

# Note

NICOLE STEDNITZ\*

## Ending Family Trauma Without Compensation: Drafting § 1983 Complaints for Victims of Wrongful Child Abuse Investigations

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\* J.D. Candidate 2012, University of Oregon School of Law; B.A. in Political Science, History, University of California–Los Angeles; Associate Editor, *Oregon Law Review*, 2011–2012. I would like to thank Professors Megan G. Thompson and Leslie Harris for their guidance and support in writing this Comment. I am also thankful to the practitioners who exposed me to family law and § 1983 litigation during my clerkship opportunities, as well as to Mikel R. Miller for being generous with his time. Finally, I am grateful for the unconditional love and encouragement of my partner, Ryan Dibble, J.D.; my parents, Mike and Kathy Stednitz; my siblings; and my uncle, Michael Reilly.

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## INTRODUCTION

In 2007, the U.S. Department of Health and Human Services estimated that Child Protective Services agencies across the country investigated 3.2 million claims of child abuse or neglect involving approximately 5.8 million children during the fiscal year.<sup>1</sup> Yet, only one quarter of these investigations produced sufficient evidence to substantiate the claim of abuse or neglect.<sup>2</sup> Thus, Child Protective Services (CPS)<sup>3</sup> agencies across the nation investigated millions of individuals for suspected child abuse in 2007 only to eventually determine that insufficient evidence existed to substantiate abuse claims. CPS may find insufficient evidence of child abuse during its investigations for several reasons, oftentimes because parents may be wrongfully accused<sup>4</sup> or evidence of abuse may be particularly difficult to obtain. Yet, in the process of conducting these child abuse investigations, well-intentioned CPS caseworkers might cause real and substantial harm to some families when CPS interferes with familial relationships based on unsubstantiated claims of child abuse.<sup>5</sup>

<sup>1</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH, & FAMILIES, CHILD MALTREATMENT 2007 ch. 2 (2009), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter2.htm>.

<sup>2</sup> *Id.*

<sup>3</sup> The use of the term "CPS" throughout this Comment will refer to a state agency responsible for protecting children from abuse because the title of agencies differ in each state yet perform a similar role. CPS utilizes the expertise of police detectives who specialize in juveniles in coordination with its investigation of abuse. Many lawsuits against CPS involve allegations of constitutional violations of individual rights stemming from investigations of child abuse.

<sup>4</sup> Some parents who are accused or suspected of committing child abuse have children who have a rare genetic disorder, such as spinal muscular atrophy, that causes children's bones to be extremely fragile and fracture easily. *E.g.*, Susan Donaldson James, *Rare Disease Mimics Child Abuse and Tears Family Apart*, ABC NEWS, Apr. 4, 2012, <http://abcnews.go.com/Health/false-child-abuse-charges-trigger-murder-suicide-colorado/story?id=16074344#.T4HrlBxFuEs>.

<sup>5</sup> Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 417 (2005) (arguing that CPS agencies may actually cause more aggregate harm to children than aggregate help to children).

CPS decision making deserves rigorous and focused examination because of the crucial role that CPS serves, which is to protect the nation's children from neglect and abuse. Families have historically been protected from arbitrary governmental interference and should be able to remain physically together absent good reason, such as neglect or abuse.<sup>6</sup> Child abuse investigations operate in a framework that requires the maintenance of a proper balance of protecting the nation's children from neglect and abuse against protecting the constitutional rights of parents and their children. However, CPS officials sometimes engage in severely intrusive conduct in investigating child abuse or removing children from parental care. The impacts of a child abuse investigation on a family can be very traumatic, especially for the children. For example, there is evidence of a "prevalence of heightened PTS [post traumatic stress] symptoms in a nationally representative sample of children for whom a child welfare investigation occurred and who subsequently were placed in out-of-home care."<sup>7</sup> Even children who were permitted to remain in their original home during a child abuse investigation were more likely to exhibit increased PTS symptoms.<sup>8</sup> Similarly, the impacts of a child abuse investigation can be significant for the parents, in part because of the stigma associated with being the subject of a child abuse investigation or receiving services aimed at decreasing child maltreatment.<sup>9</sup>

