No. 07-1075

IN THE

Supreme Court of the United States

BELINDA DUPUY, *et al.*,

Petitioners,

v.

ERWIN MCEWEN, *et al.*,

Respondents.

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

BRIEF OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION AND THE CHICAGO PSYCHOANALYTIC SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION AND THE CHICAGO PSYCHOANALYTIC SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amicus curiae* brief is submitted in support of petitioners.[1]

INTEREST OF THE *AMICI CURIAE*

The American Psychoanalytic Association ("APSAA") is a national not-for-profit association focused on researching mental health issues and educating the public about them. The members of APSAA are committed to both protecting children and securing parents' fundamental rights.

The Chicago Psychoanalytic Society is dedicated to advancing the field of psychoanalysis by educating the public and promoting research by its members.

APSAA and the Chicago Psychoanalytic Society both have a significant interest in the resolution of the question whether the Due Process Clause of the Fourteenth Amendment has been violated by the Illinois Department of Children and Family Services ("DCFS") policies and practices.

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to the brief.

INTRODUCTION

The purpose of this amicus brief is to provide the scientific context necessary to understand the fundamental error of the decision below. In the view of the U.S. Court of Appeals for the Seventh Circuit, a parent's decision to accept the onerous conditions that a state agency may place on allowing a child to remain in his or her home is no different in kind from the same parent's decision to choose between a "martini [and] a manhattan." Pet. App. 16. That abstracted view of human behavior is inconsistent with decades of scientific research proving that the "voluntariness" of a parent's decision in such circumstances is deeply flawed and the resulting choices often do not reflect a "choice" in any meaningful sense of the word.

SUMMARY OF ARGUMENT

If a state family services agency has reason to believe that a child may be unsafe, it typically offers parents a "safety plan." Under this approach, the agency threatens to remove the child from the home unless the parent suspected of abuse agrees to leave the home. Safety plans affect tens of thousands of families each year. Almost all parents offered a safety plan accept it, even though most of the resulting investigations reveal ***no evidence*** of child abuse or neglect. Pet. App. 32.

The fundamental submission of amici is that a parent who accedes to a "safety plan" is often not making a decision that is "voluntary" in any meaningful sense of the word. Instead, acquiescence to the plan represents a coerced visceral response to

a Hobson's choice: either leave the home and abandon the child or send the child to live with strangers in an unfamiliar environment. The biological and psychological stresses associated with this decision undermine the ability of many parents to make a choice that reflects their best judgment. The safety plan often elicits an instinctive response in parents to protect their children and avoid the children's separation from the family by accepting the plan. Several other factors also generally confound the voluntariness of parental decision-making here: the decision usually is made in the face of a show of authority by the state, under time pressure, and without the benefit of information about alternatives or the evidence against them. For these reasons, a parent's agreement to a safety plan cannot be presumed to be the product of a rational, voluntary choice.

Granting a hearing to allow parents to contest the safety plan is the best way to balance the safety of children and the fundamental rights of parents and children to associate without interference from the state. Parental rights cannot be denied without an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citation omitted). Similarly, a child's right to be raised by his or her parents cannot be denied without an opportunity to be heard in a meaningful way. *See id.* Compelling a parent to leave the home amounts to a stark and serious infringement of the right to familial integrity.[2] The Due Process Clause requires

[2] The right to familial integrity is fundamental, including the right of parents to the care, custody, and control of their

appropriate procedures to assure that the State takes such action based on accurate information duly tested by the adversarial process.

The Seventh Circuit erred in holding that a parent's decision to accept a safety plan is necessarily "voluntary" because "[t]he state does not force a safety plan on the parents; it merely offers it." Pet. App. 14. Consistent with the scientific evidence, the district court had properly concluded that the perceived threat of removing a child from the home is coercive and prevents parents from making a voluntary decision. Pet. App. 95. The district court reached its decision after carefully considering the totality of the circumstances, using the appropriate due process test for "voluntariness" outlined by this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).[3] The Seventh Circuit's *ipse*

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children. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'") (internal citation omitted); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"). The Court has further recognized that children share the same fundamental right. *See Santosky v. Kramer*, 455 U.S. 745, 760 (1982) ("[U]ntil the State ***proves*** parental unfitness, the child and his parents ***share*** a vital interest in preventing erroneous termination of their natural relationship.") (emphases added).

