No.

IN THE
Supreme Court of the United States

S.O. & M.B.,

Petitioners,

V.

THE DISTRICT OF COLUMBIA

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that the state and federal government's use of fabricated evidence and perjured testimony violates an individual's Due Process rights so as to render a criminal proceeding fundamentally unfair. While a number of states, including the District of Columbia, afford substantive and procedural protections to parents and children in civil neglect proceedings similar to those made available to a criminal defendant, the breath of these protections as required by the Constitution, where the government uses fabricated evidence and perjured testimony, is still unknown.

The question presented is:

Whether the Fifth Amendment prohibits the District of Columbia's use of fabricated evidence and perjured testimony in a civil child neglect proceeding, and the appropriate remedy thereof.

PARTIES TO THE PROCEEDING

Petitioners are S.O. & M.B. Pursuant to District of Columbia statute and court rules regarding privacy in child neglect proceedings, Petitioners initials, and that of their minor child, were used in the case caption of the proceedings below. Petitioners recognize, however, that by filing *pro se* their name and contract information must appear on the caption and signature page of this writ of certiorari.

Respondent is the District of Columbia. No party is a corporation.

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The opinion of the District of Columbia Court of Appeals (*In re D.O.*, No.: 17-FS-444), Petition Appendix A at 2 ("Pet. App. A"), and relevant order of the trial court (*In re D.O.*, N-204-16), Petition Appendix B (sealed) at 2 ("Pet. App. B"), are unreported.

JURISDICTION

The District of Columbia Court of Appeals issued its opinion on August 23, 2019. Pet. App. A at 2. It denied motion for rehearing on February 12, 2020. Pet. App. A at 13. On March 19, 2020, the Supreme Court issued an order extending the deadline to file any petition for a writ of certiorari to 150 days. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V.

STATEMENT OF THE CASE

The well-documented problem of public officials fabricating evidence and offering false testimony extends to the prosecutors and social workers that compose the nation's many child protective services agencies and accompanying child neglect

proceedings.[1] While this Court has well defined the prohibition on the use of fabricated evidence and perjured testimony in criminal proceedings, it has yet to address such conduct in a civil child neglect proceeding. Undoubtedly, the prohibition applies equally, but the civil nature of child neglect proceedings raises novel questions as to the appropriate remedy and to the continued jurisdiction of the courts and standing of the state.[2]

Petitioners challenged the District of Columbia's ("the District") unrefuted use of fabricated evidence and perjured testimony in a child neglect petition and at the subsequent probable cause hearing as contrary to the Fifth Amendment, but the District of Columbia Court of Appeals failed to address this issue. Remarkably, the court fully omitted the District's misconduct from its opinion. In place of an analysis, the Court of Appeals held in a footnote that the District possessed standing and the trial court jurisdiction. How the court could arive at this holding without discussing the prejudice of the District's use of fabricated evidence and perjured testimony is unclear.

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[1] *See, e.g.*, *Hardwick v. Cnty. of Orange*, 844 F.3d 1112 (9th Cir. 2017) (perjury by a state social worker); Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html; Andrea Ball and Eric Dexheimer, *Dozens of CPS case workers caught lying, falsifying documents*, Austin American-Statesman (Jan. 13, 2015), https://projects.statesman.com/news/cps-missed-signs/wrongdoing.html.

[2] "The state" is used herein to collectively refer to both state and federal governments, to include the District of Columbia.

This Court should grant review to resolve the important constitutional question left unanswered by the lower court: what is the appropriate remedy, as required by the Fifth Amendment, when the state uses fabricated evidence and perjured testimony in a civil child neglect proceeding, where fundamental liberty interests are at stake. Petitioners submit, and had submitted to the lower court, that (1) due process notice of the allegations of neglect was lacking as the only allegation in the petition was a fabrication, (2) the District lacked standing and the trial court lacked jurisdiction without a "powerful countervailing interest" or valid petition, and (3) the District's misconduct prejudiced Petitioners and rendered the entire proceeding fundamentally unfair.