In 2005, Sarah Greene's two minor daughters were removed from her home for over three weeks and subjected to questioning and invasive medical examination of their genitals.<sup>10</sup> A State of Oregon CPS caseworker named Bob Camreta asked a public school employee to remove one of the girls, S.G., from her classroom and interviewed her about suspected abuse in a private office for two hours in the presence of an armed sheriff.<sup>11</sup> After CPS removed Ms. Greene's daughters from her custody for over three weeks, Ms. Greene filed a legal action under § 1983 of the Civil Rights Act, personally and as

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<sup>6</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

<sup>7</sup> David J. Kolko et al., *Posttraumatic Stress Symptoms in Children and Adolescents Referred for Child Welfare Investigation*, 15 *CHILD MALTREATMENT* 48, 49 (2010).

<sup>8</sup> *Id.*

<sup>9</sup> Catherine A. Faver et al., *Services for Child Maltreatment: Challenges for Research and Practice*, 21 *CHILD. & YOUTH SERVICES REV.* 89, 102 (1999).

<sup>10</sup> *Greene v. Camreta*, No. Civ. 05-6047-AA, 2006 WL 758547, at \*1-2 (D. Or. Mar. 23, 2006).

<sup>11</sup> *Id.* at \*1.

next friend for her two daughters, against Mr. Camreta,<sup>12</sup> the county sheriff, the county sheriff's office, and the school district.<sup>13</sup>

In 2009, the Ninth Circuit unanimously reversed and remanded the district court's dismissal of the Greenes' complaint on two grounds.<sup>14</sup> First, the Ninth Circuit reversed the district court's order granting summary judgment to the defendants because a genuine issue of material fact existed regarding Mr. Camreta's alleged misrepresentations surrounding the juvenile court's removal order.<sup>15</sup> Second, the Ninth Circuit held that Mr. Camreta's exclusion of Ms. Greene from her daughters' medical examinations violated the Greenes' clearly established Fourteenth Amendment rights.<sup>16</sup> However, the Ninth Circuit affirmed the district court's grant of summary judgment to the defendants based on qualified immunity, despite the fact that the Ninth Circuit also concluded that Mr. Camreta and the county sheriff violated S.G.'s Fourth Amendment rights.<sup>17</sup> Specifically, the Ninth Circuit held that Mr. Camreta violated S.G.'s Fourth Amendment right to be free from unreasonable search and seizure when Mr. Camreta conducted an interview at S.G.'s elementary school for abuse investigation purposes absent a court order, warrant, parental consent, or exigent circumstances.<sup>18</sup> In other words, the Ninth Circuit determined that S.G.'s Fourth Amendment rights were not clearly established and that Mr. Camreta faced no civil liability for constitutional violations of S.G.'s autonomy, as Mr. Camreta was entitled to qualified immunity.<sup>19</sup>

Additionally, the Ninth Circuit reversed the district court's dismissal of the Greenes' Fourteenth Amendment claims, finding that the Greenes suffered Fourteenth Amendment constitutional violations

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<sup>12</sup> The Greenes' complaint named Mr. Camreta as a defendant only in his individual capacity. Under the Eleventh Amendment, states and state employees operating in an official capacity are immune from suit unless a state has consented to be sued. Because Mr. Camreta was an employee of the State of Oregon, he was not named in the Greenes' complaint in his official capacity, and neither was Mr. Camreta's employer. The complaint, however, named the county sheriff in his individual and official capacity, as well as the sheriff's employer, because the Eleventh Amendment does not bar suit against local government defendants.

<sup>13</sup> *Greene*, 2006 WL 758547, at \*1–2.

<sup>14</sup> *Greene v. Camreta*, 588 F.3d 1011, 1037 (9th Cir. 2009).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1030.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1033.

by Mr. Camreta.<sup>20</sup> Counsel for Mr. Camreta appealed the Ninth Circuit's adverse Fourth Amendment decision to the U.S. Supreme Court. The Supreme Court granted certiorari to Mr. Camreta, even though Mr. Camreta technically "won" in the court below on qualified immunity grounds.<sup>21</sup> In 2011, the Supreme Court issued a somewhat anticlimactic opinion that vacated the Ninth Circuit's holding that Mr. Camreta violated S.G.'s Fourth Amendment rights by committing an unlawful seizure at S.G.'s school without parental consent, court order, or exigent circumstances.<sup>22</sup> Because the Ninth Circuit's Fourth Amendment holding has no more precedential value, the Supreme Court's decision may have had the effect of hampering families' ability to recover compensation for Fourth Amendment violations endured by suspected victims of child abuse in the course of child abuse investigations.

