No. 21-

IN THE

Supreme Court of the United States

ERIC E.,

Petitioner,

v.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition for Writ of Certiorari (Petition) originates from child custody proceedings initiated by Respondent the Los Angeles County Department of Children and Family Services (DCFS) against Petitioner Eric E. (Father), a career military veteran and father of his son Adam E., who was 16 years old at the time. After a Court trial, custody was awarded to Adam E.'s mother over the objection of Father, who had asserted (among other contentions) his California and Federal Constitutional right to a jury trial of the factual allegations against him. The California Court of Appeal dismissed Father's appeal as moot in light of the age of Adam E., who was approaching adulthood while the appeal was pending. Appendix (App.) 3a. The California Supreme Court denied review. App. 1a.

The questions presented are:

1. Whether, under the incorporation doctrine, the Seventh Amendment right to a jury trial should apply to the States for parents in quasi-prosecutorial dependency proceedings, wherein the finder of fact determines the truth or falsity of allegations which threaten the deprivation of a fundamental liberty interest in child custody.

2. Whether, independent of the Seventh Amendment, the Due Process Clause of the Fourteenth Amendment requires States to provide parents the right to a jury trial in quasi-prosecutorial dependency proceedings, wherein the finder of fact determines the truth or falsity of allegations which threaten the deprivation of a fundamental liberty interest in child custody.

LIST OF ALL PARTIES

The Petitioner is Eric. E. The Respondent is the Los Angeles County Department of Child and Family Services.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Los Angeles County Department of Children and Family Services v. Eric E., Los Angeles County Superior Court Case No. 18LJJP00620C. Order dated July 31, 2020.

Los Angeles County Department of Children and Family Services v. Eric E., California Court of Appeal Case No. B308818. Order dated August 13, 2021.

Los Angeles County Department of Children and Family Services v. Eric E., California Supreme Court Case No. S271010. Denial of review dated December 1, 2021.

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Petitioner Eric E. respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of the County of Los Angeles.

OPINIONS BELOW

The unreported Order of the Los Angeles County Superior Court in *Los Angeles County Department of Children and Family Services v. Eric E.*, Los Angeles County Superior Court Case No. 18LJJP00620C, is contained in App. 4a.-10.a.

The unreported Order of the California Court of Appeal in *Los Angeles County Department of Children and Family Services v. Adam E.*, California Court of Appeal Case No. B308818, is contained in App. 2a.-3a.

The unreported denial of review of the California Supreme Court in *Los Angeles County Department of Children and Family Services v. Eric E.*, California Supreme Court Case No. S271010, is contained in App. 1a.

JURISDICTION

Jurisdiction is conferred under 28 U.S.C section 1257. The California Supreme Court denied review on December 1, 2021. App. 1a. This Petition is therefore timely filed.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the United States Constitution provides:

> 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.

INTRODUCTION

In *Troxel v. Granville,* 530 U.S. 57, 65 (2000), this Court characterized the liberty interest in the care, custody, and control of children as "perhaps the oldest of the fundamental liberty interests recognized by this Court." Child dependency proceedings have also been characterized by this Court as "[bearing] many of the indicia of a criminal trial." *Santosky v. Kramer*, 455 U.S. 745, 762 (1982). Loss of custody also carries with it the risk of parental inclusion in child abuse indices, even after the child reaches the age of maturity. Yet, with limited exception, States do not grant parents the option of a jury

trial for resolution of the factual allegations which place parents at risk of loss of child custody.[1] Consistent with the Fourteenth Amendment's Due Process provision, this Court should apply the Selective Incorporation Doctrine to the jury trial right in the Seventh Amendment for child custody proceedings. This is consistent with the fundamental liberty interest at stake, the prosecutorial nature of the proceedings, and the residual harm to parents when custody is lost. This is the first of the two questions presented. In the alternative, this Court should require States to provide for jury trials based solely on the Fourteenth Amendment's Due Process provision, independent of the Seventh Amendment. This is the second of the two questions presented.

STATEMENT OF THE CASE

A. Factual Background

On May 5, 2020, DCFS filed a Juvenile Dependency Petition (Dependency Petition) under California Welfare and Institutions Code sections 300(a), (b)(1), and (c). (1CT 1-5.)[2] On May 8, 2020, the detention hearing was held before Referee Stephanie Davis. (1CT 64.) Father was arraigned and emergency detention orders were entered; the hearing was continued for the Hon. Michael Kelley to make detention determinations. (1CT 65-66.) On May 11,

1. The exceptions are the States of Texas, Wisconsin, Oklahoma, Virginia, and Colorado.

2. The record consists of two transcripts, referred to as "1CT" (pp. 1-213) and "2CT" (pp. 214-373); there is one non-sequentially numbered reporter's transcript, referred to as "1RT" (pp. 1-to 213-300, 301-to 547-600, 601 to 867-900).