[3] The district court found that the safety plans implemented by DCFS were not voluntary where investigators "made threat[s] sufficient to deem the family's agreement [to safety plans] coerced." Pet. App. 94. The court concluded that where there is a perceived threat of removal of a child from the home, that action in of itself is coercive. *Id.* ("[W]hen an

dixit reasoning is at odds with well-documented scientific research regarding human decision making.[4]

ARGUMENT

This Court has held that voluntariness for purposes of constitutional analysis is "a question of fact to be determined from all the circumstances." *See Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 248-49 (1973). A crucial aspect of that inquiry is the "psychological impact" of the circumstances on the decision-maker, and the "possibly vulnerable subjective state of the person who consents." *Id*. at 229. For that reason, psychological and behavioral science research should play an integral role in the inquiry because it provides extensive guidance regarding the psychological impact and subjective state of the decision-maker who gave consent. The Seventh Circuit's assumption that *all* parents agreeing to safety plans are acting voluntarily is untenable.

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investigator expressly or implicitly conveys that failure to accept a plan will result in the removal of the children for more than a brief or temporary period of time, it constitutes a threat sufficient to deem the family's agreement coerced."). In particular, "agreement to the plans at issue here was secured in a coercive manner under the investigator's express or implied threat of protective custody lasting more than a brief or temporary period of time." *Id*. at 95.

[4] It also creates a split with the Third Circuit. *See Croft v. Westmoreland County Children & Youth Servs*., 103 F.3d 1123, 1125 n.1 (3d Cir. 1997).

I. *SCHNECKCLOTH* REQUIRES AN INQUIRY INTO THE PARENT'S STATE OF MIND IN AGREEING TO A SAFETY PLAN

This Court has recognized that there is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen," and has held that voluntariness is "a question of fact to be determined from all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 248-49 (1973).[5] Accordingly, in evaluating the voluntariness of consent decisions and of confessions, a court must consider numerous factors including unequal bargaining power, insufficient access to relevant information, the age of the accused, lack of education, level of intelligence, lack of advice about constitutional rights, use of physical punishment, the "psychological impact" of the situation on the decision-maker, and the "possibly vulnerable subjective state of the person who consents." *Id.* at 224 (collecting cases), 229. A determination of voluntariness does not turn on "the presence or absence of a single controlling criterion." *Id.* at 226.[6]

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[5] *See also, e.g.*, *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 186-88 (1972) (looking to circumstances surrounding waiver of rights to prejudgment notice and hearing in civil context to determine whether waiver was knowing, intelligent, and voluntary); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (assessing circumstances of confession, including police threats to take accused's children away if she did not cooperate, in determining that confession was "not voluntary, but coerced").

[6] The Court has further recognized that a meaningless choice is no choice at all. *See Frost & Frost Trucking Co. v.*

The Seventh Circuit ignored this clear mandate and held without meaningful analysis that safety plans are voluntary as a matter of law because "[t]he state does not force a safety plan on the parents; it merely offers it." Pet. App. 14. Concluding that a decision to enter a safety plan is voluntary simply because it is technically optional misses the point of this Court's decisions on voluntariness. For example, no one is required to consent to a search; the mere fact that a search is technically optional, however, has not led this Court to conclude that all consented-to governmental searches are voluntary. *See, e.g.*, *Schneckloth*, 412 U.S. at 248-49. The inquiry required by this Court's prior decisions necessitates consideration of the circumstances impacting voluntariness, including parents' access to information, the balance of power, and the biological and psychological implications of parent-child separation.

