed for the following reasons:

First, the Ninth Circuit seemingly relied on a single line in its prior *Capp* decision without analyzing the critical factual differences between the two decisions. In this action, the government actor (McCann) had no reasonable justification for her interference with Sara Dees' care and management of her children. The interview was conducted solely as a demonstration of her "power" over the family. This is in stark contrast to *Capp*, where the challenged school interviews were conducted at the very beginning of the County's investigation, and may have been conducted with the consent of the children's mother.

Second, the decision conflicts with multiple decisions by this Court concerning the broad scope of the familial liberty interest. These decisions encompass arenas of family life such as education, health care, and visitation rights. This Court has never held that the Fourteenth Amendment requires a loss of custody.

If this decision is left to stand, government actors will be free to interfere in a myriad of ways with the familial relationship short of severing the parent/child relationship. This will deprive fit parents of their Constitutional right to raise their children as they see fit, and will impact arenas including education, healthcare, visitation, and may even enter the arena of religious freedom. The Ninth Circuit's decision is a dangerous incursion into one of the oldest and most important fundamental liberty interests.

A. The Ninth Circuit's Reliance on its Prior *Capp* Decision to Determine the Scope of the Fourteenth Amendment Rights in this Action was Improper

In its rejection of the Fourteenth Amendment claim, the Ninth Circuit stated it was consistent with the rulings in two recent Ninth Circuit rulings: *Mann v. County of San Diego* and *Capp v. County of San Diego*. An analysis of these cases demonstrates the posture of the instant case is far more analogous to *Mann*, where the Court held the County's actions violated the parents' Fourteenth Amendment rights, than *Capp*.

1. *Mann v. County of San Diego*

The Ninth Circuit decided *Mann v. County of San Diego*, *supra*, on October 31, 2018.

In *Mann*, social workers with the County of San Diego removed Mark and Melissa Mann's four children from their care and custody following a report of child abuse. Mark Mann was reported to have "abused" one of his three-year-old triplets by spanking her with a wooden spoon. The children were taken to the County's Polinsky Children's Center.

While they were at Polinsky, the children were subjected to medical examinations that included a 22-point assessment, and a gynecological and rectal exam. The Mann parents were not informed that their children would be examined at Polinsky, did not consent to the examinations, and were not allowed to be present at the examinations.

The Manns filed suit against the County, alleging violations of the Fourth and Fourteenth Amendments. As to the medical examinations, the Mann parents contended the County violated their Fourteenth Amendment rights by performing the medical examinations without their consent, court order, or exigent circumstances, and without notifying them so they may be present.

The Ninth Circuit concluded that the County "violates parents' Fourteenth Amendment substantive due process rights when it performs the Polinsky medical examinations without notifying the parents about the examinations and without obtaining either the parents' consent or judicial authorization." *Id*. at 1161. Citing *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir.2000), the Court stated, "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." *Id*. The Court held the County "is required to notify the parents and obtain parental consent (or a court order) in advance of performing the Polinsky medical examinations, and permit parents to be present for these examinations because, while the examinations may have a health objective, they are also investigatory." *Id*. at 1162.

The Ninth Circuit's primary focus was on the investigatory nature of the examinations. "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, or whether the child demonstrably protests the examinations." *Id*. "The amount of trauma

associated with a medical examination, particularly for young children, is difficult to quantify and depends upon the child's developmental level, previous trauma exposure, and available supportive resources, among other factors." *Id.*

The Court held that the law recognizes certain exceptions to parental notice and consent, neither of which were present in the *Mann* case. These include "an emergency medical situation," or when there is "a reasonable concern that material physical evidence might dissipate." *Id.* at 1163, citing *Wallis, supra*, 202 F.3d at 1141. The Court remarked on the fact the County had already photographed the alleged injuries before the children were admitted to Polinsky, and had "no other evidence it needed to collect to support its stated basis for the dependency charge." *Id.*

The Court also noted that "providing constitutionally adequate procedures poses [no] administrative inconvenience," as the County could have easily notified the Mann parents of the examinations and obtained their consent; or obtained judicial approval for the medical examinations if they did not consent.

