

No. 22-509

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In The  
**Supreme Court of the United States**

J.T.H.; H.D.H.,

*Petitioners,*

v.

SPRING COOK,

*Respondent.*

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

**BRIEF OF PROFESSOR DOROTHY E.  
ROBERTS AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Professor Dorothy E. Roberts is an acclaimed scholar of race, gender, and the law, and is the George A. Weiss University Professor of Law and Sociology at the University of Pennsylvania, with joint appointments in the Departments of Africana Studies and Sociology and the Law School, where she is the Sadie Tanner Mossell Alexander Professor of Civil Rights

Her path-breaking work in law and public policy focuses on urgent social justice issues in policing, family regulation, and the impact of the child welfare system, especially on poor families and communities of color. Her major books include *Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World* (Basic Books, 2022); *Fatal Invention: How Science, Politics, and Big Business Re-create Race in the Twenty-first Century* (New Press, 2011); *Shattered Bonds: The Color of Child Welfare* (Basic Books, 2001), and *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (Pantheon, 1997). Professor Roberts has authored over 100 scholarly articles and book chapters and has co-edited six books on such topics as constitutional law and women and the law.

Her work has been supported by the American Council of Learned Societies, National Science Foundation, Robert Wood Johnson Foundation, Harvard Program on Ethics & the Professions, Stanford Center for the Comparative Studies in Race & Ethnicity, and

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice of the intent to file this *amicus* brief was provided to all parties, and all parties have consented to the filing of this brief.

Northwestern Institute for Policy Research. Recent recognitions of her scholarship and public service include 2022 election to the American Academy of Arts and Sciences, 2022 Juvenile Law Center Leadership Prize, 2019 Rutgers University–Newark Honorary Doctor of Laws degree, 2017 election to the National Academy of Medicine, 2016 Society of Family Planning Lifetime Achievement Award, 2016 Tanner Lectures on Human Values, and 2015 American Psychiatric Association Solomon Carter Fuller Award.

Professor Roberts has expertise in harms inherent in the child welfare system’s police powers and investigative functions, and thus has an acute interest in Petitioners’ case here.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

Many view the child welfare system as a necessarily benevolent protector—but the reality is far more fraught. The child welfare system is a multibillion-dollar government apparatus that affects millions of vulnerable families through intrusive and coercive investigations and monitoring. Families dealing with the child welfare system not only experience the ordeal of intensive home searches, bodily inspections, and interrogations, but also face the prospect of terrifying, life-altering consequences—criminal sanctions, public shaming, and lost employment, and the incalculable pain of children being forcibly removed from their parents. The mere specter of such consequences subjects those who are being investigated to a traumatizing degree of duress.

Like any government institution, even those that are supposed to serve the public, the child welfare system can be abusive. Yet unlike other institutions entrusted with comparable power, the child welfare system lacks many of the safeguards reflecting the reality of its abuses. For example, child welfare investigations largely resemble those carried out by criminal enforcement divisions—with similar constitutional and civil rights concerns. Yet families subjected to child welfare investigations lack the protections and remedies provided to criminal defendants. This mismatch—significant power, insignificant safeguards—harms not only the families directly involved, but also the broader communities affected by Child Protective Services (“CPS”) investigations, monitoring, and coercion. This is especially true in poor and other marginalized communities, particularly communities of color. Not only are these communities subjected to a disproportionate degree of the child welfare system’s policing, but they disproportionately lack the resources to respond to this policing. As a result, already struggling communities are harmed the most.

The potential harms posed by CPS investigations are well-documented. Consistent with this reality, some circuit courts have found that a retaliatory CPS investigation can present a legitimate harm subject to legal recourse. Yet in Petitioners’ case, the Eighth Circuit declined to recognize these harms. Pet. App. 7a. As a scholar focused on studying the types of harms posed by the child welfare system and intrusive investigations like that faced by Petitioners, I urge the Court to reverse the Eighth Circuit on this issue and allow Petitioners’ suit to proceed because CPS investigations cause real harms to the families involved and because Petitioners in particular experienced harm caused by the retaliatory investigation here.

