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,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Seventh Circuit

REPLY BRIEF FOR PETITIONERS

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, IL 60637
(773) 702-9563

JEFFREY L. FISHER
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(605) 724-7081

Counsel for Petitioners

May 27, 2008

Additional Counsel Listed On Inside Cover

DIANE L. REDLEAF
FAMILY DEFENSE CENTER
725 S. Wells St., Suite 702
Chicago, IL 60607
(312) 356-3202, ext. 11

ROBERT E. LEHRER
LAW OFFICES, ROBERT E. LEHRER
36 S. Wabash Ave., Suite 1310
Chicago, IL 60603
(312) 332-2121

JEFFREY B. GILBERT
JOHNSON, JONES, SNELLING,
GILBERT & DAVIS
36 S. Wabash Ave., Suite 1310
Chicago, IL 60603
(312) 578-8105

M. MARSHALL SEEDER
ANDREW L. MATHEWS
REED SMITH LLP
10 S. Wacker Dr.
Chicago, IL 60606
(312) 207-1000

CAROLYN SHAPIRO
565 W. Adams St.
Chicago, IL 60661
(312) 906-5392

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES **PAGE**

REPLY BRIEF FOR PETITIONERS

Petitioners (the "parents") seek certiorari to challenge two policies that DCFS follows with respect to its practice of imposing "safety plans" under threats that refusing to accept them may result in their children being taken into state custody and placed into foster care: (1) that DCFS does not require reasonable suspicion of abuse or neglect before imposing such plans; and (2) that DCFS does not provide any procedures for parents to challenge safety plans once they are imposed. Pet. for Cert. i. The parents seek an injunction ordering DCFS to adopt constitutionally sufficient procedures; they do not seek damages.

DCFS did not dispute the existence of these policies in either the district court or in the Seventh Circuit; there were no disputed issues of fact in the Seventh Circuit and there are none here. Nor does DCFS deny here that it follows each of the policies at issue. DCFS's undisputed policies authorize state investigators to impose safety plans on the basis of no more than an allegation of abuse or neglect and without any evidence supporting that allegation. Pet. App. 34a-40a. (DCFS's assertion that permissible reasons for an investigator's implementing a safety plan "include" reasonable suspicion that a member of the household poses a threat to the child (Br. in Opp'n 5 n.1) is simply another way of saying that DCFS does not *require* such suspicion.) And DCFS's undisputed policies provide that families who accede to the plans in order to avoid the risk of foster care are afforded no procedures to challenge DCFS's decision to deem the child in need of such a plan. Pet. App. 44a, 49a.

Nonetheless, DCFS attempts to divert attention from its policies and practices by portraying the parents' challenge to the Seventh Circuit's decision as a complaint about factual and evidentiary

matters. Br. in Opp'n i, 1, 2-3, 11-18, 20, 23, 34. More specifically, DCFS claims that the constitutionality of its two policies is not really at issue because petitioners failed to present evidence that investigators "*systematically* lack[] sufficient evidence to create reasonable suspicion of abuse when threatening to remove a child to obtain agreement to safety plans." Br. in Opp'n 3 (emphasis added).

DCFS's argument misses the mark. The parents' lawsuit challenges *policies* that: (1) fail to require its investigators to have a reasonable suspicion of abuse before requiring parents to choose between accepting a safety plan and risking foster care; and (2) provide no neutral review of such plans once DCFS imposes them. And this petition for certiorari challenges the Seventh Circuit's holding that no such suspicion is required because parents' assent to such plans is, by definition, voluntary. Pet. App. 15a. When DCFS lacks reasonable suspicion, the Seventh Circuit reasoned, parents have "only to thumb their nose" at the investigator's threat, just as a guest at a cocktail party might reject a martini in favor of a manhattan, *id.* at 15a-16a. Accordingly, to the extent DCFS now demands individualized showings that each member of the class has been harmed by its scheme, the time for such complaints has long passed. The district court certified a plaintiff class of individuals who have been or will be required by DCFS "under threat of protective custody" to submit to a safety plan and it found DCFS's policies irreparably injure families. Pet. for Cert. iii; Pet. App. 97a-99a. DCFS did not appeal that ruling, so parents may challenge the Department's policies without the need for everyone to submit particularized evidence.