2020, Judge Kelley heard further arguments of counsel and took the matter under submission. (RT 135.)

Father filed a motion to strike the Dependency Petition on grounds of collateral estoppel/res judicata and **moved the juvenile court for a jury trial**; alternatively, he requested that an advisory jury be empaneled. (1CT 143.)

A trial setting conference was held on July 20, 2020. The juvenile court set a briefing schedule for both motions and a hearing on August 3, 2020. (RT 304.)

On July 31, 2020, the juvenile court denied Father's motion to strike the petition on the basis of collateral estoppel/res judicata. The court found that this "is a new claim not previously pled or adjudicated, and based on additional moot facts." (1RT 407.) **Father's motion for a jury trial was denied** as the court stated that the cases cited were "extreme factual" situations and that an empaneled advisory jury would not necessarily assist the court in its fact-finding journey. App. 4a.-10a.; (1RT 403-404.)

On August 3, 2020, the adjudication hearing commenced. There were several witnesses, including Adam E., his mother, and his paternal great-uncle, Daniel F. Adam E. testified regarding incidents related to the allegation of being forced into a car, and treatment of his toe with hydrogen peroxide. (1RT 534-538.) With regard to being allegedly "forced" into a car, Adam E. testified about the trip to Utah with Father. He knew that Father wanted him to attend his retirement ceremony in Utah. (1RT 534.) Teen testified that Father was a career military naval officer. (Ibid.) He knew this was very important to his

father. (1RT 535.) Adam E. testified that he participated in the ceremony and was presented with the flag. He also testified that during the weekend there, he played basketball with Father and his Navy crew. (1RT 535.)

Daniel F. testified in his capacity as a visitation monitor and a percipient witness. (1RT 819-820.) He testified that he had frequently seen Father's parenting style with Teen and had never seen Father get physically violent with him. (Ibid.) He had, however, seen Father overseeing homework, taking Adam E. swimming, and engaging in sports activities. (1RT 820.)

Daniel F. was aware of the trip to Utah planned for Father's retirement from the military. (1RT 821.) He was present when father picked Teen up from school. (Ibid.) He testified that when Adam E. came to the car, he kind of bolted away and Father placed him in a kind of bear hug and brought him back over to place him in the back seat of the car. (Ibid.) He testified that he was in the vehicle front seat when they drove away from the school. (1RT 821.) He testified that Father did not run any stop signs or drive dangerously or erratically. (1RT 822.) There was never any physical altercation between father and son on the trip to Utah. (1RT 823.)

The juvenile court subsequently set a briefing schedule. Father filed his brief in opposition on August 20, 2020. (2CT 317.) On August 21, 2020, the juvenile court denied DCFS's motion for disentitlement and its renewed request to have the Father arrested for failure to appear in court. (2CT 327.)

Father then presented his motion to dismiss the case pursuant to Welfare and Institutions Code section 350, subdivision (c), asserting that DCFS failed to meet its burden of proof and the petition should be dismissed. (2CT 328-333.) The juvenile court denied Father's motion.

The juvenile court found sufficient evidence was presented to overcome the motion to dismiss for failure to meet their burden of proof. The court found a credible risk of future physical violence by Father who "evidenced a controlling nature, forcing Adam to conform to his will." (2CT 330.) The court found credible evidence that Father in 2017 pushed Adam E. into his car and pushed him into a drum set. (Ibid.) Adam E.'s testimony that he felt his father needed to "control" him was found credible and Mother's testimony that Father once said, in frustration, that he could "string Adam up by his ankles," credible and of sufficient evidentiary value as to support the teen being at substantial risk of serious harm. (2CT 331.)

Moreover, the juvenile court found substantial evidence Adam E. exhibited anxiety and untoward aggressive behaviors when he testified that he would take a knife when he went to Father's house in case he needed to "protect" his sister. (2CT 331.) The court found Father's conduct caused Adam E. emotional distress. (2CT 332.)

B. Procedural Background

On November 9, 2020, Father timely appealed the juvenile court's jurisdiction and disposition findings. (2CT 372-373.) Father contended that the new petition of the DCFS should have been stricken on grounds of res judicata and collateral estoppel, and that there was a lack

of evidence to support dependency jurisdiction. Father also contended that he was entitled to a jury trial under State and Federal Constitutional Due Process.

After briefing was completed (and after multiple requests for extensions by the DCFS), on July 29, 2021, the Court of Appeal issued an Order to Show Cause Re Dismissal of Appeal as Moot (OSC), with the Court of Appeal citing Adam E.'s upcoming 18th birthday on January 9, 2022, and the trial court's June 9, 2021, minute order terminating jurisdiction over the Teen. After Father and DCFS both provided briefing in response to the OSC, on August 13, 2021, the Court of Appeal issued an order dismissing the appeal as moot. App. 2a.