## FACTUAL SUMMARY

In 2018, a Scott County, Missouri sheriff's deputy sexually assaulted Petitioners' fifteen-year-old son. Pet. App. 2a. After Petitioners threatened to sue the county for the assault, Scott County child-welfare investigator Spring Cook ("Cook") launched an invasive child neglect investigation against Petitioners. *Id.* at 2a–3a, 58a. Cook's investigation resembled a criminal search, including arriving unannounced at Petitioners' home alongside law enforcement officers from juvenile and state highway divisions. *Id.* at 58a. The investigation harmed Petitioners, their son, and their family unit. Petitioners underwent multiple home visits, and their already traumatized son had to endure repeated interviews—the investigation even included a referral for the son to have his genitals inspected. *Id.* at 59a, 61a.

Cook also levied threats against Petitioners and their family. Aside from the threat of a child abuse finding central to Cook's investigation, the son was threatened that he could be charged with a sex crime and the father that he would lose his professional license. Pet. App. at 2a, 61a, 66a. The son's cell phone was also confiscated without a warrant. *Id.* at 59a. Cook ultimately entered a finding of child neglect without any evidence of neglect. *Id.* at 44a, 61a–63a, 66a.

While the state's review board ultimately overturned Cook's finding, the emotional, financial, and practical consequences typical of this sort of finding are still significant. Pet. App. at 3a. And had Plaintiffs not been lucky enough to find a competent pro bono counsel, this finding would have likely become permanent, causing Petitioners to be listed on Missouri's Child Abuse and Neglect Registry, resulting in further

social and professional harm. See *id.* at 3a, 67a. Given the rarity with which parents have adequate legal representation and the ability to appeal a neglect or abuse finding, Petitioners' case is an outlier in that, even given all they endured, they are luckier than most in the same or similar situations—most parents would not have the means to get the findings reversed and would experience even worse lifelong social, financial, and psychological harm.

## ARGUMENT

### **I. The Sheer Pendency of a CPS Investigation Can Cause Real Harm to Citizens.**

CPS investigations resemble criminal investigations, and carry similar, potentially life-altering consequences. CPS investigations are intended to coerce parents to comply with agency monitoring, often under threat of having their children taken away. Families and communities experience serious burdens from CPS investigations, and those burdens disproportionately fall on families of color. This injustice is made worse when courts decline to redress the wrongs imposed by these investigations.

#### **A. CPS conducts policing similar to criminal law enforcement agencies.**

The child welfare system shares many similarities with the criminal punishment system. Those similarities illustrate the error in assuming that a CPS investigation could never constitute a real harm.

History shows how policing and coercion came to overshadow CPS's welfare-based goals. Beginning in the 1970s, the asserted purpose of the child welfare system veered sharply from a service-oriented system

to help needy families to an investigation-driven system searching for allegations of abuse and neglect.<sup>2</sup> By the end of the 1990s, child welfare departments were placing outrageous numbers of children in foster care.<sup>3</sup> CPS simultaneously expanded investigations into families by overseeing them with coercive services. *Torn Apart* at 162. Child welfare investigations became “stop and frisk” family surveillance but without safeguards and legal protections that are present in the criminal context. *Id.* at 163. Now, CPS agencies investigate the families of 3.5 million children per year. *See id.* at 162. One in three children nationwide will be subject to investigation at some point, and most Black children will face an investigation in their lifetimes. *Ibid.*

Through this process, what are called “protective services” have devolved into family policing tactics that often violate Fourth Amendment protections.<sup>4</sup> CPS accuses, investigates, and prosecutes parents just like police treat criminal defendants, but its searches can be even more intense: “caseworkers delve deeply into everything about accused parents and initiate indefinite supervision of their lives. This power takes Big Brother’s watchful eye from public spaces into intimate ones.” *Torn Apart* at 165, 184. CPS investigations subject families to substantial

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<sup>2</sup> See Roberts, Dorothy E., *Kinship Care and the Price of State Support for Children* (2001), Faculty Scholarship at Penn Law 821, [https://scholarship.law.upenn.edu/faculty\\_scholarship/821](https://scholarship.law.upenn.edu/faculty_scholarship/821).

