No. 07-1075

IN THE

Supreme Court of the United States

BELINDA DUPUY, *et al.*,

Petitioners,

v.

ERWIN MCEWEN, DIRECTOR,
ILLINOIS DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE THE CHICAGO COALITION FOR THE HOMELESS; CHICAGO LEGAL ADVOCACY FOR INCARCERATED MOTHERS; COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.; EQUIP FOR EQUALITY; THE SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, HEALTH & DISABILITY ADVOCATES; THE BATTERED WOMEN'S RESOURCE CENTER; AND THE NEW YORK LEGAL ASSISTANCE GROUP IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
I. THE SEVENTH CIRCUIT ABANDONS 40 YEARS OF SUPREME COURT PRECEDENT, REDUCING THE STANDARD FOR VOLUNTARINESS TO NOTHING MORE THAN THE ABSENCE OF A MISREPRESENTATION.	3
A. The Seventh Circuit's holding directly contradicts the totality of circumstances test established by the Supreme Court.	3
B. The Seventh Circuit's holding creates a circuit split regarding the standards for voluntary consent, which is an important and recurring question of federal law.	8
C. The Seventh Circuit's holding leads to irrational results.	11
D. The Seventh Circuit's holding threatens to erode decades of Constitutional law.	12

Contents

Page

II. THE SEVENTH CIRCUIT'S NEW "VOLUNTARINESS" STANDARD CAUSES SIGNIFICANT AND UNINTENDED CONSEQUENCES FOR POOR AND DISADVANTAGED FAMILIES AND COMPROMISES THEIR DUE PROCESS RIGHTS 14

A. Poor and disadvantaged families suffer significant unintended consequences from the Seventh Circuit's new "voluntariness" standard. 16

B. Lack Of Access To Counsel Exacerbates The Unintended Consequences Of The Seventh Circuit's New "Voluntariness" Standard. 22

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Ashcroft v. Tennessee, 322 U.S. 143 (1944) 12

Blackburn v. Alabama, 361 U.S. 199 (1950) 8

Brady v. United States, 397 U.S. 742 (1970) ... 3, 7

Bumper v. North Carolina, 391 U.S. 543 (1968) . 4, 11, 14

Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004) 8

Cherita v. Gresbach, 479 F. Supp. 2d 914 (E.D. Wis. 2007) 5

Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123 (3d Cir. 1997) 2, 7, 9, 10

Davis v. North Carolina, 384 U.S. 737 (1966) .. 4

Dupuy v. Samuels, 465 F.3d 757 (7th Cir. 2006) ... *passim*

Dupuy v. McEwen, 462 F. Supp. 2d 859 (N.D. Ill. 2005) 23

Fare v. Michael C., 442 U.S. 707 (1979) 3, 12

Ferguson v. City of Charleston, 308 F.3d 380 (4th Cir. 2002) 5

Page

Fikes v. Alabama, 352 U.S. 191 (1957) 4, 12

Frazier v. Cupp, 394 U.S. 731 (1969) 4

Haynes v. Washington, 373 U.S. 503 (1963) 3

Hubbard v. Haley, 317 F.3d 1245 (10th Cir. 2003) 5

Lehr v. Robertson, 463 U.S. 248 (1983) 7, 15

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 7

Payne v. Arkansas, 356 U.S. 560 (1958) 4, 12

Santosky v. Kramer, 455 U.S. 745 (1982) 7, 15

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ..... *passim*

Schwimmer v. Kaladjian, 988 F. Supp. 631 (S.D.N.Y. 1997) 5, 7

United States v. Carter, 884 F.2d 368 (8th Cir. 1989) 6

United States v. Drayton, 536 U.S. 194 (2002) . 3

Page

United States v. Haswood, 350 F.3d 1024 (9th Cir. 2003) 5

United States v. Ivy, 165 F.3d 397 (6th Cir. 1998) 6

United States v. Kim, 27 F.3d 947 (3d Cir. 1994) 6

United States v. Lopez, 437 F.3d 1059 (10th Cir. 2006) 5

United States v. Soriano, 361 F.3d 494 (9th Cir. 2003) 5

United States v. Tompkins, 130 F.3d 117 (5th Cir. 1997) 6

Vainovich v. Women's Med. Prof'l Corp., 523 U.S. 1036 (1998) 8

Wilson v. Lawrence County, 260 F.3d 946 (8th Cir. 2001) 6

Withrow v. Williams, 507 U.S. 680 (1993) ... 3, 12, 13

Cited Authorities

Page

STATE CASES

Regenold v. The Baby Fold, Inc., 369 N.E.2d 858 (1977) 5

MISCELLANEOUS

Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 Am. U.J. Gender Soc. Pol'y & L. 1023 (2002-2003) 16, 17

Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 Ohio St. L.J. 1189 (1999) 17, 18

Judicial Education Center, *Child Welfare Handbook* 36.4.2 (2003) 18

Jennifer Macomber, *An Overview of Selected Data on Children in Vulnerable Families*, Urban Institute (Jan. 12, 2006) *http://www.urban.org/UploadedPDF/311351_vulnerable_families.pdf* 17

The Legal Aid Safety Net: A Report on the Legal Needs of Low Income Illinoisans 16, *http://www.chicagobarfoundation.org/documents/Full%20Study.pdf.* 22

INTEREST OF AMICI CURIAE[1]

Amici are non-profit organizations serving low income families, families with members who have disabilities, and families with members who are suffering other disadvantages such as domestic abuse. Amici include the Chicago Coalition for the Homeless, the Chicago Legal Advocacy for Incarcerated Mothers ("CLAIM"), Council of Parent Attorneys and Advocates, Inc. ("COPAA"), Equip for Equality, the Sargent Shriver National Center on Poverty Law, Health & Disability Advocates, and the Battered Women's Resource Center, and the New York Legal Assistance Group.

SUMMARY OF ARGUMENT

The Seventh Circuit has established a new and incorrect standard for evaluating voluntariness in *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006). The Seventh Circuit held an agreement to relinquish parental rights is only involuntary if the State makes a misrepresentation to induce the agreement. *Id.* at 763. This misrepresentation standard ignores and contradicts substantial Supreme Court precedent holding voluntariness must be evaluated using a totality of circumstances test. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It also directly conflicts with a decision by the Third Circuit, which held on essentially

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and each has been given at least 10 days notice of amici's intention to file.

the same facts, that a threat to remove a child if the parent did not agree to leave the house was coercive and not voluntary, without regard to whether there was a misrepresentation. *See Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997). The Seventh Circuit's standard leads to illogical results: the threat to take a child out of the home immediately is coercive if false, but is not coercive if true, even though the coercive effect of both statements is identical. Because the Seventh Circuit holds parents' due process rights are not implicated by an agreement to leave their house voluntarily, its unduly narrow and incorrect interpretation of voluntariness results in parents being forced to leave their homes based on mere suspicion of abuse, as in this case, or without any evidence of abuse whatsoever.

The damage done by the violation of a due process right affects all segments of society. Unnecessary safety plans which abruptly break apart families, harm people from all walks of life. Poor and disadvantaged families, however, carry a greater burden in trying to remedy this damage. These families lack resources at the initiation of the safety plan (access to counsel for advice), during the safety plan (access to alternative living arrangements and transportation), and after the safety plans (access to psychological, social work, or other professionals to help the child ameliorate the effects of the trauma). Amici raise concerns with this Court about poor, disabled, and otherwise disadvantaged families because these are the families Amici serve. Amici have insight into unintended consequences of this state practice, which illustrates why this case is of such importance that this Court must

accept it for review to correct the Seventh Circuit's improper narrowing of the voluntariness standard.

I. THE SEVENTH CIRCUIT ABANDONS 40 YEARS OF SUPREME COURT PRECEDENT, REDUCING THE STANDARD FOR VOLUNTARINESS TO NOTHING MORE THAN THE ABSENCE OF A MISREPRESENTATION.

In *Dupuy*, the Seventh Circuit held the State's threat to immediately remove a child is not coercive and does not render a parent's consent to a safety plan relinquishing parental rights involuntary, unless the State's threat is false. 465 F.3d at 763. The Seventh Circuit's focus on a single criterion—that is, coercion only exists where there is a misrepresentation—is unprecedented. Indeed, this Court has repeatedly held that voluntary consent and coercion are established by examining the totality of circumstances.

A. The Seventh Circuit's holding directly contradicts the totality of circumstances test established by the Supreme Court.