II. SCIENTIFIC RESEARCH DEMONSTRATES THAT A PARENT'S DECISION TO ACCEPT A SAFETY PLAN IS OFTEN NOT VOLUNTARY

According to psychologists, informed consent -- the scientific analogue to the law's concept of "voluntariness" -- can exist only if a person (1) receives adequate information about the decision, (2) has the capacity to understand that information, and

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R.R. Comm'n of Cal., 271 U.S. 583, 593 (1926) (holding the "option to forego a privilege which may be vital to [petitioner's] livelihood or submit to a requirement which may constitute an intolerable burden" was "[i]n reality . . . no choice"); *see also e.g., Marchetti v. United States*, 390 U.S. 39 (1968).

(3) is free to make the choice.[7] Research on informed consent repeatedly shows that people under stress find it particularly difficult to give informed consent, and that obtaining truly informed consent requires extended and skillful communication, appropriate to the totality of the circumstances, between the party giving it and party obtaining it.[8] Parents' ability to give informed consent is usually undermined by the stressful circumstances that come with a decision to accept or reject safety plans. Moreover, the effect of these stressors is cumulative, so the impact of any single circumstance is greater than it would be in isolation.[9] As we show below, the circumstances surrounding the presentation of safety plans to parents do not satisfy the three scientific criteria for inferring that parents' decisions to accept the plans are the product of real consent.

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[7] *See* Jan M. Benedict et al., *Validity and Consequence of Informed Consent in Pediatric Bone Marrow Transplantation: The Parental Experience*, 49 Pediatric Blood Cancer 846 (2007).

[8] *See also* Harold J. Bursztajn et al., *Medical Choices, Medical Chances: How Patients, Families, and Physicians Can Cope With Uncertainty* (1981); Laura B. Dunn et al., *Assessing Decisional Capacity for Clinical Research or Treatment: A Review of Instruments*, 163 American Journal of Psychiatry 1323 (2006); Margaret Holmes-Rovner & Celia E. Wills, *Improving Informed Consent: Insights From Behavioral Decision Research*, 40:9 Medical Care V30-V38 (2002).

[9] *See* Bruce S. McEwen et al., *The Role of Adrenocorticoids as Modulators of Immune Function in Health and Disease: Neural, Endocrine and Immune Interactions*, 23 Brain Research Reviews 79 (1997); Bruce S. McEwen, *Protective and Damaging Effects of Stress Mediators*, 338:3 New England Journal of Medicine 171 (1998).

A. Parents Often Lack Adequate Information To Make a Voluntary Decision

A decision-maker must have adequate material information to give valid consent. Rational choices require decisions to be based on "the weighing of the utilities and probabilities associated with all available courses of action." *See* Giora Keinan, *Decision Making Under Stress: Scanning of Alternatives Under Controllable and Uncontrollable Threats*, 52 Journal of Personality and Social Psychology 639 (1987). Moreover, recent behavioral science research demonstrates that the way a decision is framed has a significant effect on the choice people make. Typically, people tend to be risk-averse to secure a certain gain, but are risk-seeking to avoid a certain loss. *See* Daniel Kahneman & Shane Frederick, *Frames and Brains: Elicitation and Control of Response Tendencies*, 11 Trends in Cognitive Sciences 45 (2007).

Parents faced with a safety plan may well not have adequate information to give valid consent. Here, for example, DCFS investigators failed to disclose key pieces of information to parents, including plan terms, the bases for offering a plan, alternatives to safety plans, and the possible consequences of rejecting a plan. Pet. App. 41. The district court found that in most instances DCFS investigators presented a proposed safety plan to parents with little or no discussion of plan terms or alternatives. Pet. App. 41. DCFS investigators are not obligated to, and often do not, present or explain important information like relevant procedural protections and the evidence of abuse justifying the

State's investigation. *Id.* The paperwork accompanying safety plans makes no mention of the legal standards or procedures DCFS must follow to remove a child from the home. *Id.*