A. Factual Background

On June 25, 2016, Petitioners' daughter, D.O., sustained injury from an accidental fall onto the back of her head from Petitioner S.O.'s arms. Although visibly appearing uninjured, Petitioners took D.O. to the hospital where it was discovered that she had fractured her skull in the fall. While there, the District of Columbia's Child and Family Services Agency ("CFSA") interviewed Petitioners regarding D.O.'s injuries. Petitioners provided consistent audio-recorded interviews, a reenactment of the fall, and agreed to a home visit. The investigators never spoke with either Petitioner again.

Instead, the District directed Dr. Norrell Atkinson, a pediatrician with Children's National Hospital ("Children's"), to investigate the etiology of D.O.'s injuries. Without disclosing her investigatory

role, Dr. Atkinson interviewed Petitioners, performed a physical examination of D.O., and ordered medically unnecessary and painful tests to be performed on D.O. without Petitioners' consent. Dr. Atkinson's tests subjected D.O. to 72-hours of needless starvation for an unnecessary MRI of her spine, painful lacerations of her feet for a battery of blood tests, and poisoned her with dangerous radiation and anesthetic. Upon learning their daughter was being abused by hospital staff, Petitioners confronted Dr. Atkinson, informed her that she committed a battery on D.O., and demanded communication.

As a result of that encounter, Dr. Atkinson contacted CFSA investigator Channell Reddrick, and they agreed to remove Petitioners from the hospital. The next day, Reddrick arrived at D.O.'s hospital room with completed removal paperwork and hospital security to remove Petitioners. Yet, the District would claim that Reddrick merely intended to ask Petitioners additional questions. Without exigent circumstance or judicial authorization, D.O. was unlawfully seized from Petitioners' care from their private hospital room in violation of their Fourth Amendment rights. The removal enabled Dr. Atkinson to continue subjecting D.O. to more painful testing to look for non-existent evidence of abuse.[3]

Rather than correct the misdeeds of Reddrick and Dr. Atkinson, Assistant Attorney General Lynsey

[3] After Petitioners' removal, Dr. Atkinson subjected D.O. to a second MRI to look for non-existent evidence of shaking. Petitioners could not consent due to their removal; yet, D.O.'s medical records reveal that M.B.'s signature was forged on the consent form for the anesthesia.

Nix drafted a neglect petition that singularly alleged D.O.'s injuries were "not medically possible," invoking the District of Columbia's permissive inference of neglect statue.[4] Pet. App. B at 158-59. There was no actual evidence of abuse or neglect. However, the investigation and medical records in the District's possession contradicted this allegation. Those records state that the District only spoke to two physicians, Dr. Xian Zhao, a Children's emergency room physician who informed investigators that D.O.'s injuries "can be ruled as normal," and Dr. Atkinson, who was "unable to fully assess" D.O.'s injuries.

Undeterred by the truth, Nix made numerous false representations at the probable cause hearing to support the court's necessary finding of probable cause to believe the allegations in the petition were true. She said:

> The medical evidence we have right now from the [ER] doctor at Sibley, the [ER] doctor from Children's, Dr. Atkinson from her review of the medical records, from the neurology doctor, from the ophthalmology doctor said this is not possible.

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[4] D.C. Code § 16-2316(c) ("Where the petition alleges a child is a neglected child by reason of abuse, evidence of illness or injury to a child who was in the custody of his or her parent, . . . for which the parent . . . can give no satisfactory explanation shall be sufficient to justify an inference of neglect."). The District's petition exclusively relied on the permissive inference of neglect to satisfy its burden to demonstrate (1) D.O. was neglected, D.C. Code § 16-2301(9)(A)(i), and (2) D.O. was without proper parental care or control, D.C. Code § 16-2301(9)(A)(ii). *See infra*, Part IA.

* * *

> Accidents happen, but the bottom line is, the medical evidence we have today, Sibley, Children's, multiple doctors at Children's, say a simple fall, a simple drop from chest height to the hardwood floor didn't cause these significant injuries.