<sup>3</sup> Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build A Safer World* 165 (2022) (“*Torn Apart*”).

<sup>4</sup> See generally Ismail, Tarek, *Family Policing and the Fourth Amendment* (Aug. 21, 2022), *California Law Review*, Vol. 111, (Forthcoming 2023), <https://ssrn.com/abstract=4219985>.

government surveillance. “Compared with the analogous stage in criminal justice—police stops or perhaps arrests—CPS investigations are much more informationally invasive.”<sup>5</sup> Investigations often involve multiple home visits, including assessing children’s bedrooms and individual interviews with children. Fong at 622-623. Investigators may “ask parents about deeply personal experiences, such as substance use triggers, unfaithful partners, family relationships, and childhood traumas.” *Id.* at 623. Such widespread surveillance of families is considered a feature, not a bug, of the CPS system, though it is highly distressing for families under investigation.

CPS investigations, even those based on vague suspicions, are life-altering government intrusions. CPS rarely asks parents what would help to ensure their children’s wellbeing but does force parents to follow mandates, akin to probation orders, that list requirements and restrictions. *Torn Apart* at 184. Parents who fail to meet any such requirement risk having their rights terminated and never seeing their children again. Using such coercive authority generates substantial and lasting apprehension for families, even when cases close after investigation. Fong at 626.

Because the increasing focus on family policing has made CPS investigations increasingly comparable to criminal investigations, those subject to them should be afforded at least protections similar to those afforded criminal suspects. *Torn Apart* at 195. Indeed, the Pennsylvania Supreme Court recently recognized

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<sup>5</sup> Fong, Kelley, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 84 Am. Sociological Rev. 610, 622-623 (Aug. 2020) (“Fong”).

that the Fourth Amendment’s probable cause and warrant requirements apply to CPS home searches because of the similarities to criminal investigations, finding that the CPS investigation order “was deficient for want of probable cause.”<sup>6</sup> Compared to police stops and arrests, CPS investigations dig far deeper into the private lives of “suspect” parents. “Caseworkers can make multiple unannounced home visits at any time of day or night, interrogate all household members, force children to disrobe, do criminal background checks, and request personal information from teachers, hospitals, therapists, and other service providers.” *Torn Apart* at 165.

Confusion as to what rights parents have during in a CPS investigation leads to further problems. Because child welfare is classified as part of the *civil* legal system, CPS workers are not considered law enforcement officers. *Torn Apart* at 164. This has caused some courts to improperly make a child welfare exception to the constitutional protections applied to police searches. Worse still, CPS investigations can even turn the “innocent-until-proven-guilty” criminal procedure standard on its head—proceeding from the assumption that parents are guilty of any reported suspicions, until parents prove themselves innocent. “Any resistance on the part of parents to giving CPS full access to inspect their homes, children, and intimate lives is considered evidence of guilt.” *Ibid.* That assumption of guilt puts parents in an impossible po-

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<sup>6</sup> *Interest of Y.W.-B*, 265 A.3d 602, 635 (Pa. 2021),



sition: “in order to keep CPS from taking their children they must participate in an investigation that risks that very outcome.”<sup>7</sup>

CPS has one of the lowest bars for investigation of any government agency and often investigates every tip, even if wholly unsupported. As a result, investigators regularly exploit vulnerable families when, based solely on often vague or anonymous accusation of maltreatment, caseworkers enter parents’ homes without a warrant or question the family without *Miranda* warnings. *Torn Apart* at 165. Unlike police officers who are expected to arrest suspects and interrogate them about their alleged wrongdoing only after issuing proper *Miranda* warnings, caseworkers rarely inform parents of their rights. As one parent said: “As many issues as there are in the criminal justice system, I wish all of this happened in criminal court. At least we would get a jury trial.”<sup>8</sup>

It is intolerable that state child welfare and criminal punishment systems operate so similarly to one another. Child welfare departments carry out family policing and control with the potential to inflict terror on children, families, and communities.