The totality of circumstances test was carefully crafted by the Supreme Court in *Brady v. United States*, 397 U.S. 742, 749 (1970) (voluntariness to an agreement "can be determined only by considering all of the relevant circumstances surrounding it"), and has been cautiously protected by this Court ever since. *See Schneckloth*, 412 U.S. 218; *see also United States v. Drayton*, 536 U.S. 194, 207 (2002); *Withrow v. Williams*, 507 U.S. 680, 689 (1993); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Haynes v. Washington*, 373 U.S. 503, 520–21 (1963). To

determine if consent to a governmental action was voluntary or coerced, a court must "assess[] the totality of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226. Voluntary consent is not determined by "the presence or absence of a single controlling criterion." *Id.* The rationale behind the totality of circumstances test is that the law will not condone using a person's apparent consent against him when his will has been over-borne and his consent is the product of coercion. *Id.*

The totality of circumstances test requires courts to carefully "scrutin[ize] all the surrounding circumstances." *Id.* Courts have considered, among other things, an individual's age, lack of education, intelligence, and access to counsel. *See, e.g., Payne v. Arkansas*, 356 U.S. 560 (1958); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Davis v. North Carolina*, 384 U.S. 737 (1966). Courts have also considered government coercion or threats. *Bumper v. North Carolina*, 391 U.S. 543, 548–50 (1968).

Under the totality of circumstances, the fact that the government threatens an individual may inform the court's decision about whether consent is voluntary, but it is not controlling. This is true regardless of whether the government has a legal right to make the threat or whether the threat is a misrepresentation. Indeed, this Court has affirmed the finding of voluntary consent in cases where the government's threat was an indisputable misrepresentation and has found consent to be involuntary in cases where the government's threat was true. *See, e.g., Frazier v. Cupp*, 394 U.S. 731, 737-39 (1969) (voluntariness affirmed *despite* indisputable misrepresentations made by police); *Bumper*, 391 U.S.

at 548–50 ("[w]hen a law enforcement officer claims authority to search a home under a warrant . . . [t]he situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.").

The totality of circumstances test was initially developed in criminal cases involving Fourth and Fourteenth Amendment rights, but it has since been applied in the civil arena. *See, e.g., Regenold v. The Baby Fold, Inc.*, 369 N.E.2d 858, 866 (1977) (totality of circumstances test used to consent to adoption); *see also Cherita v. Gresbach*, 479 F. Supp. 2d 914, 920 (E.D. Wis. 2007); *Schwimmer v. Kaladjian*, 988 F. Supp. 631 (S.D.N.Y. 1997). Since *Schneckloth*, the Court of Appeals for nearly every circuit has adopted and applied the totality of circumstances test to evaluate the voluntariness of one's consent in both civil and criminal cases. *See, e.g., United States v. Lopez*, 437 F.3d 1059, 1063–67 (10th Cir. 2006) (confession involuntary under totality of circumstances); *Kaniff v. United States*, 351 F.3d 780, 785 (7th Cir. 2003) (plaintiff's consent to x-ray voluntary under totality of circumstances); *United States v. Soriano*, 361 F.3d 494, 501–03 (9th Cir. 2003) (under totality of circumstances, mother's consent to search voluntary despite officers' threats to take children if she did not consent); *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (confession involuntary under totality of circumstances when resulted from psychological coercion); *Hubbard v. Haley*, 317 F.3d 1245,1252–53 (10th Cir. 2003) (statement to police voluntary under totality of circumstances); *Ferguson v. City of Charleston*, 308 F.3d 380, 402–03 (4th Cir. 2002) (consent to take urine sample involuntary under totality

of circumstances); *Wilson v. Lawrence County*, 260 F.3d 946, 952–53 (8th Cir. 2001) (confession involuntary under totality of circumstances because plaintiff's will over-borne by officer's conduct); *United States v. Ivy*, 165 F.3d 397, 402–03 (6th Cir. 1998) (consent to search house involuntary under totality of circumstances in part because officers' representations were coercive); *United States v. Tompkins*, 130 F.3d 117, 121–22 (5th Cir. 1997) (consent to search evaluated under totality of circumstances; officers' representations to defendant only one factor to be considered); *United States v. Kim*, 27 F.3d 947, 952–55 (3d Cir. 1994) (consent to search voluntary under totality of circumstances); *United States v. Carter*, 884 F.2d 368, 375 (8th Cir. 1989) (deception standing alone does not invalidate consent).

The Seventh Circuit's departure from the totality of circumstances test in *Dupuy* is against the great weight of authority across the nation. The rationale behind the totality of circumstances test applies with equal force to situations where parents "consent" to safety plans: the law will not condone using parents' consent against them where their will has been over-borne and their consent is the product of coercion. The Seventh Circuit's holding overlooks this rationale by ignoring years of Supreme Court authority and basing voluntariness on a single factor, whether the consent was coerced by a misrepresentation.