Father timely filed a Petition for Review in the California Supreme Court. The Petition for Review was denied on December 1, 2021. App. 1a.

REASONS FOR GRANTING CERTIORARI

I. The Seventh Amendment right to a jury trial is one of the last in the Bill of Rights to be made applicable to the States

Within the last 15 years, this Court has addressed the issue of incorporation of the Second and Eighth Amendments to the States. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), it was held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Timbs v. Indiana*, 139 S. Ct. 682 (2019), it was held that the Eighth Amendment's proscription against excessive fines

applies to the States, relying again on the Due Process Clause of the Fourteenth Amendment. This leaves only the Third Amendment (addressing the quartering of soldiers), and the Seventh Amendment yet to be held applicable to the States. "Only a handful of the Bill of Rights protections remain unincorporated." *McDonald v. City of Chicago, supra*, 561 U.S. at 765.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Although this Court has yet to consider the question of the whether the Seventh Amendment should apply to the States in juvenile dependency proceedings, in the early 20th Century it generally acknowledged that "[w]hile the Seventh Amendment governs federal court proceedings, it does not regulate civil proceedings in state court." *Minneapolis & St. Luis R. Co. v. Bombolis*, 241 U.S. 211, 217-218 (1916). As discussed below, in the century since *Bombolis* was decided the analysis of whether one of the Constitutional amendments in the Bill of Rights should apply to the States has developed significantly, and hinges on the due process nature of the liberty interest at issue. This nation has for centuries valued the parent-child relationship as fundamental to its liberties and traditions.

II. Parents have a fundamental Due Process liberty interest in child custody, as recognized by this Court and the Federal Courts of Appeal

In *Santosky v. Kramer, supra,* 455 U.S. 745, this Court confirmed the "fundamental liberty interest of natural parents in the care, custody, and management of their child…." In that case, the Court held that before a State could sever completely and irrevocably the rights of parents in their natural child, due process required that the State support its allegations by at least clear and convincing evidence. The Court found that the "fair preponderance of the evidence" standard was inconsistent with due process because the private interest in parental rights affected was substantial and the countervailing governmental interest favoring the preponderance standard was comparatively slight.

More recently, this Court addressed the issue of grandparent visitation in *Troxel v. Granville, supra,* 530 U.S. 57. At issue was a Washington statute that permitted "[a]ny person" to petition the superior court for visitation rights "at any time," and authorized the trial court to grant such visitation if it would "serve the best interest of the child." The paternal grandparents petitioned for visitation with their two granddaughters after their son committed suicide, and the children's mother notified them she wished to limit their visitation with her daughters to one short visit a month. The parents had never married and had separated two years before the father died. Before his death, the father had lived with the paternal grandparents and had regularly brought his daughters to his parents' home for weekend visits.

Justice O'Connor's plurality opinion in *Troxel*, in which Chief Justice Rehnquist, and Justices Ginsburg and Breyer joined, observed that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, *supra*, 530 U.S. at 66. The plurality opinion concluded that the Washington statute, as applied in that case, violated this fundamental liberty interest. *Id.* at p. 67.

California courts have expressly acknowledged the "fundamental liberty interest" all parents have in the custody of their children as articulated in *Santosky v. Kramer* and have further recognized that this liberty interest "may not be extinguished without due process. [Citation.]" *In re James Q.* (2000) 81 Cal.App.4th 255, 263. *See also In Re Marriage of Harris* (2004) 34 Cal.4th 210; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242.)

Parental claims that children were unlawfully removed from their custody "should properly be assessed under the Fourteenth Amendment standard for interference with the right to family association." *Hardwick v. County of Orange* (9th Cir. 2019) 980 F.3d 733. The Ninth Circuit in *Hardwick* emphasized the parental right of custody as the "oldest" fundamental right recognized by the United States Supreme Court:

> '[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].' *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *see e.g., Pierce v. Soc'y*

> *of the Sisters*, 268 U.S. 510, 530, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (requiring parents to send their children to public school 'unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control'). Thus, parents have both a constitutional interest in 'the companionship of their children' and a 'constitutionally protected interest in raising their children.' *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

Considering the indisputable fundamental liberty interest at issue, Father is entitled to a jury trial and the Petition should be granted to confirm this right. The California Supreme Court has historically required a jury trial in *civil* cases implicating fundamental liberties and State Constitutional Due Process protection, irrespective of English common law. For example, in *In Re Gary W.* (1971) 5 Cal.3d 296, the California Supreme Court addressed the question of whether persons subject to confinement proceedings under the California Welfare and Institutions Code are entitled, upon request, to a jury trial. The Court concluded that the right applies, as "interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings and that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction." Id. at 307. *See also People v. Smith* (1971) 5 Cal.3d 313, 317 [due process requires jury trial in proceedings to extend commitment to California Youth Authority].