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<sup>7</sup> *Torn Apart* at 164 (citing Tarek Z. Ismail, *The Consent of the Compelled: Child Protective Agents as Law Enforcement Officers* (unpublished manuscript, 2021)).

<sup>8</sup> Naveed, Hina, *If I Wasn’t Poor, I Wouldn’t Be Unfit*, Human Rights Watch (Nov. 17, 2022) (“Naveed”), <https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare>.

**B. CPS investigative functions are coercive and interfere with family support and parental autonomy.**

The threat of CPS investigations discourages parents from seeking help and services, such as avoiding taking a child to hospital or divulging domestic violence, for fear of investigation and wrongful child removal. The fact that parents, and in turn their children, fear investigations is itself proof that the investigation itself, even if frivolous, is harmful. CPS combines a façade of service systems with increased surveillance as tools of coercion that increase the likelihood of poor and other marginalized families experiencing CPS investigations. See generally Fong. Parents are coerced to comply under threat of child removal, which interferes with parental authority and creates more harm for children.<sup>9</sup>

CPS's web of potential investigation triggers is vast: "Educational, medical, and other professionals invite investigations of families far beyond those ultimately deemed maltreating, with the hope that child protection authorities' dual therapeutic and coercive capacities can rehabilitate families, especially marginalized families." Fong at 610. Those systems channel families to the coercive powers of CPS, fostering apprehension among parents who may second guess seeking services for their children.

In one case, a mother, Adaline, was investigated after taking her son to the hospital for an injury

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<sup>9</sup> Roberts, Dorothy E., *Child Welfare's Paradox* (2007), Faculty Scholarship at Penn Law 578, 886, [https://scholarship.law.upenn.edu/faculty\\_scholarship/578](https://scholarship.law.upenn.edu/faculty_scholarship/578).

he suffered from dancing. Naveed. The hospital reported her to CPS, “triggering a cascade of state interventions that irreparably harmed her children and their family bond.” *Ibid.* A caseworker pulled her children from school to question them, then came to her home unannounced and randomly strip searched her children to check their bodies for signs of abuse. *Ibid.* “[T]hese visits were so frightening for her children that her youngest child began screaming every time she saw anyone with a badge.” *Ibid.* Adaline, her family now caught up in CPS’s web, and like most parents, unfamiliar with her legal rights, feared that her children would be taken from her. She was coerced into agreeing to six months of follow-up with the caseworker, weekly drug testing, and parenting classes, in exchange for keeping her children home with her. *See ibid.* All of this because her son was injured while dancing.

Despite Adaline’s weekly follow-up with CPS, a judge ordered that her children be removed from her custody due to “bed bugs in a couch and holes in the walls in of her home.” Naveed. Her children were separated from their mother and from each other in different foster homes. *Ibid.* Adaline is a Black mother, and CPS requirements are often disproportionately imposed on Black mothers. *Ibid.* Four of Adaline’s six children have been abused while in foster care, and she is still fighting to get her children back after more than two years. *Ibid.* Adaline is one mother among too many who face unjustified removal of their children.

Because CPS investigations generally include a home visit and an interview with and examination of the child in search of damaging evidence, “[t]he parent-investigator relationship is likely to be adversar-

ial, not mutually supportive. The two parties seek conflicting ends: the parent seeks to preserve family unity and privacy, whereas the investigator is obligated to violate the family's privacy, the child's privacy, and, if necessary, disrupt the family unit."<sup>10</sup> That adversarial positioning is a policy choice. CPS intentionally pits investigator against parent. CPS justifies its actions "by the belief that, on balance, maltreatment is clearly worse than the intrusions that are necessary to find it." Coleman at 444. That "justification" simply cannot be squared with reality. CPS investigations are invasive and a violate family and child privacy. See *id.* at 502-503, 506 ("Searches of the family home, which are almost always intrusions of the highest order, and of parts of the body that are not typically in plain view, exemplify this category."<sup>11</sup>).