Pet. App. B. at 163-65. Nix then called CFSA supervisor Brooke Beander, who similarly testified:

> Q. And, from your review of any medical records that you have, who expressed concern that the report of the injury . . . could not have caused injuries as significant as those [D.O.] suffered?
>
> A. Every doctor that she seen from Sibley Hospital, the Children's ER, to ophthalmology to neurology to CAPC to PICU.
>
> * * *
>
> Q. And, where did you get the information that the consistent statement about the fall is not possibly the cause of these injuries.
>
> A. From every doctor from Sibley Hospital to the ER to the CAPC.

Pet. App. B. at 166-69. Despite lacking any medical record to support these representations and despite speaking with only two physicians, neither of whom stated that D.O.'s injuries were "not medically possible" or that Petitioners' account of the accidental fall did not satisfactorily explain her injuries, the District deliberately and knowingly represented the opposite. Moreover, the wording between Nix's statements and Beander's testimony

is too strikingly inaccurate and identical to be mere coincidence, suggesting prior coordination. Based on this fabricated evidence and perjured testimony, the court "reluctantly" found probable cause owing exclusively to the false representation that the medical community as a whole believed D.O.'s injuries were "not medically possible."

At trial, the District failed to produce one expert who would opine that either D.O.'s injuries were "not medically possible" or that Petitioners' account did not satisfactorily explain D.O.'s injuries. Drs. Atkinson and Zhao both testified that D.O.'s injuries were possible from a single impact to the back of the head, as Petitioners had described. Dr. Louis Vezina, a Children's radiologist, testified that he sees children with similar injuries "almost every day" and D.O.'s injuries were pretty typical with blunt force trauma like accidental falls. Dr. Vezina and Dr. Woo Kim, a Sibley Hospital emergency room physician, also testified that D.O.'s injuries were only "mild" to "moderate" in severity.

Dr. Atkinson's testimony was the crux of the District's case. She was twice asked what determination she was able to make "to a reasonable degree of medical certainty." Her first response was, "The fractures to [D.O.'s] skull are the result of significant impact trauma to the head." Pet. App. B at 172-73. Her second response was that D.O.'s head injuries "are the result of blunt force impact to her head." *Id.* at 179-80. Dr. Atkinson further explained that skull fractures are *always* "the result of some type of blunt force trauma to the skull" and that "any type of impact to the head is blunt force." *Id.* at 173, 178, 182. This includes the accidental fall as

described. When directly asked whether she believed that D.O.'s skull fractures were "explained or unexplained," Dr. Atkinson equivocated, "I have concerns about the degree of injury that I'm seeing with the fall as described." *Id.* at 176, 181. Undoubtedly, the "subjective belief or unsupported speculation" of a doctor, who admitted at trial to inappropriate conduct with Petitioners' daughter, does not qualify as an expert opinion as they were not based on any reliable methodology. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993). Despite being raised, the Court of Appeals failed to address the admissibility of Dr. Atkinson's testimony.

Conversely, Petitioners called five highly accomplished experts: two biomechanical engineers, two pediatric radiologist, and one pediatric neurosurgeon. Each of whom opined, to reasonable degrees of professional certainty, that D.O.'s injuries were consistent with Petitioners' account. These opinions were further supported with numerous peer-reviewed articles and case studies, demonstrating identical injuries from similar falls of infants from even a lower height. In total, nine experts, including four of the District's own, offered testimony and opinions favorable to Petitioners.

Yet, despite the overwhelming weight of evidence, the trial court ruled against Petitioners based solely on an unfavorable credibility determination of Petitioners, rather than affirmative evidence from the District, whose sole burden it was to prove neglect.[5] The trial court never found that

[5] Based on its unfavorable credibility determination, the trial

any medical provider or medical record stated that D.O.'s injuries were "not medically possible," the petition's sole allegation of neglect. It was only after the District failed to produce such evidence that the full extent of its previous misrepresentations became apparent.[6]

On appeal, Petitioners raised, *inter alia*, the District's use of fabricated evidence and perjured testimony and the glaring absence of expert testimony to support the trial court's drawing of the

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court discredited Petitioners' account of an accidental fall. Pet. App. B at 122-27. It then disregarded Petitioners' uncontradicted experts because those experts "were relying solely" on an account given by Petitioners. *Id.* at 123-24. Like all experts, Petitioners' experts actually relied on their education and experience, the academic literature, and the medical records to opine that D.O.'s injuries were consistent with a single vertical fall from a caregiver's arms, as Petitioners had described; otherwise, their testimony would have been inadmissible. The trial court erred in bypassing the necessity of expert testimony and ruling solely on the character of the parents.