This lack of relevant information is exacerbated by the biased and self-serving statements frequently made by investigators and contained in the plans presented to parents. Investigators often verbally threaten to remove children if a parent does not agree to the safety plan. *Id.* at 44. The plan itself warns that failure to agree may lead to placement of the child in protective custody or a referral to the State attorney's office for a court order to remove the child. *Id.*

The damage caused by the lack of relevant information is magnified by the "framing effect." Parents just made aware that their children may have been abused will view a safety plan as a way to ensure that a child will stay at home. Rejecting the safety plan is risky because if DCFS finds the abuse allegations are unfounded, both parent and child can stay home, but if DCFS does find evidence of abuse, the child will be taken into protective custody. Because of the way the choice has been framed, parents not surprisingly seek this certain (if small) gain rather than choose the riskier path and reject the safety plan.

Parents forced to make a decision with little information—all of which is skewed in favor of the State's interests—are making effectively no decision at all.

B. Parents Often Lack the Psychological Capacity to Make a Voluntary Decision

In addition to failures of information, a parent's decision to accept a safety plan is undermined by various other features of the decision that may work together to render the decision involuntary.

1. Unique Features of the Relationship between Parents and their Children Preclude Informed Consent

Several factors rooted in parental biology and psychology make it unlikely that parents have the capacity to make a voluntary decision about whether to accept a safety plan.

The biological and psychological elements of the parent-child relationship make demands for decisions involving separation of children from parents inherently coercive. Children are physically immature for a long period of time and depend on an adult's care and protection. John Bowlby, *Separation, Anxiety, and Anger: Attachment and Loss* (Vol. 2, 1973). Parents have a corresponding instinctual drive to care for their children and protect them from danger. *Id*. Numerous studies have tested Bowlby's attachment theory.[10] They

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[10] *See* Helen Barett, *Parents and Children: Facts and Fallacies about Attachment Theory*, 16 Journal of Family Health Care 3 (2006); Paul C. Notaro & Brenda L. Volling, *Parental Responsiveness and Infant-Parent Attachment: A Replication Study with Fathers and Mothers*, 22 Infant Behavior and Development 345 (1999); John Bowlby,

showed that children separated from parents acted out with great physical distress aimed at reuniting them with their parents. Parents responded to separation with intense efforts to locate their children. The observed reactions to separation were visceral, not the product of reasoned analysis.

The parents' response in these studies appears to have a biological basis. The scientific community widely accepts that there are specific hormones, such as oxytocin, and brain functions of the limbic system driving parents' attachment to and protection of their children. Moreover, these structures and functions are connected with, and therefore can activate, the areas of the brain associated with responses to stressful situations.[11]

In particular, parents faced with possible separation from their children respond with intense states of physiological arousal akin to the physical response to dangerous situations. This response, first identified almost a century ago and referred to as the "fight or flight" response, has been demonstrated to have a clear basis in normal brain function.[12] As a result, brain functioning shifts,

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Attachment and Loss: Retrospect and Prospect, 52 American Journal of Orthopsychiatry 664 (1982).

[11] *See* James F. Leckman et al., *Primary Parental Preoccupation: Circuits, Genes, and the Crucial Role of the Environment*, 111 Journal of Neural Transmission 753 (2004); Alison S. Fleming et al., *Cortisol, Hedonics, and Maternal Responsiveness in Human Mothers*, 32 Hormones and Behavior 85 (1997).

[12] Walter B. Cannon, *Bodily Changes in Pain, Hunger, Fear, and Rage: An Account of Recent Researches into the Function of Emotional Excitement* (1929); Joseph LeDoux, *The*

helping the individual make very rapid decisions in the face of perceived danger. In these states it becomes very hard to think clearly, ideas of taking physical action to protect against danger block out more elaborate and rational thought, and attention becomes narrowly focused on dealing with the immediate danger.

Parents also experience strong psychological responses to the prospect of separation from their children. *See* Cathy R. Schen, *When Mothers Leave their Children Behind*, 13 Harvard Review of Psychiatry 233 (2005). Research shows that parents respond to separations of even short periods of known duration with vigilance and concern. *See, e.g.*, Carl Corter & Jane Bow, *The Mother's Response to Separation as a Function of Her Infant's Sex and Vocal Distress*, 47 Child Development 872 (1976). The record indicates that parents typically have far more severe responses to proposed safety plans, which often have indefinite time frames, or sometimes fail to state any duration at all. Pet. App. 48.