Reports of potential child abuse can be made anonymously to CPS to encourage reporting and identification of children at risk. But anonymous reporting also carries with it significant risks of misuse, in particular by those who "see reporting as a means of retaliation for grievances." Naveed. Bad actors use CPS investigations as retaliation precisely because investigations are often highly stressful and traumatizing for children and their families. Parents describe the investigation and monitoring period as "nerve-wrack-

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<sup>10</sup> Coleman, Doriane Lambelet, *Storming the Castle to Save the Children: The Ironic Costs of Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 439 (Nov. 2005) ("Coleman") (citation omitted).

<sup>11</sup> Citing *Ferguson v. City of Charleston*, 532 U.S. 67, 83-84 (2001).

ing,” “invasive,” and “humiliating.” CPS investigations can “tear[] the fabric of the child’s life and community.” *Ibid.*<sup>12</sup>

If a CPS caseworker subjectively determines that abuse or neglect has occurred, “the allegation is deemed substantiated, and the parents or other caregivers are listed on a state central registry for years, adversely affecting their access to employment and ability to foster other children, including their own relatives.” Naveed; see also *Torn Apart* at 189. Even without a substantiated allegation, some states still list parents on a registry of potential abusers. See Naveed.

### **C. Families and communities face serious consequences.**

Significant stigma attaches to families even when an investigation does not lead to a finding of wrongdoing. The sheer fact that a parent underwent an investigation can adversely affect how parents are perceived by others. The adverse effect of this stigma is felt not only by parents but also by the children who are part of the investigation and the larger communities. CPS intervention is not a onetime event but a process that extends state surveillance, disproportionately to impoverished, Black, and Indigenous families, even as allegations in most cases are unsubstantiated. Though neither reporters nor investigators typically expect children to be removed, the possibility of family separation engenders acute fears among parents, and

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<sup>12</sup> See also Roberts, Dorothy E., *The Racial Geography of Child Welfare: Toward a New Research Paradigm* (2011), Faculty Scholarship at Penn Law 2783, [https://scholarship.law.upenn.edu/faculty\\_scholarship/2783/](https://scholarship.law.upenn.edu/faculty_scholarship/2783/).

the active involvement of reporting systems strains relationships between families and the service providers reporting them. See Fong at 611. Because information from investigations, including investigations that find allegations are unsubstantiated, remains in state databases to inform risk assessments and decision-making on future reports, a gray cloud of CPS pressure hangs over the family indefinitely. *Id.* at 615.

CPS investigations are also a financial burden on families, leading to loss of work and even lost jobs. The costs of obtaining counsel during an investigation can be so staggering for vulnerable families who are already living at the edge that the vast majority cannot obtain legal counsel. There are few risks that are more daunting than losing one’s children. The sheer pendency of an investigation thus subjects parents and children not only to a clearly cognizable trauma—but also to one of the starkest harms parents and children can experience.

Most parents are unrepresented and unaware of their rights to fight unjustified CPS investigations. What rights parents do have is unclear—as shown in the present dispute. Furthermore, since most CPS reports are deemed to be frivolous, finding any legal counsel is difficult. According to a recent ProPublica and NBC News investigation, most CPS investigations are unwarranted—of the roughly 3.5 million CPS investigations every year, only about 5% ultimately found abuse.<sup>13</sup> Just as strikingly, New York City’s CPS “obtains an average of fewer than 94 entry

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<sup>13</sup> Hager, Eli, *CPS Workers Search Millions of Homes A Year. A Mom Who Resisted Paid A Price*, ProPublica (Oct. 13, 2022) (“Hager”), <https://www.nbcnews.com/news/us-news/child-abuse-welfare-home-searches-warrant-rcna50716>.

orders a year to inspect homes, meaning it has a warrant less than 0.2% of the time.” Hager.