[6] Petitioners also learned that the District destroyed Reddrick's handwritten notes after being subpoenaed and withheld additional discovery. A separate judge of the trial court reopened the neglect proceeding to compel production. While acknowledging that it withheld discovery, the District refused to produce those documents. The trial court ultimately ruled that procedurally it did not have jurisdiction to reopen the neglect proceeding. This, however, does not diminish that the District withheld and destroyed evidence in a matter where Petitioners' Due Process rights were at stake. *Cf. Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.").

permissive inference of neglect. The District, in turn, purposefully refused to deny or refute the unmistakable evidence in the record of misconduct. The District also failed to cite to any expert opinion that D.O.'s injuries were not satisfactorily explained.

Embarrassingly, when pressed at oral arguments to direct the court to a definitive expert opinion, the District could not do so. Instead, the District filed a letter with the court weeks after oral arguments—and long after briefing had concluded—in which it took a never before presented sentence from Dr. Atkinson's testimony out of context and argued for the first time that it was a part of her opinion. The court overruled Petitioners' objection to the District's *post hoc* arguments and afforded them no opportunity to rebut it. Pet. App. A at 13.

The District of Columbia Court of Appeals' unreported opinion fully obfuscated the District's misconduct from public scrutiny and rephrased Petitioners' arguments, rendering any suggestion of misconduct imperceptible. *See infra,* Part IB. Those rephrased arguments were then summarily dismissed with in a footnote.

With regard to the missing expert opinion, the court wrote, "Dr. Atkinson testified that D.O.'s skull fractures were the result of blunt force trauma impact to the head, and that a simple household fall should not have resulted in the degree of injury sustained by D.O." Pet. App. A at 9. This is flatly not consistent with Dr. Atkinson's opinion or supported by the record, as discussed above. The latter portion of this statement was the out-of-context sentence the District submitted after oral arguments. The court even failed to justify the

glaring contradiction this statement has with Dr. Atkinson's definitive testimony that D.O.'s injuries were consistent with a single vertical fall as Petitioners' had described. The Court of Appeals thus created affirmative evidence for the District and singularly relied on it to rule against Petitioners.[7]

Not to belabor the lower court's opinion, one additional issue that highlights the overwhelming absence of evidence and efforts taken to uphold the trial court's ruling is the Court of Appeals' holding that Petitioners deprived D.O. of proper care and control. The court did not cite evidence of a deprivation. Rather, according to the court, Petitioners failed to provide proper care because (1) their "behavior did not demonstrate appropriate care," (2) they waited until the very moment that D.O. exhibited any symptomology before seeking medical care, and (3) for additional factors unrelated to D.O.'s care.[8] Pet. App. A. at 10. Notably, the District's own witnesses attested to the appropriateness of Petitioners' behavior and decision making. Dr. Kim, the first physician to see D.O., asserted that the brief lapse of a few hours between the accident and coming to the hospital was not concerning and nothing raised a "red flag." He

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[7] Nowhere in the 118-pages of findings of fact and conclusion of law, written by the District and adopted nearly verbatim by the trial court, is this purported opinion of Dr. Atkinson stated. Pet. App. B. at 2-119. It was truly created in the first instance on appeal.