Once this case is brought back into focus, the need for certiorari becomes clear. Notwithstanding DCFS's protestations, the Seventh Circuit's holding creates a conflict with the Third Circuit's decision in

Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123 (3rd Cir. 1997), and contravenes this Court's precedents. The Seventh Circuit's holding also forms the predicate for its additional erroneous conclusion that "no hearing of any kind is necessary" once a safety plan is imposed (Pet. App. 15a) – a conclusion that also conflicts with this Court's precedents. Certiorari should be granted to resolve these extremely important legal issues that affect thousands of families in Illinois alone. Pet. App. 40a. *See Illinois State Bar Ass'n* Brief as Amicus Curiae in Support of Petitioners at 2 (noting other states with similar safety plan policies).

1. In *Croft*, the Third Circuit held that "a state has no interest in protecting children from their parents" – and thus cannot offer a safety plan on pain of removing children from their homes – "unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." 103 F.3d at 1126. DCFS argues that the Seventh Circuit's decision is consistent with *Croft* because: (a) the investigator there lacked legal authority to threaten removal of the child; and (b) the investigator there threatened "certain removal" instead of merely possible removal. Br. in Opp'n 16-19. Neither of these purported distinctions withstands scrutiny.

First, the constitutional issue here – namely, the level of suspicion required before implementing a safety plan – does not turn in any way on whether investigators have legal authority under state law to impose safety plans. Just as violating a state law does not violate the federal Constitution, *see, e.g., Virginia v. Moore,* 128 S. Ct. 1598 (2008), *conforming* to state law or policy does not transform an unconstitutional action into a constitutional one.[1]

[1] Even if the content of state law made a constitutional difference, Illinois law is materially no different from the

Accordingly, the only issue here is the constitutional question of whether imposing safety plans without reasonable suspicion[2] (and under DCFS's other policies and procedures) violates the Due Process Clause.

Second, DCFS is wrong that this case differs from *Croft* in that state investigators here merely "offer" safety plans "without the threat of the child's certain removal." Br. in Opp'n 19. Although state investigators ordinarily give parents forms stating that if parents reject safety plans the investigators "may" remove their children, Pet. App. 16a, the district court found, and neither DCFS nor the Seventh Circuit disputed, that in light of investigators' actual behavior in presenting safety

---

state law at issue in *Croft*. Both require reasonable suspicion before the state may take custody of a child. *Compare Croft*, 103 F.3d at 1126 (citing 42 PA. CONS. STAT. § 6324 and 23 PA. CONS. STAT. § 6315 as "providing for removing child from home only where there are reasonable grounds to believe the child suffers from injury, or is in imminent danger of injury from her surroundings"), *with* Pet. App. 15a (noting that under Illinois law, "mere suspicion ... is not a statutory ground for removing a child from his parents' custody").

[2] DCFS insinuates at certain points that its policies, at least as applied to certain class members, conform to the reasonable suspicion standard. Br. in Opp'n 3-4, 16-17. But DCFS has never disputed that it policies authorize it to act with far less than reasonable suspicion. Furthermore, the bases for DCFS's actions here are, in all relevant respects, identical to those deemed constitutionally inadequate in *Croft*, including multi-level hearsay, uncorroborated and anonymous allegations, and investigators' admissions that they impose safety plans without any belief that abuse occurred. *Compare Croft*, 103 F.3d at 1126-27 *with* Pet. App. 53a (multilevel and anonymous hearsay); *id.* at 67a-68a (anonymous and uncorroborated allegations); and *id.* at 36a-37a (safety factors warranting imposition of safety plans may be found "based solely on an allegation of abuse or neglect, even if no investigation has yet occurred or if an investigation suggests that the allegation may be untrue"). In any event, the due process challenge here does not depend on whether any individual safety plan would be upheld under constitutional policies and procedures.