In this case, the threat of involuntary loss of custody of a child—the oldest fundamental liberty interest recognized by the United States Supreme Court—cannot be undertaken without the right of a trial of peers. California courts which have denied the right to a jury trial in civil cases have done so by expressly *rejecting* assertion of a fundamental liberty interest. For example, in *County of Sutter v. Davis, supra*, 234 Cal.App.319, the California Court of Appeal addressed the question of whether the appellant was entitled to a jury trial on the issue of paternity and payment of child support. The Court denied the request not because of English common law, but because the issue of paternity did not implicate a fundamental liberty interest. On the contrary, the "only direct consequence of an adjudication of paternity is an obligation to pay money." Id. at 328, citing *County of El Dorado v. Schneider* (1987) 191 Cal.App.3d 1263, 1270. That is quite different than the involuntary loss of custody of a child. Indeed, the appellant in *County of Sutter v. Davis* was seeking to *avoid* custody and the child support payments which would flow from a finding of paternity. In the case herein, Father is seeking to *retain* custody.

III. Both the fundamental liberty interest in child custody and the Seventh Amendment right to a jury trial are consistent with ordered liberty and are deeply rooted in the Nation's history and tradition

In *McDonald v. City of Chicago*, *supra,* 561 U.S. 742, this Court applied the Second Amendment right to keep and bear arms to the States with respect to possession of a handgun in the home. In reaching this conclusion, the Court confirmed the modern analytical framework for the incorporation doctrine, which is grounded in Due Process:

> ….we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncan,* 391 U. S., at 149, or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition,' *Washington* v. *Glucksberg,* 521 U. S. 702, 721 (1997) (internal quotation marks omitted).

McDonald v. City of Chicago, supra, 561 U.S. at 767.

> The Court must decide whether that right is fundamental to the Nation's scheme of ordered liberty, *Duncan*, *supra*, at 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491, or, as the Court has said in a related context, whether it is "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg,* 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.

Id. at 744.

> For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause.

Id. at 746.

Currently, all States have either Constitutional provisions or statutes securing jury trial rights in actions at law. At the time the Seventh Amendment was ratified,

the colonies all had Constitutions with provisions securing jury trial rights. California has a Constitutional provision (Article I, Section 16) providing that the right to a jury is "*secured to all,*" and a statute (California Civil Code section 592) ensuring the right to a jury trial in specified civil cases, including "actions…for injury".

The liberty interest in child custody is "deeply rooted in this Nation's history." Alternatively, it is "fundamental" to the Nation's scheme of ordered liberty. This Court has acknowledged the fundamental liberty interest in child custody in a long line of cases dating back to 1923. See *Santosky v. Kramer, supra*, 455 U.S. 745, 753 ["…. freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," citing *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978); *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore* v. *East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley* v. *Illinois*, 405 U.S. 645, 651-652 (1972); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); and *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

In the oldest of the cases cited above, *Meyer v. Nebraska*, *supra,* 262 U.S. 390, a Nebraska law prohibited teaching in a language other than English or teaching a foreign language to a child who had not completed the 8th grade. In striking down the Nebraska law, this Court defined the liberty interest guaranteed by the Fourteenth Amendment's Due Process clause as denoting this Court defined the liberty interest guaranteed by the Fourteenth Amendment's Due Process clause as denoting

> "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, ***establish a home and bring up children***, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as ***essential to the orderly pursuit of happiness by free men***." (Emphasis added.)

Id. at 399.

In *Troxel v. Granville*, *supra,* 530 U.S. 57, this Court reiterated that the parental interest in "the care, custody, and control of their children" is ""perhaps the oldest of the fundamental liberty interests recognized by this Court" and reaffirmed the validity of such long-standing precedents as the above-referenced *Meyer v. Nebraska*, 262 U.S. 390, 401 [right of parents to control education of their children]; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) [right to direct upbringing and education of children]; and *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944) ["the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." See also *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972) ["***primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition***," particularly in matters of "moral standards, religious beliefs, and elements of good citizenship" (emphasis added)].

IV. Dependency proceedings are quasi-prosecutorial, and subject parents to the jeopardy of inclusion in child abuse data bases even after the child reaches maturity

Child dependency proceedings have been characterized by this Court as "[bearing] many of the indicia of a criminal trial." *Santosky v. Kramer*, *supra,* 455 U.S. at 762. In *Brittain v. Hansen* (9th Cir. 2005) 451 F.3d. 982, 989-990, the Ninth Circuit expanded upon this characterization:

> When the state seeks to terminate parental rights due to child abuse, the state is required to prove abuse or neglect by clear and convincing evidence. *Santosky*, 455 U.S. at 769-70. Such hearings necessarily are adversarial in nature, with the government bringing accusations of fault against parents. *Id.* at 748, 759-62 ("[T] he factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial") (citations omitted). When the government brings legal actions against individuals and seeks to deprive them of liberty interests, the constitutional concerns are at their zenith. *See Santosky*, 455 U.S. at 756 (explaining that termination of parental rights based on child abuse requires heightened constitutional scrutiny because the actions are "*government-initiated proceedings* that threaten the individual with a *significant deprivation* of liberty or stigma") (internal quotations and citation omitted, emphasis added); *see also In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (requiring proof beyond a reasonable doubt for criminal convictions).