[8] The court confusingly held that Petitioners' military training, lack of hysterics, and lawful audio-recording of a mandatory follow up visit with Dr. Atkinson evidence a lack of proper care.

further attested, "to be honest with you, I felt [Petitioners] were quite appropriate." Dr. Zhao, likewise, attested that Petitioners showed the appropriate level of concern for their daughter. No expert testified that any decision of Petitioners caused any detriment to D.O.[9]

In so holding, the lower court departed from precedent set by this Court and created a *per se* rule that a parent fails to provide his/her child with proper care when electing not to seek medical treatment immediately following an accident, regardless of the severity of the accident, absence of symptomology, and lack of detrimental effect on the child. *See Troxel v. Granville*, 530 U.S. 57, 58 (2000) ("There is a presumption that fit parents act in their children's best interests; there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Simply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.").

The appearance of the Court of Appeals' decision is troubling. Although issues of first impression were raised, the court delivered an unreported opinion, in which it failed to address those issues, obscured clear and unrefuted misconduct by members of the bar, and conjured an expert opinion

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[9] The petition's only allegation of neglect is that D.O.'s injuries were "not medically possible." *See infra*, Part IA. Petitioners never received notice that they would have to defend their character and parental decision making at trial.

where non-existed. The number of issues present in the court's opinion cannot be addressed in a single writ for certiorari. This writ is thus limited to the District's use of fabricated evidence and perjured testimony as it presents the greatest danger to the inviolability of the Due Process Clause and because it substantially undermines the integrity of these sealed family proceedings—let alone the integrity of the bar.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DEPARTED FROM BASIC NOTIONS OF DUE PROCESS AND ANALOGOUS PROTECTIONS THIS COURT HAS ESTABLISHED

The fundamental liberty interest in a parents' right to the care, custody, and management of their children is not at issue. This *parental presumption* has been firmly established starting with *Meyer v. Nebraska* and proceeding through the present. 262 U.S. 390 (1923).[10] At issue are the substantive and procedural protections necessary to safeguard the parental presumption from unwarranted and malicious government interference into the sanctity of the family.

Petitioners appropriately appealed the District's use of fabricated evidence and perjured testimony.

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[10] *See also* Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 Conn. L. Rev. 1209, 1215 (1994).

In so doing, Petitioners argued that this misconduct encroached on several due process issues: notice, standing, jurisdiction, and fairness/prejudice. For reasons unknown, the Court of Appeals passed on answering these important questions, but its indifference does not diminish the gravity of these arguments.

A. Petitioners did not receive due process notice of the allegations of neglect as the only allegation in the District's petition was a fabrication

Putting aside the fabrications in the District's petition, the petition's only allegation of neglect was the purported existence of "not medically possible" injuries.[11] Pet. App. B at 158-59. The petition relies exclusively on the statutory permissive inference of neglect, rather than actual evidence of neglect. *See supra* n. 5. Petitioners were only expected to marshal the facts in their defense of this allegation, and in fact, did so quite effectively. In the short three-month period between D.O.'s seizure and the start of the trial, Petitioners were able to secure five highly accomplished experts—three of whom testified without compensation or compulsion—who would all opine to reasonable degrees of professional

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[11] The petition is so poorly written that it fails to state any clear allegation of neglect. Petitioners had to infer that this is the District's justification for the unlawful seizure of D.O. from the following sentence: "At that point, given the fact that the parents' explanation of the cause of injuries was not medically possible, and they refused to provide any additional accidental account, the cause of [D.O.'s] injuries is unknown, and non-accidental trauma cannot be ruled out." It is remarkable that the District justified its conduct on an inability to prove the negative.

certainty that D.O.'s injuries were medically possible and consistent with Petitioners' account of an accidental fall. These opinions were further supported with numerous peer-reviewed publications. In contrast, the District only had the subjective concerns of one admittedly inappropriate doctor. Petitioners never received notice that they would be expected to marshal evidence to defend their general character and parental decision making, which the trial court exclusively relied on to find against Petitioners.

When the fabrication of the petition's only allegation is considered, the petition becomes nothing more than an empty vessel making noise. As mentioned, both the drafter and attestor of the petition knew that no medical record or physician had informed the District that D.O.'s injuries were "not medically possible." Quite the contrary, the District was informed that her injuries "can be ruled as normal." So, if it is discovered that a petition is no longer viable, what is the appropriate remedy?