The Seventh Circuit's holding defeats the due process rights of parents. Under the Fourteenth Amendment, parents have fundamental rights in the custody, care, and management of their children that cannot be disrupted before substantive and procedural

due process requirements have been met. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Lehr v. Robertson*, 463 U.S. 248, 258 (1983); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Croft*, 103 F.3d at 1125. Only where articulable evidence exists that a child has been abused or is in imminent danger of abuse, or where consent is voluntarily given from an authorized person, may the government interfere with parents' custody of their children without first meeting due process requirements.[2] Any waiver of parents' fundamental rights "must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.

Safety plans offer parents a gut-wrenching "choice," which amounts to no choice at all: leave your family and your home, or lose your child to foster care. The Seventh Circuit held that parents' due process rights are not implicated if parents agree to leave their home in response to such a threat, provided that the State does not lie. The Seventh Circuit contends that this practice is acceptable, even if the State has no evidence of abuse, because the "choice" to accept a safety plan is voluntary:

> But as a mere suspicion—some inarticulable hunch—is not a statutory ground for actually removing a child from his parent's custody (Illinois law requires, as we know, that the state have reason to believe that the child is in imminent danger), the parents in such a case have only to thumb their nose at the offer and

[2] *Croft*, 103 F.3d at 1126; *Schwimmer*, 988 F. Supp. at 643.

> the agency can do nothing but continue its investigation, which it would do anyway.

Dupuy, 465 F.3d at 761. This ignores the reality that few, if any parents, would risk the loss of their child by thumbing their noses at a worker with the power to divide their family.

The Seventh Circuit's holding especially affects parents who are poor, disabled, or otherwise disadvantaged, because it does not permit consideration of factors unique to them. *Schneckloth*, 412 U.S. at 226 (lack of education and lack of access to counsel must be considered under totality of circumstances); *see also Blackburn v. Alabama*, 361 U.S. 199 (1950) (holding consent not voluntary in part because the person questioned was mentally disabled). Under *Dupuy*, even if parents are incapable of understanding their rights or have no access to counsel, their agreement to a safety plan in response to a threat to remove their children is voluntary and not a violation of due process.

B. The Seventh Circuit's holding creates a circuit split regarding the standards for voluntary consent, which is an important and recurring question of federal law.

This Court must grant certiorari where the circuits are split about an important and recurring question of federal law. *See, e.g., Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 744 (2004) (granting certiorari "to resolve . . . the circuit split" between the Fifth and Seventh Circuits); *cf. Vainovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036, 1040 (1998) ("[w]hen state statutes on matters of significant public concern have been declared unconstitutional, we have not hesitated to

review the decisions in question, even in the absence of a circuit split."). This case presents such a split. In *Dupuy*, the Seventh Circuit held that the State's threat to immediately remove a child is not coercive and does not render a parent's consent to a safety plan involuntary, unless the State's threat is false. In *Croft*,[3] on the other hand, the Third Circuit held the State's threat to remove a child was coercive without regard to whether there was a misrepresentation. Applying the totality of circumstances test, the Third Circuit held:

> Defendants repeatedly have characterized Dr. Croft's decision to leave as "voluntary." This notion we explicitly reject. The threat that unless Dr. Croft left his home, the state would take his four-year-old daughter and place her in foster care was blatantly coercive. The attempt to color his decision in this light is not well taken.

Croft, 103 F.3d at 1125. The Seventh Circuit's holding directly contradicts the Third Circuit's holding[4] and for that reason alone, certiorari should be granted.

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[3] The facts in *Croft* are nearly identical to this case. *See Croft*, 103 F.3d at 1124–26. Faced with the same issue, the Third Circuit found that absent procedural safeguards, the policy of removing a parent from the family home during a child abuse investigation raises a procedural due process issue. *Id.* at 1126 n.3.

[4] The Seventh Circuit's attempt to distinguish *Croft* highlights the absurdity of its own logic:

(Cont'd)

The question presented involves recurring issues of exceptional importance and threatens the due process rights of parents across the nation. In Illinois, there are approximately 10,000 safety plans implemented per year.[5] The Seventh Circuit's holding has an adverse and disparate impact on parents within its jurisdiction, compared to parents in the Third Circuit where the totality of circumstances test is applied. To ensure parents' fundamental rights are protected equally from state to state, the petition for a writ of certiorari must be granted.