plans "all class members were threatened that their children would be placed in protective custody if they refused to accept a safety plan." Pet App. 86a; a*ccord* Pet. App. 89a; Pet. for Cert. 7-8 (providing examples). Indeed, the plaintiff class here is explicitly defined as individuals who have been or will be required by DCFS "under threat of protective custody" to submit to a safety plan. Pet. for Cert. iii. In other words, the parents do not claim – as DCFS repeatedly says (Br. in Opp'n 9, 12, 16, 19, 22) – that "a mere safety plan offer, standing alone" is "*per se* unconstitutional." The "offers" that parents challenge in this case do not "stand alone."[3]

---

[3] DCFS says that "the Department procedures to which class members testified below have been amended, meaning much of the factual evidence on which the district court relied is no longer meaningful, for the only relevant practices are the Department's current ones in a case seeking only injunctive relief," Br. in Opp'n 3; *see also id.* at 8. This claim ignores the record in this case. Although DCFS adopted some modest amendments to its challenged policies in August 2002, those amendments did not modify its policies and procedures of threatening parents with removal of their children if they do not agree to safety plans while providing no procedures for review. Pet. App. 42a-43a. Moreover, although the amendments DCFS now relies on were instituted *before* the trial, DCFS has never argued that these amendments worked a constitutionally significant change to its policies, which continue in force. Nor did the district court suggest, in its March 2005 opinion finding that DCFS consistently threatens parents into accepting safety plans, Pet. App. 86a, 89a, 93a, that the amendments had any impact on its findings of fact – findings DCFS did not appeal.

If DCFS is suggesting that the parents' claims have become moot because amended DCFS procedures forbid investigators from threatening parents (Br. in Opp'n 3, 8, 15), this suggestion is without merit. The district court's opinion was issued in March 2005, and DCFS did not then or thereafter suggest that this case had become moot. In any event, "it is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.,* 528

2. The Seventh Circuit's decision allowing DCFS to impose safety plans based on hunches that fall short of reasonable suspicion (Pet. App.15a) also contravenes this Court's precedents.

DCFS does not dispute that parents have a fundamental liberty interest in directing "the care, custody and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2001). It also is well established that state interference with that interest need not rise to the level of the state's direct removal of a child from a parent to be unconstitutional. *Id.* (invalidating a statute allowing any person to petition for visitation rights against parents' wishes). DCFS nonetheless contends that it can impose safety plans without reasonable suspicion of wrongdoing – the minimum level of suspicion ordinarily required to impair a fundamental liberty interest – because "a parent always has the right to refuse a safety plan offer." Br. in Opp'n 21. But this Court made clear in *Quilloin v. Walcott*, 434 U.S. 246 (1978), that parents have a fundamental liberty interest against more than just unilaterally forced familial separations. A state must have some evidence of unfitness even to "*attempt* to force the breakup of a natural family." *Id.* at 255 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment)) (emphasis added). Yet the entire point of safety plans is to interfere with parents' care, custody, and control over their children — otherwise DCFS would not impose them. Once that reality is clear, it follows that DCFS's policy of

---

U.S. 167, 189 (2000) (quoting *City of Mesquite v. Alladin's Castle, Inc.,* 455 U.S. 283, 289 (1982)). Only if "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur" may a case "become moot by the defendant's voluntary conduct," *id.* DCFS has not sought to make any such showing, and even if it had materially changed its ways that would not suffice, for nothing currently prevents it from resuming its prior practices.

allowing investigators to impose safety plans based upon mere "inarticulable hunches" is unconstitutional. *See Parham v. J. R., 442 U.S 584, 603* (1979) ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition")*; Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that a law prohibiting the teaching of German unconstitutionally impairs "the power of parents to control the education of their own [children]").

3. DCFS suggests that the parents' claims of unconstitutional coercion fail because they did not present "class-wide" evidence that DCFS investigators secured safety plans through misrepresentations or other "improper means." Br. in Opp'n 23. But the parents were unable to prove coercion on remand only because the Seventh Circuit held that threatening to take children into custody without reasonable suspicion of abuse or neglect was not an "illegal" or otherwise independently "improper means" of interfering with parents' care, custody, or control over their children. Pet. App. 3a, 15a, 19a. The parents' challenge precisely *that* holding, which presents a pure legal question that does not depend on any individualized evidence.