When analyzing the appropriate framework for assessing procedural due process in neglect/dependency proceedings, this Court has previously relied on the *Mathews v. Eldridge* balancing test. 424 U.S. 319 (1976); *see Santosky v. Kramer*, 455 U.S. 745, 745-46 (1982) (termination of parental rights). However, the District of Columbia has statutorily afforded greater protections in neglect proceedings. *In re Jam.J.*, 825 A.2d 902, 915 (D.C. 2003) (The District of Columbia's "neglect statute, which sets forth the process that is due, accordingly affords protections . . . similar to those made available to a criminal defendant.").

Accordingly, the appropriate framework in the District of Columbia should be whether the procedure is offensive to the concept of "fundamental fairness." *Medina v. California*, 505 U.S. 437, 443 (1992).

Under either framework, though, the only appropriate remedy was for the Court of Appeals to remand with instructions to vacate the petition and dismiss the matter without further proceedings. Without a valid petition providing Petitioners notice, the "risk of an erroneous deprivation of a private interest" was considerable and the complete absence of notice flatly "offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 443, 445. It is simply inconceivable that a family could be subjected to prolonged separation and a full-blown factfinding hearing without even rudimentary notice of the allegations against them. Finally, a valid petition also serves an important *res judicata* role in prohibiting the district from relitigating the same issues of fact and allegations of neglect.

B. Without a valid petition the District lacked standing and the Court lacked jurisdiction

Historically, state authorities sought to use their *parens patriae* authority to remove children based on little more than a belief that the parents followed an immoral lifestyle or failed to fulfill the authorities' expectations of ideal parenting. This Court departed long ago from antiquated notions that the state has carte blanche authority to intervene in the rights of parents and the sanctity of the family. State standing to intervene has rightfully been precluded

in cases where it inhibits the parents' right to, *inter alia*, establish a home and rear a child, control their child's education and religion, choose medical care for their child, and generally, the right to maintain the companionship, care, custody, and management of their child. *See generally, Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The state is restrained in these types of actions because they infringe upon a fundamental parental presumption, and only a "powerful countervailing interest" could warrant such interference. *Id.*

This is not to say that the state cannot intervene to protect a child from abuse or neglect, but any arbitrary exercise of state authority clearly fails to satisfy the requirement of a "powerful countervailing interest." Where the state's basis for such intervention is a fabrication and its petition a nullity, the state lacks any basis from which it could possibly override the parents' fundamental liberty interests. Thus, the state is not "entitled to have [a] court decide the merits of the dispute." *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) (*citing Warth v. Seldin*, 422 U.S. 490, 498 (1975)) (establishing the three-factor test for standing in federal courts).

Petitioners argued the District lacked standing because the petition contained only one allegation of neglect that the District knew to be a fabrication. Similarly, the trial court's necessary finding of probable cause to believe the allegations in the petition were true was void as it was precured through the use of perjured testimony. Substantively, there was no valid "powerful countervailing interest" that warranted interfering

in the sanctity of Petitioners' family.[12] Procedurally, there was no valid petition filed with the trial court, and served on Petitioners, from which the District could assert standing.

Yet, the Court of Appeals mistakenly represented this argument as something completely different: "[T]he District lacked standing to file the neglect petition . . . without a determination that there was probable cause to believe the allegations were true." First, the court's rephrased argument is illogical. No one would contend that the District's ability to file a neglect petition was contingent on the trial court making a finding, which could only be made after the District filed a petition. Second, the court's rephrased argument fails to address the absence of a "powerful countervailing interest" that justified the District's infringement into Petitioners' family. Third, it ignores the fact that the trial court failed to find that D.O.'s injuries were "not medically possible," the one finding it was obligated to make pursuant to this petition. Finally, the court failed to address the procedural problem that arises in the absence of a valid petition filed with the trial court or served on Petitioners. *See also, supra* Part 1A (notice). The implicit holding from this is that the District can seize a child and subject any family to a full-fledged neglect proceeding without either a valid petition or probable cause.