(Cont'd)

> The court held the threat improper on the grounds that the case worker did not have adequate grounds for removing the child from the parents' custody even temporarily. The threat was not grounded in proper legal authority. The coercion about which the plaintiffs complain in this case does not include such ultimata; the consent form informs the parents of the *possibility* that the child will be removed—information that is in the nature of a truism.

Dupuy, 465 F.3d at 763 (emphasis in original). This fails to distinguish the case and overlooks the record in *Dupuy*. The record shows that the parents here were presented with an "ultimatum" just like the one in *Croft*. (*See* Tr. Prelim. Inj. Hr'g vol. 3, 347; vol. 4, 470; vol. 5, 624; vol. 6, 719; vol. 9, 1165; vol. 10, 1304; vol. 11, 1534–35; vol. 20, 2923–24.)

[5] Petitioner's App. 41.

C. The Seventh Circuit's holding leads to irrational results.

According to the Seventh Circuit, it would be coercive to threaten immediate removal of a child only if the State did not intend to remove the child, because that would be a misrepresentation of the State's intent. But it would not be coercive to make the same threat, so long as the State truly intended to remove the child. Therefore, according to the Seventh Circuit, the threat to take a child out of the home immediately is coercive if the threat is false, but it is not coercive if true. This irrational view is untenable and must be rejected. Otherwise, nothing the State threatens to do will be considered coercive, as long as the State intends to carry out its threat. To a parent the threat to remove a child is equally coercive whether the State intends to carry out the threat or not. *See Bumper*, 391 U.S. at 550.

The Seventh Circuit's decision also turns the idea of voluntary consent on its head. Whether an individual voluntarily consents is basically a question of that individual's intent or mental state. But, because it is impossible to know what a person is truly thinking, courts have developed objective standards to determine consent, like the totality of circumstances test. Under the Seventh Circuit's test, however, consent is not determined by objective criteria or by the individual's own subjective intent. Instead, the focus becomes another person's—the State's—subjective intent. If the State is lying about its intent to remove a child, then the parent's consent is involuntary. But, if the State is telling the truth, the parent's consent is voluntary.

D. The Seventh Circuit's holding threatens to erode decades of Constitutional law.

For nearly thirty years, this Court has applied the totality of circumstances test to Fourth and Fourteenth Amendment issues. "The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment." *Schneckloth*, 412 U.S. at 223. And, in all of those cases, the Court examined the totality of surrounding circumstances, not a single, isolated factor. *Id.* at 226, *discussing*, *Payne*, 356 U.S. 560 (examining lack of education); *Fikes*, 352 U.S. 191 (examining intelligence level); *Ashcroft v. Tennessee*, 322 U.S. 143 (1944) (examining length and nature of questioning); *see Fare*, 442 U.S. at 725 (examining age).

The Court has also used the totality of circumstances test to determine whether an individual voluntarily consents to a search. *Withrow*, 507 U.S. at 689. In these cases, this Court considers all the circumstances surrounding the individual's consent, including "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth*, 412 U.S. at 229. This Court has also noted that, "if under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats of force, or granted only in submission to a claim of lawful authority—then . . . the consent [is] invalid and the search unreasonable." *Id.* at 233.

The Seventh Circuit's holding in *Dupuy* renders voluntary consent, and decades of this Court's precedent, a virtual nullity. Provided the government honestly represents its intent, consent would be deemed voluntary, period. Consider, for example, the following scenario:

The police put an uneducated, developmentally delayed man in an interrogation room and tell him that he will remain there indefinitely, not receiving food or bathroom breaks, while the police repeatedly question him. The man eventually confesses. Under the Seventh Circuit's holding, the man's confession would be deemed voluntary, as long as the police honestly represented their intent. This Court, however, has repeatedly held the opposite is true, and that under the totality of circumstances, a confession from a defendant under the described circumstances is involuntary. *See, e.g.*, *Withrow*, 507 U.S. at 689. Yet, if the Seventh Circuit's opinion in *Dupuy* is allowed to stand, the door will be opened to allow this type of action. If not in confession cases, then certainly in future parental rights cases.

Likewise, if an individual "allowed" the following search it would be deemed voluntary under the Seventh Circuit's holding in *Dupuy*: A police officer comes to an individual's door, says he has a search warrant, and asks to search the premises. The officer never produces the warrant, but asks the individual to sign a piece of paper stating "failure to allow the officer to search your home may result in additional police investigations and possibly a court order to allow a full police search of the home." This scenario is impermissible and unconstitutional under current Supreme Court

precedent. *See Schneckloth*, 412 U.S. 218; *see also Bumper*, 391 U.S. 543, 550.