Last, the Court rejected the argument that it must apply a "shocks the conscience" standard to the Mann parents' Fourteenth Amendment substantive due process claim, since neither *Wallis* nor *Greene* applied such a test, there was no cited authority that the test should apply, and the claim was a "direct" *Monell* claim "based on the County's undisputed policy or practice of failing to notify parents of the Polinsky medical examinations." "The County's deliberate adoption of its policy or practice

'establishes that the municipality acted culpably.'" *Id*. at 1164, citing *Bd. Of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404-5, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

The focus of the Court's decision in *Mann* was the fact the County's policy ignored completely a parent's recognized Fourteenth Amendment right to make medical decisions for his or her child, particularly where the routine examinations were at least partially investigatory. The Court's decision echoed that of the Ninth Circuit in the *Wallis* decision, where the Court stated "The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct – real or imagined – of the other parent." *Wallis, supra*, 202 F.3d at 1142 fn. 14.

2. *Capp v. County of San Diego*

Capp v. County of San Diego was finally decided by the Ninth Circuit on October 4, 2019.

In *Capp*, the County of San Diego received a report that Jonathan Capp's children may be at risk of neglect and emotional abuse by their father. One of the first investigative acts undertaken by the County social worker assigned to the referral was to interview the children at their elementary school. After further investigation, the agency closed the referral. However, the agency did consider the allegations of abuse or severe neglect as to Jonathan Capp were "substantiated." *Id*. at 1051.

Capp then filed a complaint against the County and its social workers alleging that the defendants

retaliated against him in violation of his First Amendment rights. Capp also claimed that the actions of the County and its social workers, and "the investigation, generally, violated Capp's Fourteenth Amendment right to familial association." *Id*. at 1052. The minor children brought a claim that the school interviews violated their Fourth Amendment right to be free from unreasonable seizure, and a *Monell* claim based on the County' policy of detaining and interviewing children without exigent circumstances, court order or consent of their parents. *Id*.

The appeal was from the District Court's decision on Defendant's motion to dismiss. The primary focus of the Ninth Circuit decision was whether Capp had stated sufficient facts to support his First Amendment retaliation claim. The Court held that he had, since he pled that the defendants "'were purely motivated by their desire to retaliate against' Capp, acted 'without proper reason or authority' and 'without probable cause,' and 'ma[de] false and misleading statements to retaliate against [Capp] and in order to unduly influence and threaten [Debora] to file an application with the Family court.'" *Id*. at 1058.

The Court further held that the social worker was not entitled to qualified immunity for her actions. "A reasonable official would have known that taking the serious step of threatening to terminate a parent's custody of his children, when the official would not have taken this step absent her retaliatory intent, violates the First Amendment." *Id*. at 1059.

However, the Court held the district court properly dismissed Capp's Fourteenth Amendment claim.

> The basis for Plaintiffs' Fourteenth Amendment claim is the same as their First Amendment retaliation claim: Defendants' alleged retaliatory actions, which Plaintiffs claim violated their "fundamental rights to familial association and due process."
>
> "To establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998). Here, Plaintiffs have not pleaded that Capp experienced such a deprivation. We have recognized that "[o]fficial conduct that 'shocks the conscience' in depriving parents of [a relationship with their children] is cognizable as a violation of due process," *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010) (quoting *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)), ***but Plaintiffs do not allege that Capp actually lost custody of his children as a result of Defendants' alleged misconduct***. Capp might have been subjected to an investigation by the Agency, but that alone is not cognizable as a violation of the liberty interest in familial relations. *Cf. Woodrum v. Woodward County*, 866 F.2d 1121, 1124

> (9th Cir. 1989) ("A parent's interest in the custody and care of his or her children is a constitutionally protected liberty interest, such that due process must be afforded prior to a *termination* of parental status." (emphasis added))

Id. at 1060 (emphasis added.)

It is on the highlighted language, containing a sweeping generalization unsupported by case law, that the Ninth Circuit determined, in the present case, that Sara Dees could not have suffered a violation of her Fourteenth Amendment rights.

However, the facts in this case could not be more different from the facts in *Capp* – and in fact fit more readily into the Ninth Circuit's discussion in *Mann*.

The interview which is the subject of the present matter was the second interview of L.G., performed at the very end of McCann's investigation; and after she had been told to close the case by her supervisor. McCann had no exigent circumstances to conduct the interview, and she had no reason to be collecting "evidence" through this final interview. Indeed, she had no reason to be conducting this interview at all.

By contrast, the *Capp* school interviews were conducted at the very start of the County's investigation into the reported child abuse; and may well have been prompted by an urgent need.