The consequences of CPS investigations go far beyond intrusion into the family home—an investigator can remove a child into foster care based on a subjective perception of risk. Even if unfounded and the foster placement is only temporary, the disruption can cause long-lasting trauma to parents and children alike and permanently harm family bonds. *Torn Apart* at 132. Moreover, numerous studies have shown that experiencing the foster system puts children at heightened risk of negative outcomes, including poverty, homelessness, PTSD, and incarceration. *Id.* at 221-248 Indicative of the system’s harm to families is the fact that: “The child welfare service our nation spends the most money on is separating children from their parents.” *Id.* at 142.

**D. Potential harms posed by the child welfare system disproportionately affect already vulnerable communities.**

Child welfare investigations are targeted at the most marginalized communities in the nation. CPS agencies investigate impoverished and low income families, especially those that are Black and Indigenous, almost exclusively. Data analysis shows a correlation between poverty and increased CPS investigations: “counties with higher numbers of families below the poverty line have a higher rate of maltreatment investigations[, and] counties with higher family incomes have lower rates of investigations.” Naveed. Impoverished families with limited resources are more likely to be reported for suspected abuse because they have a greater need for, and use of, social services—not because they are more likely to be abusers.

See *ibid.* Moreover, most investigations result from allegations of child neglect, not physical or sexual abuse, which is typically confused with conditions of poverty. See *Torn Apart* at 66-69.

By contrast, it is extremely rare for wealthy parents to be subjected to this scrutiny, both because they have private means to address their children's needs and problems and because they can afford high quality legal representation when accused of child maltreatment. "This creates a dynamic where families living in poverty are surveilled, scrutinized, and reported more than those with greater resources." Naveed.

The child welfare system is also marked by startling racial inequities. "Black and Indigenous families are more likely to be reported for child abuse and neglect than white families, resulting in a racial and ethnic disproportionality of families surveilled and scrutinized." Naveed. CPS's millions of yearly investigations disproportionately focus on impoverished families of color. Studies show staggering racial disparities in investigations, child removal, and parental terminations.<sup>14</sup> A 2021 study of the 20 most populous counties in the United States demonstrated "the ubiquity of having a CPS investigation," concluding that Black children experience "exceptionally high rates"

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<sup>14</sup> Roberts, Dorothy, *The Clinton-Era Adoption Law That Still Devastates Black Families Today*, SLATE (Nov. 21, 2022) (citing Edwards, Frank, et al., *Contact With Child Protective Services Is Pervasive But Unequally Distributed By Race And Ethnicity In Large U.S. Counties*, 118 PNAS 30 (July 19, 2021) ("Edwards"), <https://www.pnas.org/doi/10.1073/pnas.2106272118>), <https://slate.com/news-and-politics/2022/11/racial-justice-bad-clinton-adoption-law.html>.)



of traumatic child welfare interventions. Edwards. A Black child's risk to undergo a CPS investigation can be as high as 62.8%, far above the median investigation rate of 34.5%. *Id.* at Fig. 1.

Numerous studies have documented racial bias in the decisions to report child maltreatment, to investigate it, and to remove children from their homes. See *Torn Apart* at 75-82. Impoverished families of color are also investigated for conduct or omissions that are not seen as suspicious when families are white and affluent.

Excessive state interference in families of color damages their sense of personal and community identity.<sup>15</sup> Family and community disintegration weakens the community's ability to overcome institutionalized discrimination, which would allow marginalized communities to work toward greater political and economic strength. *Ibid.* CPS's "racial disparity also reinforces negative stereotypes about black people's incapacity to govern themselves and their need for state supervision" *Ibid.*

## **II. Other Circuits Appropriately Recognize that Retaliatory Investigations Cause Actionable Harm.**

As some circuit courts already rightly recognize, the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation through an investigation is an actionable harm. The Petition for a Writ of Certiorari sets forth the circuit

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<sup>15</sup> Roberts, Dorothy E., *Child Welfare and Civil Rights* (2003), Faculty Scholarship at Penn Law 585, 179, [https://scholarship.law.upenn.edu/faculty\\_scholarship/585](https://scholarship.law.upenn.edu/faculty_scholarship/585).

split as to whether a retaliatory government investigation may sustain a First Amendment claim. Circuits that recognize First Amendment claims based on retaliatory investigations do so in part because the mere act of investigation without proper basis causes harm, including by chilling speech and other constitutionally protected actions.