In *Miller v. Gammie* (9th Cir. 2003) 335 F.3d 889, the Ninth Circuit *en banc* addressed the question of whether a social worker had absolute immunity in a civil rights action in connection with the placement of a minor with prior sexual abuse history into a private home without disclosing that history to the parents. Citing *Myers v. Contra Costa County Dept. of Social Services* (9th Cir. 1987) 812 F.2d 1154, 1157, the Court recognized that "*the initiation and pursuit of child-dependency proceedings were prosecutorial in nature* and warranted absolute immunity on that basis." Id. at 896. (Emphasis added.) The Court elsewhere confirmed "immunity for social workers only for the discretionary, *quasi-prosecutorial decisions to institute court dependency proceedings to take custody away from parents*." Id. at 899, citing *Myers v. Contra Costa County, supra*, 812 F.2d at 1157. (Emphasis added.) Subsequent Ninth circuit cases have confirmed the prosecutorial nature of dependency proceedings. *See, e.g., Hardwick v. County of Orange* (9th Cir. 2017) 844 F.3d 1112, 1115.

California cases are in accord with the Ninth Circuit. *See, e.g., Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal. App. 4th 456, 467 ["a social worker's decision to initiate dependency proceedings is a quasi-prosecutorial decision immunized by [Government Code] section 821.6"]; *McMartin v. Children's Institute International* (1989) 212 Cal. App. 3d 1393, 1404 ["Child services social workers are entitled to absolute immunity in performing quasi-prosecutorial functions such as initiating and pursuing dependency petitions in cases of suspected child abuse or neglect"].

As a result of the prosecutorial nature of child-dependency proceedings, social workers typically have immunity from civil liability, just as criminal prosecutors have immunity. The immunity is not absolute. In California, for example, it does not extend to wrongdoing such as perjury, fabrication of evidence, and failure to disclose exculpatory evidence with malice. *See* Government Code section 820.21, which applies specifically to juvenile court social workers.

There are other aspects of dependency proceedings which illustrate its prosecutorial nature. For example, indigent parents are afforded the right to have counsel appointed, as to indigent defendants in criminal prosecutions. Welfare and Institutions Code section 317.

V. Dependency proceedings are actions at common law which impact the legal rights of parents to the custody and care of their children

With respect to the "Suits at common law" component of the Seventh Amendment, the inquiry is whether such proceedings are actions in equity or admiralty. As this Court explained in *Pernell v. Southall Realty*, 416 U.S. 363, 374-375 (1974):

> "'while the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common law forms of action recognized at that time.'" *Curtis v. Loether,* 415 U. S. 189, 415 U. S. 193 (1974). The phrase 'suits at common law' includes not only suits 'which the *common* law recognized

> among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.' *Parsons v. Bedford,* 3 Pet. 433, 28 U. S. 447 (1830) (emphasis in original). Whether or not a close equivalent to § 11501 existed in England in 1791 is irrelevant for Seventh Amendment purposes, ***for that Amendment requires trial by Jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty***. *See Curtis v. Loether, supra,* at 415 U. S. 195. (Emphasis added.)

Child dependency proceedings are actions at law, not equity, and are certainly not actions in admiralty. More importantly, modern legal scholars recognize that child custody proceedings in the United States have always been common law actions, not actions in equity. *See* Sarah Abramowicz, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody,* Columbia Law Review Vol. 99:1344, 1348, fn. 16: In nineteenth century America "most child custody cases were heard by courts of common law rather than by courts of chancery." English law in 1971 confirms that the equivalent of modern dependency proceedings were

likewise actions at common law. The closest English case to the relevant time period of 1791 is *Rex v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763). (KB referring to the King's Bench, or "Rex".) In that case, the court granted itself discretion (upon a petition for habeas corpus) to release to a child "improperly restrained" its legal guardian, whether that guardian be the mother or the father. Previously, the King's Bench granted itself no such discretion to release custody to the mother. The Court proceeded to refuse delivery of the child to the father's custody.