In this case, as in *Mann*, "providing constitutionally adequate procedures pose[d] [no] administrative inconvenience" to McCann or the County. McCann could have called Sara Dees to ask for her consent to speak with L.G. again, or, knowing that Sara Dees was likely present at the school, could have asked her in person. Sara Dees was never suspected of abuse, and was known by McCann to be an excellent, protective mother.

By contrast, in *Capp*, Jonathan Capp was the actual target of the child welfare investigation. It would not have been administratively feasible, in that instance, to seek consent from Jonathan. It is worth noting that in its discussion of the children's Fourth Amendment claims, the Court mentioned it was possible the County sought consent for the school interviews from their mother.

And in this matter, McCann was well aware that Sara Dees was a fit parent, but decided to interview L.G. at her school anyway simply because the County's policy purported to give her the authority to do so. She used her governmental office to intentionally interfere with Sara Dees' care and custody of her children – to demonstrate her power. It is exactly this type of conduct that the Fourteenth Amendment is designed to protect against.

B. There is no Basis for the Ninth Circuit's Decision that a Parent's Fourteenth Amendment Rights Can Only be Violated when they have Lost Custody of Their Child.

The Fourteenth Amendment states, in pertinent part, that no State shall "deprive any person of life, liberty, or property without due process of law." This Clause guarantees more than fair process. *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). "The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* at 720. One of the oldest and most important fundamental liberty interests recognized by the Supreme Court is the right of parents to raise their children as they see fit without unwarranted governmental interference. *Troxel* v. *Granville,* 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

"Freedom of choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974). There does exist a "private realm of family life which the state cannot enter." *Prince, supra*, 321 U.S. at 166. This has been afforded both substantive and procedural protection.

"Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.

Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979). In *Parham*, the Supreme Court held that "natural bonds of affection lead parents to act in the best interests of their children," and that "the statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* at 602-603. The *Parham* court held that parents "can and must" make judgments concerning "many decisions, including their [child's] need for medical care or treatment." *Id.* at 603. A "*natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference.*" *Hodgson v. Minnesota*, 497 U.S. 417, 447, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990) (emphasis supplied).

In *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), this Court held that parents had the right, under the Fourteenth Amendment's liberty interest, to engage a teacher to instruct their children in the German language. *Id.* at 400. This right comes from the same source as enunciated in *Parham*.

This point was driven home in *Troxel v. Granville*, *supra*, which did not involve loss of custody or termination of parental rights. Instead, Granville challenged a Washington statute which authorized

visitation of a child by "any person" if the court believed the visitation served the child's best interest. Granville contended that the statute unconstitutionally infringed on a parent's fundamental right to rear his or her children.

This Court agreed that the statute violated the parents' due process right to make decisions concerning the care, custody and control of Granville's daughters. *Id.*, at 57. This Court held that the statute allowed a court to "disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id.* at 67. "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69. The statute allowed a judge to make decisions for the child, and "failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters." *Id.* at 70.

Thus, this Court has recognized a wide-reaching liberty interest of parents in the companionship, care, custody and management of their children, encompassing areas including education, medical treatment decisions, and visitation decisions. It has not limited its discussion of due process concerns to cases involving the termination of parental rights or loss of custody. This Court's decisions clearly demonstrate that due

process must be afforded to parents in scenarios in which State action is interfering in some way with the parent's liberty interests in their children's upbringing.

In this case, there is no doubt that the subject interview was conducted by McCann to intentionally interfere with Sara's management of her child. This type of governmental interference is precisely the type of conduct this Court condemned in decisions such as *Parham, Meyer*, and *Troxel*. To narrow the scope of this well-established Constitutional right as contemplated by the Ninth Circuit will give government actors free access to interfere with the parent/child relationship. This fundamental liberty interest must be protected by this Court.

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CONCLUSION

This Court's decisions regarding the Fourteenth Amendment's prohibition against unwarranted governmental interference to a parent's familial association right to raise their child as they see fit have never restricted that right to only circumstances where the parent loses custody of the child. To do so would allow government unfettered access to interfere in family life so long as it does not remove the child from his or her parent. Such happened here when the government seized Sara's child at school to interview her without cause or reason and without her knowledge, consent or presence. Such a limitation to a parent's Fourteenth

Amendment familial association rights has not been supported by this Court, nor should it be.

Based on the foregoing, this Court should grant Plaintiff Sara Dees' Petition for Writ of Certiorari.

Respectfully submitted,

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