For example, the Ninth Circuit has twice held that the threat of losing child custody during a retaliatory investigation is such a severe consequence that it would chill the average person from complaining of official misconduct. *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1020–1021 (9th Cir. 2020); *Capp v. City of San Diego*, 940 F.3d 1046, 1055 (9th Cir. 2019). In *Capp v. City of San Diego*, a social worker convinced a mother to file a baseless custody application against a father who complained about an unfounded child welfare investigation. 940 F.3d at 1055. The court held that “the threat of losing custody of one’s children is a severe consequence that would chill the average person from voicing criticism of official conduct.” *Ibid.* Similarly, in *Sampson v. County of Los Angeles*, the court held that the threat of losing custody could chill both parents and legal guardians from engaging in First Amendment activity. 974 F.3d at 1022. *Sampson* involved a retaliatory child welfare services investigation after a child custody applicant spoke out about a social worker’s sexual harassment and other misconduct. *Id.* at 1019. Likewise, the Seventh Circuit found a cognizable retaliation claim when CPS threatened to play “hard ball” with a father who complained about their handling of his children’s case, subjecting the father to middle-of-the-night home visits, a recommendation that he repeat a counseling class, and “fear of continued custody struggles.” *Johnson v. Collins*, 5 F.

App’x 479, 486 (7th Cir. 2001). The *Johnson* court determined that “[b]ecause there is no justification for harassing people for exercising their constitutional rights, the injury alleged by Johnson need not be great in order to be actionable.” *Ibid.* (citing *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)); see also *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (“[A]ny form of official retaliation for exercising one’s freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.”).

The Ninth Circuit also recognized that a retaliatory U.S. Department of Housing and Urban Development (“HUD”) investigation “unquestionably chilled the plaintiffs’ exercise of their First Amendment rights” in *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000). The court recognized that “[i]nformal measures, such as ‘the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,’ can violate the First Amendment,” thus “in the First Amendment context, courts must ‘look through forms to the substance’ of government conduct.” *Ibid.* (citing *Bantam Books v. Sullivan*, 372 U.S. 58, 67 (1963)). In *White*, HUD investigated neighbors that opposed a planned multi-family housing development for the unhoused. 227 F.3d at 1220–1022. The HUD officials threatened to subpoena the neighbors, questioned them about their views and public statements, required them to produce documents and correspondence, and urged them to agree to cease all litigation and stop distributing discriminatory newsletters and flyers. *Id.* at 1222–1224. While HUD’s local investigation led to a finding that the neighbors had violated the Fair Housing Act, as in Petitioners’ case here, an oversight body later concluded the neighbors did not violate the act. *Id.* at

1224–1225. When the neighbors sued the HUD officials, the Ninth Circuit held that, even though the investigation did not result in “criminal or civil sanctions,” the retaliation claim was still actionable because the investigation-related acts “would chill or silence a person of ordinary firmness from future First Amendment activities.” *Id.* at 1228 (citing *Mendocino Env’t Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999)).