This Court has acknowledged that actions before the King's Bench were indeed actions at common-law, citing *Rex. V. Delaval*:

> "….common-law courts sometimes ordered or considered ordering release in circumstances that would be beyond the reach of any habeas statute ever enacted by Congress, such as release from private custody. See, *e.g.*, *Rex* v. Delaval, 3 Burr. 1434, 1435-1437, 97 Eng. Rep. 913, 914 (K. B. 1763) (release of young woman from "indentures of apprenticeship"); *Rex* v. *Clarkson*, 1 Str. 444, 93 Eng. Rep. 625 (K. B. 1722) (release from boarding school); *Lister's Case*, 8 Mod. 22, 88 Eng. Rep. 17 (K. B. 1721) (release of wife from estranged husband's restraint). What matters is that all these cases are about release from restraint.

Department of Homeland Security v. Thuraissigiam, 140 S.Ct. 1959, 1972.

The remedy sought by the DCFS in this case, removal of child custody, also directly impacts the legal right of Father to the custody and care of Adam E. *See Tull v. United States*, 481 U.S. 412 (1987) [an action for civil penalty is similar to common-law remedies to punish culpable individuals which could only be enforced in courts of law, since the legislative history of the Clean Water Act reveals that Congress wanted the United States District Court to consider the need for retribution].

Further, the central underlying factual issues in the DCFS dependency proceeding against father was a claim of injury to Adam E. [application of hydrogen peroxide]. Injury claims are actions at law, not equity. *See Workman v. New York City*, 179 U.S. 552, 581 (1900).

With respect to the "value in controversy to exceed twenty dollars" component of the Seventh Amendment, the financial ramifications of child custody are incalculable. As noted in Section VI, *infra*, loss of custody places parents at risk of inclusion of child abuse indices, require disclosures for future employment, and in the case of Father resulted in increased child support payments in excess of twenty dollars.

VI. Although Adam E. has now reached the age of maturity, this action is not moot pursuant to established exceptions

The California Court of Appeal dismissed Father's appeal as moot, as Adam E. was approaching the age of maturity while the appeal was pending. App. 2a. He has now reached the age of maturity. Yet there are several established exceptions to mootness which should apply.

A. The exception of "collateral consequences" applies as Father remains in jeopardy of inclusion in California's Child Abuse Central Index, and must report the loss of custody to potential employers

The doctrine of "collateral consequences" as an exception to mootness was first applied by this Court in *Sibron v. New York,* 392 U.S. 40, 55 (1968). The "essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary." *United States Parole Comm'n v. Geraghty*, 455 U.S. 388, 412 (1980).

Not only has Father lost custody of his child—the loss of a fundamental liberty interest—he is subject to the power of the government to impose the residual penalty of identification in a "Child Abuse Central Index" (CACI) pursuant to California's Child Abuse and Neglect Reporting Act (CANRA), Penal Code section 11164 et seq. CANRA authorizes persons to report suspected child abuse or neglect to certain public agencies, including a county welfare department. (Pen. Code, §§ 11165.7, 11165.9, 11166.) The CANRA defines child abuse or neglect to include "physical injury or death inflicted by other than accidental means upon a child by another person" (Pen. Code, § 11165.6) and "the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare" (*id.*, § 11165.2).

An agency reviewing a report of alleged child abuse or neglect must forward to the Department of Justice "a

report in writing of every case it investigates of known or suspected child abuse or severe neglect" after the agency "has conducted an active investigation and determined that the report is not unfounded … ." (Pen. Code, § 11169, subd. (a).) The reporting agency must notify the known or suspected child abuser that he or she has been reported to the CACI. (*Id.*, § 11169, subd. (b).) The DOJ is required to "maintain an index of all reports," called the CACI. (Pen. Code, § 11170, subd. (a)(1); see *id.*, § 11169, subd. (b).) The DOJ acts only as "a repository" of reports to be maintained in the CACI, while the reporting agencies are "responsible for the accuracy, completeness, and retention of the reports … ." (*Id.*, § 11170, subd. (a)(2).) The DOJ must retain reports for a period of 10 years from the date the most recent report is received. (*Id.*, § 11170, subd. (a)(3).)

Of significance herein, identification in the CACI is not restricted to parents accused or convicted of criminal offenses against their children. Parents who are subject to loss of custody of their children in dependency proceedings are likewise subject to identification in the CACI. For example, in *In Re C.F.* (2011) 198 Cal.App.4th 454, the appellant (mother) was identified in the CACI after having been charged with infliction of serious physical harm and failure to protect her infant daughter. Criminal charges were not brought, but the mother was subject to a dependency petition for loss of custody. Several months *before* the jurisdictional hearing the agency reported the allegations to the Department of Justice and mother was identified in the CACI. At the hearing, the mother was not found culpable for infliction of serious physical harm, she was found culpable for failure to protect. Although the failure to protect count was reversed on appeal, identification in the CACI remained and mother had to petition the court for removal.