The threat of separation or harm to a child brought by a DCFS investigator triggers this instinctive parental response to eliminate the threat of separation and reduce danger to the child.

2. The Seriousness of the Accusations Often Impairs Parents' Capacity to Make a Voluntary Choice

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Emotional Brain: The Mysterious Underpinnings of Emotional Life (1998).

The seriousness of an accusation of abuse or neglect often impairs a parent's ability to make a voluntary decision. Most parents are profoundly upset to learn that their child may have been abused or neglected and that a spouse or relative is suspected. Expert Report of Robert M. Galatzer-Levy at 13.[13] They experience intense emotions, including concern for the well-being of the child, suspicion, anger, and fear towards the alleged perpetrator, and concern over social stigmatization. Expert Report of Robert M. Galatzer-Levy at 13-15. Research shows that such severe stress produces a state of "hypervigilance" in the individual, and decision-making becomes irrationally "hasty, disorganized, and incomplete . . . leading to faulty decisions and post-decisional regret." Keinan, *supra*, at 639.

3. Parents Usually Face Time Pressure to Make a Decision, which Reduces Their Capacity to Consent

The short timeframe for parents to decide usually affects their ability to make a voluntary choice. Expert Report of Robert M. Galatzer-Levy at 12. Safety plans generally are implemented within 48 hours of the initial call to a DCFS hotline. Pet. App. 46. Research shows that when decisions must be made under time constraints, decision-makers do not think faster, but instead consider less information. *See* Mieneke W.H. Weenig and Marleen Maarleveld, *The Impact of Time Constraint on Information Search Strategies in Complex Choice Tasks*, 23

[13] The Expert Report of Robert M. Galatzer-Levy will be made available to the Court upon request.

Journal of Economic Psychology 689 (2002). Parents faced with the "choice" of entering into a safety plan generally are not capable of making an informed, rational decision in a short time frame and without the ability to seek legal advice. Expert Report of Robert M. Galatzer-Levy at 12.

These observed lapses in rationality are associated with a shift in brain activity from the cerebral cortex, which is active during rational thought, to the limbic system, a set of brain structures associated with emotions and fear. *See* Benedetto De Martino et al., *Frames, Biases, and Rational Decision-Making in the Human Brain*, 313 Science 684 (2006). Studies of a large variety of situations indicate that individuals required to make decisions quickly or under conditions of uncertainty abandon ordinary rationality in favor of heuristics and short-cuts. The resulting decisions are not always rational, but they are made using available information in the time available. *See* Daniel Kahneman et al., *Judgment Under Uncertainty: Heuristics and Biases* (1982).

Research shows that severe stress causes the individual to forego reasoned decision-making, which customarily involves the orderly and careful evaluation of alternatives. Instead, persons under stress reach decisions before they have considered all available alternatives, consider alternatives in a nonsystematic, disorganized fashion, and devote insufficient time to the consideration of each alternative. *See* Keinan, *supra*, at 639.

In this case, parents suddenly confronted with DCFS workers usually must make a quick,

uninformed decision with weighty consequences. Many of these decisions will be heavily influenced by the fact that an authority figure is present in the parent's home and urging the parent to accept a safety plan. Parents presented with safety plans have also experienced the same shift in brain activity impairing their capacity for rational thought. Expert Report of Robert M. Galatzer-Levy at 19-22.