DCFS's demands for evidence that *each* class member suffered "improper coercion,"[4] along with its revised Question Presented (Br. in Opp'n i), do not even address that question. Moreover, the Seventh Circuit's position that threatening removal of children is not improper (Pet. App. 2a, 3a, 15a, 19a)

[4] Individualized factual questions as to whether particular investigators improperly coerced parents into waiving their due process rights by threatening removal of their children would arise only if DCFS had a policy that forbade investigators from making such threats absent reasonable suspicion. Since DCFS has no such policy, its arguments about what constitutes such coercion (Br. in Opp'n 23-28) are irrelevant.

flies in the face of this Court's decisions which hold that a state "may not impose conditions [on the grant of a privilege] which require the relinquishment of constitutional rights." *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593-94 (1926); *Steffel v. Thompson*, 415 U.S. 452 (1974); *Terrace v. Thompson*, 263 U.S. 197 (1923), discussed in Pet. for Cert. 21-23. DCFS strains to distinguish *Frost* as a case about unconstitutional conditions, not coercion. Br. in Opp'n 27. But this is a distinction without a difference: the issue is whether and how the government can pressure individuals to give up their constitutional rights.

DCFS's reliance on *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), is misplaced. In *Wilkie*, the government had a legitimate basis for coercive actions. *Id.* at 2601-02. In contrast, DCFS lacks such an interest. *See Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (a state has no interest in separating "children from the custody of fit parents") (quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

4. DCFS's argument that the parents are not entitled to post-deprivation process likewise fails. DCFS mischaracterizes the parents' claim as one for the same "robust set of procedural rights" that are required to ensure that a guilty plea is voluntary. Br. in Opp'n 33-34. Petitioners, however, discuss those protections only to illustrate the flaws in the Seventh Circuit's analogy between safety plans and plea bargains. Pet. App. 14a; Pet. for Cert. 27-28. Petitioners have consistently requested timely *post*-deprivation procedures.

Finally, DCFS claim that various types of potential state court proceedings – principally individual declaratory judgment actions – provide adequate process for parents who have acceded to safety plans. Br. in Opp'n 34-35. But DCFS has never raised this argument before: it never has suggested that such proceedings offer an adequate

form of class-wide relief, not even when the district court, in its March 2005 opinion, solicited DCFS's views as to appropriate post-deprivation procedures, *see* Pet. App. 100a. Moreover, state court procedures like individual declaratory judgment actions come with no guarantee of timely adjudication, making them entirely inappropriate for parents suffering ongoing deprivations of their parental rights.[5] In any event, the only question at issue here is whether the Seventh Circuit properly held that "no hearing of any kind is necessary." Pet. App. 16a. If this Court reverses that ruling (as it should), then DCFS could argue on remand that these state court proceedings supply adequate process and that DCFS has not waived its ability to so argue.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, the writ should be granted.

[5] In contrast, in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S. Ct. 764, 772-73, 775 (2007), upon which DCFS relies (Br. in Opp'n 27, 35), this Court approved a declaratory judgment action because doing so permitted the plaintiff to *avoid* the injuries with which it was threatened, money damages and the loss of a good part of its business.

Respectfully submitted,

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, IL 60637
(773) 702-9563

JEFFREY L. FISHER ,
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

DIANE L. REDLEAF
FAMILY DEFENSE CENTER
725 S. Wells St., Suite 702
Chicago, IL 60607
(312) 356-3202, ext. 11

ROBERT E. LEHRER
LAW OFFICES, ROBERT E. LEHRER
36 S. Wabash Ave.,
Suite 1310
Chicago, IL 60603
(312) 332-2121

JEFFREY B. GILBERT
JOHNSON, JONES, SNELLING, GILBERT & DAVIS
36 S. Wabash Ave.,
Suite 1310
Chicago, IL 60603
(312) 578-8105

M. MARSHALL SEEDER
ANDREW L. MATHEWS
REED SMITH LLP
10 S. Wacker Dr.
Chicago, IL 60606
(312) 207-1000

CAROLYN SHAPIRO
565 W. Adams St.
Chicago, IL 60661
(312) 906-5392

May 27, 2008 *Counsel for Petitioners*