The foregoing illustrates the importance of the right to a jury trial. Not only is the "oldest" fundamental liberty interest at stake, but parents face the risk of inclusion in a government database with *no assurance of removal until the parent reaches the age of 100*. (Pen. Code section 11169 (f).) Thus, not only is the loss of custody at stake, so is the residual "scarlet letter" of inclusion in a Department of Justice database. In perpetuity, that parent must disclose, if asked, that he or she is a "child abuser", for such things as applications for organized activities or employment involving children, and applications for employment involving policing, national security clearances, weapon permits, and related renewals. That this punishment, in addition to loss of custody, can still occur in the 21st Century without the right of trial by peers is a travesty.

In addition, Father's loss of custody requires disclosures for future employment, and has resulted in increased child support payments. Prior to the dependency proceedings at issue, Father was divorced from Adam E.'s mother. As of May 1, 2020, Father had joint 50-50 custody of Adam E. with prior wife. Yet after loss of custody, Father was required to pay substantially higher support payments by operation of California law. *See* California Family Code sections 3901 and 17402 [setting forth mandatory child support obligations, which increase if custody is lost].

B. Judicial review will be perpetually evaded and denied to a parent when dependency proceedings are initiated while the minor child is close to the age of adulthood

In addition to the foregoing, this Court should apply the exception of "capable of repetition, but evading

review." *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109. Parents at risk of loss of custody of children approaching the age of maturity, such as Father, will never be able to bring the issue of the right to a jury trial to fruition as the appellate process will inevitably be ongoing while the minor reaches the age of maturity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

DATED: March 1, 2022

APPENDIX

APPENDIX A — ORDER DENYING REVIEW OF THE SUPREME COURT OF CALIFORNIA, FILED DECEMBER 1, 2021

Court of Appeal, Second Appellate District,
Division Four - No. B308818

S271010

IN THE SUPREME COURT OF CALIFORNIA

En Banc

IN RE ADAM E., A PERSON COMING UNDER THE JUVENILE COURT LAW.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ERIC E.,

Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B — ORDER OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR, FILED AUGUST 13, 2021

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

B308818
(Super. Ct. No. 18LJJP00620C)
Los Angeles County

IN RE ADAM E., A PERSON COMING UNDER THE JUVENILE COURT LAW.

———————————————

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ERIC E.,

Defendant and Appellant.

Appendix B

THE COURT:*

On July 29, 2021, the court ordered both parties to show cause why this appeal should not be dismissed as moot. Having reviewed the parties' responses, we dismiss the appeal filed November 9, 2020 as moot.

/s/ *MANELLA
MANELLA, P.J.

/s/ COLLINS
COLLINS, J.

/s/ CURREY
CURREY, J.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, DATED JULY 31, 2020

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Juvenile Dependency/Adoption Division

LJ427

18LJJP00620C

IN THE MATTER OF:

EVERS, ADAM

July 31, 2020
8:30AM

Honorable Michael C. Kelley, Judge

Wendy Diaz, Judicial Assistant
Linda Meyer (#8534), Court Reporter

NATURE OF PROCEEDINGS: Motion Hearing

The minor subject to the following orders is: Adam Evers

Date of birth: 1/9/2004

The matter is called for hearing.

The following parties are present for the aforementioned proceeding:

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DCFS, Petitioner

Eric Evers, Presumed Father

Anastasia Goncharko, LADL3 for Mother

Aaron Jeppson, Deputy County Counsel

Liza Park, Children's Law Center 2 for Minor

Pamela Tripp, Attorney

all parties appear via webex

The Court admonishes all parties present regarding the confidential hearing advisement on the record this date.

The father's motions for a Jury Trial and to Strike the Petitioner's Dependency Petition in Whole are heard, argued and denied for the reasons stated on the record.

Father's counsel oral request to stay the trial is heard, argued and denied for the reasons stated on the record.

The court grants father's counsel request for a transcript of this hearing.

Trial setting conference is held in open court as stated on the record.

The Court denies the request to preclude the minor's testimony as stated on the record.

Appendix C

The Court orders the Dependency Investigator to be on call on August 3, 2020.

All prior orders not in conflict shall remain in full force and effect.

The Adjudication Hearing on 08/03/2020 remains In full force and effect.

APPENDIX D — TRIAL TRANSCRIPT EXCERPT, FILED JULY 31, 2020

[401] CASE NUMBER:
18LJJP00620-C

CASE NAME:
ADAM E., A MINOR

LANCASTER, CALIFORNIA;
FRIDAY, JULY 31, 2020

DEPT. 427
HON. MICHAEL C. KELLEY, JUDGE

COURT REPORTER:
LINDA MEYER, CSR NO. 8534

TIME:
A.M. SESSIONS

(THIS CASE BEING CALLED
AND WHEREBY COMMENCED
AS TO THIS DATE, VIA
THE COURT WEBEX, AS
FOLLOWS)

THE COURT: WE'RE READY TO GO ON THE RECORD IN THE CASE CONCERNING THE EVERS MINOR. CASE NUMBER 18LJJP00620-C.