The Seventh Circuit's opinion in *Dupuy* threatens to erode Constitutional safeguards by blithely ignoring decades of Supreme Court precedent. Indeed, allowing the Seventh Circuit's holding to stand will facilitate the erosion of the voluntariness standard in all cases, civil and criminal, regardless of subject matter.

II. THE SEVENTH CIRCUIT'S NEW "VOLUNTARINESS" STANDARD CAUSES SIGNIFICANT AND UNINTENDED CONSEQUENCES FOR POOR AND DISADVANTAGED FAMILIES AND COMPROMISES THEIR DUE PROCESS RIGHTS.

Amici do not oppose the use of safety plans when agreement to those plans is truly voluntary.[6] Amici think, however, that whenever a parent is coerced into a safety plan, due process rights are implicated. Amici believe that parents here are not voluntarily agreeing to safety plans and instead are being forced to waive their right to due process and to the protections that arise whenever the state aims to bar a parent from the enjoyment of

[6] Amici have grave concerns about the effects of these plans on all communities and the manner in which they are managed by the Department of Children and Family Services (DCFS). Amici recognize, however, that these issues are not before this Court because the Seventh Circuit opinion failed to address the due process issue once it determined that absent a misrepresentation, service plans are voluntary.

their families and the company of their children. *Lehr*, 463 U.S. at 258; *Santosky*, 455 U.S. at 753.

The consequences—though perhaps unintended—of the Seventh Circuit's new "voluntariness" standard are felt in every sector of society, but no more so than with the poor and disadvantaged who have little access to resources to defend against the state. Who are these parents and families? Amici know them well.[7] Amici represent, study and serve these disadvantaged populations and bring to this Court a wealth of experience about the effect of unfettered state discretion. Several examples from this case show the destructive and coercive effects of the Seventh Circuit's "voluntariness" standard. Amici's insight will illuminate why the Court should grant certiorari to address the Seventh Circuit's narrowing of the voluntariness standard.

[7] For example, CLAIM has clients, who have been the target of false abuse allegations simply because others had grudges against them. While fighting to find housing, secure employment, and repair broken relationships with their children, the consequences of a safety plan for a formerly incarcerated mother may include permanent family dissolution. COPAA is a non-profit organization, whose member attorneys and advocates represent students with disabilities, many of whom live in poverty and are likely to suffer unwarranted intrusion into their family lives as a result of the decision of the Court of Appeals. Finally, Chicago Coalition for the Homeless assists clients who, due to safety plan intervention by DCFS, have been forced into homelessness.

A. Poor and disadvantaged families suffer significant unintended consequences from the Seventh Circuit's new "voluntariness" standard.

Safety plans impose stringent conditions, which often require a parent to move out, participate in therapy, attend anger management classes, or be subject to only supervised visitation. Because compliance with these requirements can be costly, poor and disadvantaged families may not be able to comply. Likewise, financial circumstances may prevent them from accessing resources necessary to make a meaningful decision, like hiring a lawyer, or may prevent them from accessing resources necessary to recover from the trauma of separation, like therapy.[8]

The fact that poor and otherwise disadvantaged families often do not have the resources or ability to comply with safety plan requirements makes it even less realistic that the initial consent was voluntary. Why would they have agreed to a plan they knew they could not follow unless they knew they had no choice? The

[8] "Removing indigent children from their families, even temporarily ... results in the unfair disruption of emotional parent-child bonds." *See* Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 Am. U.J. Gender Soc. Pol'y & L. 1023, 1036 (2002-2003).

Seventh Circuit's whittled down definition of "voluntary consent" ignores the fact that parents concede to safety plans knowing it is nearly impossible for them to meet the plans' demands[9] and as a result, effectively strips these parents of their due process rights.

Low Income Families

Low income families are disproportionately subject to the Seventh Circuit's unreasonably narrow standard. It is well documented that "children from low-income households are more likely than children from middle- and high-income households to be reported to child-protective service agencies." *See* Bullock, *supra* at 1024, *citing* Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 Ohio St. L.J. 1189, 1991 (1999).[10] Why? Impoverished families do not have the luxury of seeking medical, educational, or social services from private organizations, and thus must rely on public services, whose employees are often mandated by law to report suspected abuse.[11] More

[9] *See* Jennifer Macomber, *An Overview of Selected Data on Children in Vulnerable Families*, Urban Institute (Jan. 12, 2006) *http://www.urban.org/UploadedPDF/311351_vulnerable_families.pdf* (discussing the link between poverty and alleged abuse).