No civil or criminal proceeding, in either state or federal court, would be permitted to proceed if it

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[12] Petitioners cannot say what was the District's "interest" in fabricating evidence, but the facts suggest it was done to avoid accountability for the District's abuse of D.O. by Dr. Atkinson, a state actor, and for the District's unlawful seizure of D.O.

were known that the initiating document (i.e. the complaint, indictment, petition, etc.) was a fabrication, or if a judicial determination was obtained through the use of fraud, misrepresentations, or misconduct. *See, e.g.*, Fed. R. Civ. P. 11 (sanctions for improper purpose); Fed. R. Civ. P. 60 (relief from judgment based on fraud, misrepresentations, or misconduct); Fed. R. Crim. P. 5.1(f) (dismissal of complaint for a lack of probable cause); D.C. Code § 16-2324(a) (setting aside Family Court orders obtained by fraud). The only appropriate remedy is reversal. This is even more true where the ultimate judicial determination was inconsistent with the original allegation. Yet, the Court of Appeals has now held otherwise in the context of neglect proceedings.

With regard to the trial court's jurisdiction over this neglect proceeding and, by extension, jurisdiction over Petitioners' family, the reasoning above applies equally. The trial court only has subject matter jurisdiction over "proceedings in which a child . . . is *alleged* to be delinquent, neglected, or in need of supervision." D.C. Code § 11-1101 (a)(13) (emphasis added). Just as a civil complaint must allege sufficient facts to establish jurisdiction, the District's petition is the vehicle that alleges a neglected child and grants the court jurisdiction. When discovered that the petition's sole allegation of neglect is a fabrication or lacks probable cause, the trial court lacks jurisdiction to hear the matter further. The Court of Appeals has now effectively held that a neglect proceeding may continue, a great expense and suffering to the innocent family, despite a judicial determination that no probable cause exists to believe the

allegations in the petition are true, the lowest possible judicial standard. That is an affront to basic pleading standards, judicial efficiency, and the rights of the accused. *See, e.g.*, Fed. R. Civ. P. 12(b); Fed. R. Crim. P. 5.1(f).

C. The District's use of fabricated evidence and perjured testimony rendered the entire neglect proceeding fundamentally unfair

Though it presented an issue of first impression, the Court of Appeals wholly dispensed with any discussion of the prejudice associated with the District's use of fabricated evidence and perjured testimony, despite being raised in Petitioners' brief. The Court's silence is remarkable as it is routine for an appellate court to discuss the harmful affect that a trial error has on the outcome of the proceeding. Where fundamental liberty interests are at stake, such analysis is necessary.

In answering this novel issue, the Court of Appeals should have looked to this Court's precedent in criminal matters where the state has incorporated fabricated evidence and perjured testimony. The criminal analog is appropriate not only because the District "affords protections [in neglect proceedings] . . . similar to those made available to a criminal defendant," but also because the seizure and prolonged removal of children from their parents is a federal constitutional issue, warranting a heightened level of protection commonly afforded to criminal defendants. *In re Jam.J.*, 825 A.2d 902, 915 (D.C. 2003). Thus, *Napue*, *Bank of Nova Scotia*, and their many progeny were the appropriate springboard for the court to begin its analysis. *Bank of Nova Scotia*

v. United States, 487 U.S. 250 (1988); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). These cases make clear that the state's use of fabricated evidence and perjured testimony is a *Chapman* constitutional error. *Chapman v. California*, 386 U.S. 18 (1967). This would mean that "before a federal constitutional issue can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. Because the Court of Appeals ignored the prejudice associated with the District's misconduct, it cannot be said now that the error was harmless.

Furthermore, the burden was on the District to demonstrate that its use of fabricated evidence and perjured testimony was harmless. *Id.* Yet, the District made no attempt to address or refute the allegations of misconduct or to argue that such misconduct was harmless. The District's silence is itself a concession of the validity of said misconduct. Regardless, any attempt to refute the prejudice of the District's conduct is futile. Because the fabricated evidence was the sole allegation in the petition, Petitioners entire trial strategy and the evidence they presented was to refute this one untrue allegation, which ultimately was not the basis for the trial court's ruling. The degree of prejudice is considerable and would not be tolerated in a criminal proceeding.