The Seventh and Ninth circuit approaches are sound and cohere with this court’s guidance elsewhere. For example, in connection with employer-retaliation claims, this Court has noted that whether a claim for retaliation is actionable turns on whether the defendant’s conduct would have been “materially adverse” to the plaintiff. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). And, as this Court has explained, the touchstone of material adversity is *deterrence*: there is cognizable harm so long as the particular action “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Ibid.* Accordingly, courts have regularly recognized that an employer’s investigation can give rise to actionable harm on account of its chilling effect. See, e.g., *Wrobel v. City of Erie*, 211 F. App’x 71, 73 (2d Cir. 2007) (recognizing, among other adverse actions, that initiation of an investigation was an adverse action and could be enough to chill a reasonable employee’s speech); *Velikonja v. Gonzales*, 466 F.3d 122, 124 (D.C. Cir. 2006) (reversing the dismissal of a Title VII retaliation claim because a reasonable jury could find the prospect of a long investigation that clouded the employee’s career would chill employee misconduct reports).

The same applies here. Applied to the context of an investigation by child protective services, the potential to lose custody of one's children after an investigation is a material consequence—indeed, perhaps the most severe consequence a parent could ever face.

### **III. Respondent's Retaliatory Investigation Harmed Petitioners.**

Petitioners' petition for review presents ample evidence that Cook's investigation was retaliatory, including that Cook shared a last name and social media contacts with the deputy that sexually assaulted their son; contrary findings by other state and federal investigators; and Cook's refusal to recuse herself. Pet. at 6–7. Cook's potential status as a relative or close relation of the deputy highlights the potential for corruption and weaponization of child welfare investigations.

And, as is typical in even frivolous child welfare investigations, Petitioners faced real harm from Cook's invasive interference in their lives. The referral for an inspection of Petitioners' son's genitals likely compounded the trauma of a child still recovering from the deputy's sexual assault. Pet. App. 61a. The added threat to the son that he could be charged with a sex crime, apart from being highly inappropriate, likely compounded any shame and fear that would be expected when a child is sexually assaulted by a person with power like a police officer. *Ibid.* Cook's threat to take away the father's professional license also caused psychological harm including the potential loss of his and his family's livelihood. *Id.* at 2a, 67a. This sort of coercive threat is all too common. See *Torn Apart* at 197-198. The symbiotic relationship

between law enforcement and child welfare means that investigators are often emboldened to levy various threats against families including imprisonment, child removal, and public shaming that can result in employment disqualification. *Ibid.* The threats central to CPS investigations trigger deep-seated fears of loss and the stigma associated with such an investigation can stick with the family both by damaging the family unit and by humiliating parents or families in their larger community.<sup>16</sup>

Cook's confiscation of the son's cell phone without a warrant shows more harm, violating well-known protections against unreasonable searches and seizures. U.S. Const. amend. IV. And given that Petitioners had to seek legal representation of an attorney, the added cost of attorney's fees and administrative costs imposed greater harm the family.<sup>17</sup>

Further, Cook's entry of a final finding of neglect caused even more significant harm, though Petitioners were uniquely situated to appeal the finding through legal counsel. Most parents facing a CPS investigation—unlike Petitioners—are unrepresented

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<sup>16</sup> *Id.* at 37 (noting that regardless of the outcome of an investigation, the process is traumatic: "Even when charges are dropped, the children and parents can feel the traumatizing effects—the children interrogated and possibly strip searched by strangers, the parents humiliated and marked as suspects, everyone terrified of what might come next." (citation omitted)).

<sup>17</sup> See Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 Tenn. L. Rev. 835, 872 (1998) (noting that representation is not constitutionally guaranteed in child welfare proceedings).

at these crucial stages.<sup>18</sup> Most parents in this same situation do not have a lawyer to protect their rights in a CPS investigation nor to appeal a subsequent finding of neglect, even in a retaliatory sham investigation like Cook’s investigation. Despite these serious violations, records of child maltreatment are maintained in public registries and can lead to life-altering consequences that may be irreversible and irremediable. Petitioners deserve a remedy for the devastating harms caused by the retaliatory investigation their family endured.

## CONCLUSION

*Amicus curiae* respectfully requests that the Court grant the petition for writ of certiorari.

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<sup>18</sup> *Torn Apart* at 297 (“Most Black parents don’t seek legal counsel before submitting to a CPS investigation, and they may meet with a lawyer for the first time after caseworkers have already taken their children.”).

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