[10] Amici work with families who have suffered from unintentionally discriminatory assessments by citizens assuming poor or disabled children are the victims of abuse because they are merely poor and disabled.

[11] *See* Macomber, *supra* (discussing the link between poverty and alleged abuse).

frequent contact, coupled with the notion that the effects of poverty can be mistaken for abuse or neglect, places poor families at a greater risk for being victims of unsubstantiated safety plans. *See id.* at 1142–44.[12]

Families who are poor lack the resources to comply with safety plans, and DCFS does not provide these families access to the services necessary to comply. This leads to unintended consequences. Forcing a parent from a home, for example, can force that parent into homelessness. It is axiomatic that two households cost more to maintain than one, and parents who can barely make ends meet when living together are simply unable to do so living apart. No parent would choose homelessness voluntarily.

A prime example is Patrick and Stacey D., parents of three children and employees of a day care center. (*See* Tr. Prelim. Inj. Hr'g vol. 4, 454–55.) After the day care owner called DCFS because a child claimed Patrick touched her "bootie," DCFS told Stacey that Patrick had to leave the house or DCFS would take her children away. (*See id.* at 466–68, 470.) Patrick left the home, and was forced to live on the street for a week until he was able to receive help from Stacey's sister. (*See id.* at 475.) DCFS ultimately concluded the allegation was unfounded, but failed, even then, to tell Patrick he could return home. (*See* Tr. Prelim. Inj. Hr'g

[12] Likewise, parents who are disabled often face additional challenges in caring for their children that may trigger unfounded reports to DCFS and unnecessary separation of families. *See* Judicial Education Center, *Child Welfare Handbook* 36.4.2 (2003).

vol. 11, 1560.) As a result, Patrick spent 11 months separated from his family. (*See* Tr. Prelim. Inj. Hr'g vol. 6, 835.)

In the rare situation where the state provides the required services, a long waiting list can necessitate longer or more stringent safety plans for poor and disadvantaged families than for families who can afford private services. (*See* Tr. Prelim. Inj. Hr'g vol. 11, 1543.) As a result, parents from poor families are forced to stay separated from their family for longer periods of time, and otherwise live with a stricter safety plan than those who could afford to engage the services privately.[13]

[13] Separation due to a safety plan has significant, long-term effects, which are often unintended. Defendant's own expert, Dr. Galatzer-Levy, testified about the effect of such separation:

> [S]eparation of parents and children is enormously stressful and frightening to [parents] with the result that most parents will do virtually anything in order to avoid being separated from the child in an uncontrolled way such as occurs in this situation.... Separation between parents and children, especially uncontrolled separation, separation where the parent doesn't know what's going to be happening, is utterly terrifying to most people.

(*See* Tr. Prelim. Inj. Hr'g vol. 8, 1028.) The long-term effects of safety plans are exacerbated by the fact that, although they are purportedly short in duration and are supposed to be reviewed every five days, it is a common practice for these plans to be extended by weeks and even months before the underlying allegations are proven to be unfounded. (*See, e.g.*, Tr. Prelim. Inj. Hr'g, vol. 2, 136.)

Disabled Parents

Even where a family has the money to comply with the requirements of a safety plan, a family's particular circumstances may interfere with its ability to do so.

Parents with disabilities,[14] for example, like parents who are poor, are more likely to be investigated by DCFS because of societal biases against the disabled. They are also less likely to "thumb their noses" at DCFS, and less able to comply with the requirements of a safety plan. Indeed, if a parent has a disability, complying with a safety plan may be physically and practically impossible.

In the case of one petitioner below, DCFS instituted a safety plan based on a phone call from a man reporting inappropriate touching between a father and his autistic son. (*See* Tr. Prelim. Inj. Hr'g vol. 16, 2356–57.) The mother, who was forced to accept the safety plan, had multiple sclerosis and used a wheelchair. (*See* Tr. Prelim. Inj. Hr'g vol. 6, 693.) The plan, written a day before anyone from DCFS even spoke with the family, barred the father from caring for his son and imposed several requirements on the mother, which due to transportation difficulties associated with her disability, were practically and physically impossible. (*See* Tr. Prelim. Inj. Hr'g vol. 6, 704, 714.) The family was told about the safety plan over the phone, and when the plan was implemented, they had not received a copy. (*See id.* at 721.) At no time

[14] "Parents with disabilities" include a broad spectrum of parents with children of all ages. These parents may have a physical disability, a psychiatric disability, or a developmental disability.

did DCFS ask the mother whether she had the resources to adequately parent her son without her husband's assistance. (*See* Tr. Prelim. Inj. Hr'g vol. 16, 2372–73.) When the family asked DCFS to lift or modify the "voluntary" safety plan because of difficulty meeting the requirements, DCFS refused. (*See* Tr. Prelim. Inj. Hr'g vol. 21, 2977–88.) DCFS ultimately concluded that the allegations were unfounded and dropped the charges against the father.