Of note, considering that neglect proceedings are civil in nature, there exists an issue as to whether the error ought to be held harmless beyond a reasonable doubt. The District of Columbia has previously adopted and applied the standard articulated in *Kotteakos* to civil cases. *R. & G.*

Orthopedic Appliances and Prosthetics, Inc. v. Curtin, 596 A.2d 530, 538-41 (D.C. 1991) (citing *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) ("But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.")). Even under this lower standard, reversal was necessary because the District's use of fabricated evidence and perjured testimony categorically affected the substantial rights of Petitioners. *See also* Fed. R. Civ. P. 61 (identical to the District's rule of procedure requiring consideration of errors that affect a party's substantial rights).

II. THIS IS A VITALY IMPORTANT AND RECURRING ISSUE

Certiorari is warranted because the decision below is not compatible with either this Court's precedent or basic principles of due process. By ignoring these issues and rendering its opinion unreported, the Court of Appeals avoided public scrutiny of these issues. But its message was clear: there will be zero transparency and accountability for the District's use of fabricated evidence and perjured testimony in a child neglect proceeding.

The legitimacy of sealed neglect proceedings rests in large part on the sense that the courts will ensure that they are conducted fairly with due regard to the rights of families. In the District of Columbia, the Court of Appeals alone delivers accountability when

misconduct occurs and ensures the integrity of the bar. There is no intermediate appellate court on which the public may rely. When the Court of Appeals refuses to deliver justice, it transfers that responsibility to this Court. That is the wrong course of action, and this Court ought to correct it.

Irrespective of the lower court's inaction, the inability of public officials to conduct themselves with regard for the truth is a problem. The recent public attention that has been directed towards law enforcement, in particular, demonstrates how wide spread this issue has become. When it comes to the truth, there should not be two separate standards: one for the state and a second for everyone else. The public has the absolute right to expect that state officials do not fabricate evidence or perjure themselves before a tribunal. When it relates to our children, this expectation should be even greater.

This case is an ideal vehicle for the Court to reassert that such misconduct, especially from members of the bar, will not be tolerated. First, the District's misconduct is unmistakably evident in the record. The District, for its part, has refused to repudiate this fact. Second, the constitutional question was squarely presented in the District of Columbia Court of Appeals (though that court did not adequately address the issue). This Court should not allow a lower court to neuter a petitioner's ability to seek review by simply ignoring issues and filing unreported opinions. The Court of Appeals had an obligation to fairly and fully consider dispositive issues supported with case law and the record. At a minimum, this matter ought to be remanded with instruction to fully address

Petitioners' arguments and the inconsistencies between the Court of Appeals' holding and this Court's precedent.

Although this matter presents issues of first impression as they relate to civil child neglect proceedings, the constitutional issues raised and appropriate remedies have been firmly established by the Court in the context of other civil and criminal proceedings. Thus, the facts and posture of this case provide an excellent opportunity to rightly extend the Fifth Amendment's prohibition on the state's use of fabricated evidence and perjured testimony to civil child neglect proceedings, where the best interests of the child are indisputably paramount.

III. PETITIONERS' *PRO SE* STATUS SHOULD NOT DISCOURAGE THE COURT FROM GRANTING CERTIORARI

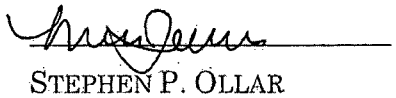
Petitioners appreciate the importance of being represented by qualified members of the Court's bar, and their *pro se* status should not be considered presumptuous. After Petitioners and their families spent three quarters of a million dollars in legal fees to dispute the District's baseless allegations and regain custody of their daughter, Petitioners can ill afford additional debt, especially in these difficult and uncertain economic times. Petitioners are fortunate they possess the legal training and education necessary to effectively advocate for themselves, but it is understood that Petitioners will have to retain counsel should the Court grant

certiorari. In the interim, Petitioners only ask that the Court afford the instant writ its due consideration without regard to Petitioners' *pro se* status.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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