APPEARANCES, PLEASE.

MR. JEPPSON: AARON JEPPSON FOR THE DEPARTMENT.

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MS. PARK: LIZA PARK, CLC ON BEHALF OF THE MINOR

* * *

[403] EITHER RES ADJUDICATA OR COLLATERAL ESTOPPEL.

I WILL HEAR EVERYBODY. I WANT EVERYONE TO KNOW I HAVE READ THE OPINIONS AND AM FAMILIAR WITH THE ISSUES IN WHICH YOU FILED THE MOTION.

MS. TRIPP, I'LL LET YOU START.

MS. TRIPP: THANK YOU, YOUR HONOR. I WOULD BE INCLINED TO WAIVE MY OPENING ON THE MOTION, JUST RESERVE AND RESPOND TO, BY WAY OF REBUTTAL TO OPPOSING COUNSEL.

THE COURT: ALL RIGHT. THAT'S FINE.

MR. JEPPSON.

MR. JEPPSON: IN THAT CASE, YOUR HONOR, I'LL JUST SUBMIT ON WHAT HAS BEEN WRITTEN; SO NO REBUTTAL WILL BE NEEDED.

THE COURT: ALL RIGHT. MS. PARK, DO YOU WANT TO BE HEARD?

MS. PARK: YOUR HONOR, I WOULD LIKEWISE SUBMIT.

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THE COURT: ALL RIGHT. SO AS I SAID, YES, THAT I HAVE READ THE PAPERS CAREFULLY AND REREAD A NUMBER OF A FEW CAME-INS THAT ARE CITED.

WITH RESPECT TO THE JURY TRIAL MOTION, FATHER'S MOTION ASKS FOR A JURY TRIAL AND ARGUES THAT SUCH A PROCEDURE IS NOT SPECIFICALLY EXCLUDED BY CASE LAW. ALTERNATIVELY, HE REQUESTS THAT THE COURT EMPANEL AN ADVISED JURY PANEL TO HEAR, ADVISED JURY -- THE EVIDENCE AND THE ALLEGATIONS. I'LL -- A DENIAL TO THAT REQUEST, THAT ALTHOUGH THAT PROCEDURE IS NOT EXCLUDED BY CASE LAW, IS NOT AUTHORITY THAT IT WOULD SUPPORT ITS

[404] ADOPTION. HERE -- OF THE PRIMARILY RELIED UPON IN COURT, THE IN RE CARL W. CASE MADE IT CLEAR THAT THERE IS NO RIGHT TO A JURY TRIAL IN JUVENILE CASES. AS TO THE REQUEST FOR AN ADVISORY JURY, THERE ARE NO AUTHORITY THAT IS W RIGHT TO THAT THE PROCEDURAL SYSTEM IN THE DEPENDENCY CASE WOULD, AND ONE INSTANCE IN WHICH THE APPELLATE COURT HELD THAT IT WAS PROPER WAS A JUVENILE DELINQUENCY CASE, JUVENILE JUSTICE CASE; AGAIN THAT'S IN RE CARL W. CASE.

IN ADDITION, THAT CASE INVOLVED EXTREME FACTS, THAT THERE ARE EXTREME

Appendix D

-- EVIDENCE FOR THE CASE; EVEN IF SUCH A PROCEDURE WERE PERMITTED IN A DEPENDENCY CASE, AND I SEE NO AUTHORITY TO SUPPORT THAT, I DO NOT BELIEVE IT WOULD IMPROVE THE QUALITY OF THE FACTFINDING OR/AND EXPEDITE THE USE OF, TO USE AN ADVISORY JURY. SO. SO THAT MOTION IS DENIED.

WITH RESPECT TO THE MOTION TO STRIKE, I'M GOING TO DENY THAT MOTION, AS WELL. FROM FATHER'S MOTION, SEEKS TO STRIKE THE ENTIRE PETITION ON THE GROUND THAT IT IS BARRED BY THE DOCTRINES OF RES ADJUDICATA OR COLLATERAL ESTOPPEL -- IN AS TO WHETHER SUCH A MOTION IS EVEN VIABLE PROCEDURALLY, WHICH SEEKS TO DISMISS A PETITION PRIOR TO THE JURISDICTION HEARING. BUT I REALLY DON'T HAVE TO DECIDE THAT ISSUE BECAUSE EVEN IF I WERE TO CONCLUDE THAT A MOTION TO STRIKE ON THE PETITION ON THESE GROUNDS WOULD BE PROPER PROCEDURALLY, THE MOTION LACKS MERIT IN THIS PARTICULAR CASE.