Battered Spouses

It is not uncommon for an abusive spouse to lodge false child abuse allegations against the battered spouse. Abusive husbands can, and often do, exploit the anonymity and availability of abuse hotlines to coerce battered mothers to remain in an abusive home.[15] The batterer is then placed in a position of power—the underpinning of an abusive relationship—because the child is taken from the abused parent and often placed into the custody of the batterer.[16]

[15] This has been the experience of the Battered Women's Resources Center's Voices of Women Organizing Project. Though V.O.W. is not involved with the DCFS hotline in Illinois, V.O.W has experience with Statewide Central Register (SCR), New York's equivalent to the DCFS hotline, in which batters have abused the anonymous hotlines to threaten and coerce their spouses.

[16] A perfect example is Debra C., who lost children to her abusive spouse for three months while the unfounded allegations against her were investigated. (*See* Tr. Prelim. Inj. Hr'g vol. 9, 1132, 1218.)

The Seventh Circuit's new voluntariness standard makes a bad situation worse. If a battered woman tries to leave an abusive relationship, her abuser may threaten to call DCFS. Because an unfounded allegation may trigger a safety plan—giving her the "choice" to leave her children with her abusive husband or put her children in foster care—battered women are far less likely to leave their abusers.

B. Lack Of Access To Counsel Exacerbates The Unintended Consequences Of The Seventh Circuit's New "Voluntariness" Standard.

DCFS, like its counterparts in other states, has the difficult task of separating founded and unfounded child abuse allegations. A parent with sufficient resources can hire an attorney to challenge the unfounded allegations. Poor and disadvantaged parents, however, lack access to counsel.[17] As a result, they cannot knowingly agree to a safety plan or challenge the conditions of a safety plan once in place. Access to counsel plays a crucial role in these cases, empowering parents to view the safety plan dilemma as a meaningful choice rather than a take-it-or-leave-it demand.

Without an attorney, parents are often unable to understand the nature of the claims brought against them. They also have no way of knowing the procedures

[17] Low-income families in Illinois faced over 1.1 million legal issues without representation in 2003; 140,000 of those families sought legal assistance, but were unable to secure it. *The Legal Aid Safety Net: A Report on the Legal Needs of Low Income Illinoisans* 16, *http://www.chicagobarfoundation.org/documents/Full%20Study.pdf.*

DCFS must follow or how long a safety plan may last. As is, DCFS barely affords a parent any information. For example, although DCFS is required to complete a CERAP Safety Determination Form, detailing the underlying basis for the safety plan, DCFS is not required to provide a copy to the family. *Dupuy v. McEwen* (*Dupuy I*), 462 F. Supp. 2d 859, 869 (N.D. Ill. 2005). There is no evidence that DCFS gives the CERAP form to accused parents. *Id.* Instead, DCFS provides only the safety plan form, which sets forth the restrictions imposed on the parents. *Id.* Thus, a parent knows what he can and cannot do without knowing the underlying reasons for the restrictions. *Id.* Likewise, the safety plan form does not explain the standard or procedure that DCFS must follow to remove a child from his home or the evidence required to obtain protective or temporary custody of the child. *Id.* As though DCFS were a law unto itself, the safety plan form implies that DCFS has gathered enough information to take custody of the child at the time of the plan's implementation, but there is no requirement that DCFS provide that evidence to the parent. *Id.*

Without an attorney, accused parents simply do not know—and the Seventh Circuit's holding does not require DCFS to tell them—whether they have any right to appeal a DCFS decision. (*See* Tr. Prelim. Inj. Hr'g vol. 5, 631–32.) Nor do accused parents have any way of knowing that by agreeing to a safety plan, they are waiving certain constitutional rights. Instead, the only thing parents know is that failure to agree to the safety plan "may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home." *Dupuy I*, 462 F. Supp. 2d at 868.

CONCLUSION

For the reasons set forth above and in Petitioners' brief, this Court should grant the Petition For a Writ of Certiorari requested in this case.

Respectfully submitted,

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