C. Parents Often Feel They Lack the Freedom to Make a Voluntary Decision

An additional factor that often prevents a voluntary parental decision is the perceived power imbalance between government officials and parents. Parents normally view state officials as wielding significant authority over them. As a result, parents effectively lack the freedom to make a choice about whether to accept a safety plan. Psychological research confirms that individuals typically comply with authority figures in stressful situations.[14]

Recent studies establish that when faced with an interaction with child protective services, parents uniformly perceive a power imbalance. Gary C. Dumbrill, *Parental Experience of Child Protection*

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[14] Stanley Milgram, *Behavioral Study of Obedience*, 67 Journal of Abnormal and Social Psychology 371 (1963) (showing that many people will make irrational decisions that they would not otherwise make because they were obeying authority figures). *See also* Expert Report of Robert M. Galatzer-Levy at 12, 17-18; Tr. at 1043, 1052; Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (2007).

Intervention: A Qualitative Study, 30 Child Abuse & Neglect 27 (2006). This study notes that parents were skeptical that the system worked in the interest of their children and believed case workers either had preconceived notions about the allegations or provided the parents with no opportunity to challenge the allegations or open a dialogue. *Id*. Moreover, parents felt they were poorly equipped to challenge child protective services due to lack of resources and lack of emotional energy; and many believed workers had the power to impose changes even though they were illogical or not in the best interests of the child. These fears existed even when allegations against the parents had no basis in fact. *Id*.

* * *

As the above discussion demonstrates, the decision to accept a safety plan bears no serious resemblance to a choice of pre-dinner drink. A voluntary decision requires adequate information, the psychological strength to process that information, and the confidence to act on the resulting choice. The guest who selects a martini does so aware of all relevant facts, able to understand the facts, and free to make a choice of drink. In sharp contrast, the parent facing the choice of agreeing to a safety plan lacks relevant material information, is inundated with biological responses to the threat of child removal that render accurate processing of the information difficult, and are often intimidated by the overwhelming power of the state agency presenting the plan.

III. THE COMMON LAW CHARACTERIZES AGREEMENTS AS INVOLUNTARY IN SIMILAR CIRCUMSTANCES

In two similar situations, the common law recognizes that a person's consent is not truly given unless it is based on an understanding of the material facts, in a rational state of mind, and unfettered by coercion. According to common law precedent, a patient's acquiescence to a medical procedure does not constitute informed consent if doctors have not informed the patient of the risks. So too, a contract is not entered into voluntarily when a powerful party extracts grossly unfair and inflexible contract terms from a weaker party through contracts of adhesion. The standards in these cases resemble this Court's analysis in *Schneckloth* and the scientific criteria for valid consent. Similar analysis should apply to consent to safety plans.

A. Patients Can Give Informed Consent to Medical Procedures Only If They Receive Adequate Information about the Procedure, Its Risks, and Alternatives

A doctor generally must disclose to a patient the nature and probable consequences of a contemplated medical procedure, as well as material risks and alternatives. This allows the patient to make an intelligent and informed choice about undertaking the treatment. *See Bang v. Charles T. Miller Hosp.*, 88 N.W.2d 186, 190 (Minn. 1958). A doctor's failure to properly disclose means the patient's consent is ineffective and does not represent a voluntary choice by the patient. *See Florida v. Presidential Women's*

Ctr., 937 So. 2d 114, 116 (Fla. 2006); *Landon v. Zorn*, 884 A.2d 142, 155-56 (Md. 2005) (discussing informed consent standard and citing to the seminal case of *Sard v. Hardy*, 379 A.2d 1014 (Md. 1977)); *Kenny v. Wepman*, 753 A.2d 924, 926 (R.I. 2000); *Bartal v. Brower*, 993 P.2d 629, 634 (Kan. 1999); *see also Cruzan ex rel Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 269-78 (1990) (discussing the common law doctrine of informed consent in examining the right to refuse treatment).

The duty to disclose arises from the asymmetric nature of the physician-patient relationship, with some courts recognizing a fiduciary quality to the relationship, *Woods v. Brumlop*, 377 P.2d 520, 524-25 (N.M. 1962), and others acknowledging that a patient is completely dependent upon the knowledge and skill of the physician to make decisions about medical procedures. *Cobbs v. Grant*, 502 P.2d 1, 9-10 (Cal. 1972).

While the nature and scope of disclosure vary by state, the Joint Commission on the Accreditation of Healthcare Organizations defines informed consent as:

> Agreement or permission accompanied by full notice about what is being consented to. A patient must be apprised of the nature, risks, and alternatives of a medical procedure or treatment before the physician or other health care professional begins any such course. After receiving this information, the patient then either consents to or refuses such a procedure

> or treatment. The patient should not be subjected to any procedure without his [or her] voluntary, competent, and understanding consent . . . Where medically significant alternatives for care or treatment exist, the patient shall be so informed.

Hospital Accreditation Standards 398 (JCAHO 2004).

The decision about a safety plan is equally serious and traumatic as a decision on a medical procedure, and is complicated further by confounding factors such as the parents' biological and psychological imperatives, the seriousness of accusations of abuse or neglect, and the duration of time in which to make the decision. It also involves parties of disproportionate negotiating leverage and with asymmetrical access to information. The same factors that vitiate consent in the context of medical procedures bolster the notion that parents' agreement to safety plans can be involuntary.

B. Factors that Contribute to the Finding that a Contract Is Unconscionable Are Present in the Context of Safety Plans

A finding that a contract is unconscionable is, in effect, a finding that the contract was entered into involuntarily. Traditionally, a contract was said to be unconscionable if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Hume v. United States*, 132 U.S. 406, 411 (1889) (*quoting Earl of Chesterfield v.*

Janssen, 28 Eng. Rep. 82, 100 (1750)). Agreements can be held unconscionable for either substantive or procedural defects. The purpose of the doctrine is "to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in meaningful fashion." *See* 8 *Williston on Contracts* § 18:8 (4th ed. 1998) (quoting *Kugler v. Romain*, 279 A.2d 640, 652 (N.J. 1971)). Three procedural factors that contribute to the finding of unconscionability are present in the context of safety plans.

First, gross inequality of bargaining power between the parties can be evidence of an unconscionable agreement. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). *See also* Restatement (Second) of Contracts § 208(d) (1979). Just as Mrs. Williams had little power to bargain with the Walker-Thomas Furniture Company for better credit terms, parents presented with a safety plan have little power to bargain with DCFS workers. DCFS workers usually do not give parents the opportunity to suggest changes to the proposed safety plan. If parents do not agree to a safety plan, there is a substantial likelihood that their children will be placed in protective custody, and a possibility that the matter will be referred to the state's attorney. Pet. App. 93-94. Even though both parents and Mrs. Williams nominally can choose whether to enter into the agreement, the meaningfulness of that choice is negated by the gross inequality of bargaining power between the parties. *See id*.

Second, contract terms that limit one party's ability to seek remedies often are viewed as indicia of unconscionability. *See generally* 8 *Williston on Contracts* § 18:13 (4th ed. 1998). For example, under the Uniform Commercial Code, warranty terms purporting to limit consequential damages for personal injury resulting from consumer goods are prima facie unconscionable. *See* U.C.C. § 2-719(3) (2004). When parents agree to safety plans, they forfeit the right to challenge DCFS findings, and the safety plan itself, in subsequent hearings. Pet. App. 50.

Finally, inequality in bargaining power and terms to limit remedies are particularly problematic when the contract is offered on a take-it-or-leave-it basis. Contracts of adhesion receive greater scrutiny under these circumstances because the lack of negotiation about individual terms provides further evidence that the contract was not a voluntary, bargained-for exchange. *See, e.g., Walker-Thomas*, 350 F.2d at 449-450 (holding that consent was not voluntarily given to a standard form contract when there was gross inequality in bargaining power between the parties); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (declining to enforce a standard form contract that purported to disclaim all implied warranties, also citing gross inequality in bargaining power between the parties). Nearly every testifying class member said that the DCFS investigator simply presented a proposed safety plan with little or no discussion of the plan terms or alternatives. Pet. App. 41.

Just as these factors undermine the notion that a contract was entered into voluntarily, they

undermine the notion that a safety plan was entered into voluntarily.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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