Part I of this Comment discusses the factual background of the Greene family's § 1983 lawsuit based on CPS's conduct during the child abuse investigation. Part II examines the Fourteenth and Fourth Amendments as constitutional sources of the rights of parent and child. Although there are additional legal avenues an attorney might pursue against CPS, such as state claims of false imprisonment, intentional infliction of emotional distress, or malicious prosecution, this Comment focuses on federal constitutional violations. Part III explains how CPS's conduct may be analyzed as the basis for a § 1983 lawsuit and how an adverse qualified immunity ruling may preclude a family from obtaining any compensation.

Part IV discusses the Ninth Circuit's decision, *Greene v. Camreta*, which was vacated by the Supreme Court solely for justiciability reasons. Though the Ninth Circuit's Fourth Amendment holding in *Greene* expanded the scope of constitutionally violative CPS conduct for which families may be entitled to compensation, attorneys may no longer rely on this Ninth Circuit holding because it was vacated. An essential element of the Supreme Court's decision in *Camreta v. Greene*, however, was that the Ninth Circuit's Fourth Amendment holding was vacated on a purely procedural basis without addressing its merits. Because of this rather unique procedural posture, it is plausible that another panel of judges in the Ninth Circuit could reestablish a strict Fourth Amendment standard in the child abuse

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<sup>20</sup> *Id.* at 1037.

<sup>21</sup> *Camreta v. Greene*, 131 S. Ct. 2020, 2026–28 (2011).

<sup>22</sup> *Id.* at 2026–27.

investigation context. Part V of this Comment explores the legal theories of liability that attorneys representing families, such as the Greenes, who are harmed by wrongful CPS conduct might utilize in obtaining compensation for violations of the rights of parent and child based on binding precedent in the Ninth Circuit. Last, Part VI concludes with a discussion of specific types of allegations attorneys might consider in drafting a § 1983 complaint against CPS in the wake of the Supreme Court's *Camreta* decision.

## I

### THE GREENE FAMILY

CPS officials in Oregon became involved with the Greene family in early 2003.<sup>23</sup> The Greenes' case was heard after the defendants filed motions for summary judgment on each of the Greenes' claims, so the district court evaluated all factual inferences in the light most favorable to the Greenes.<sup>24</sup> On February 12, 2003, Nimrod Greene, Ms. Greene's husband and the father of her two daughters, was arrested for sexual abuse of an unrelated seven-year-old boy.<sup>25</sup> The sheriff reported to CPS the circumstances surrounding Mr. Greene's arrest and indicated that Mr. Greene was possibly abusing his two young daughters.<sup>26</sup> On February 21, 2003, Mr. Greene was released from jail, and the assigned CPS caseworker, Bob Camreta, became concerned about Mr. Greene's unsupervised access to his two young daughters.<sup>27</sup>

Three days after Mr. Greene was released from jail, on February 24, 2003, Mr. Camreta visited Ms. Greene's oldest daughter, S.G., who was nine years old, at her elementary school.<sup>28</sup> With the assistance of school employees who retrieved S.G. from her classroom, Mr. Camreta questioned S.G. in a private office on school grounds in the presence of an armed sheriff for two hours.<sup>29</sup> S.G. claimed during the interview that her dad touched her all over because he hugged and kissed her and gave her piggyback rides.<sup>30</sup> S.G.

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<sup>23</sup> *Greene v. Camreta*, No. Civ. 05-6047-AA, 2006 WL 758547, at \*1 (D. Or. Mar. 23, 2006).

<sup>24</sup> *Id.* at \*3.

<sup>25</sup> *Id.* at \*1.

<sup>26</sup> *Id.*

<sup>27</sup> *See id.*

<sup>28</sup> *Greene v. Camreta*, 588 F.3d 1011, 1016–17 (9th Cir. 2009).

<sup>29</sup> *Id.* at 1017.

<sup>30</sup> *Id.*

testified that Mr. Camreta was dissatisfied with her statements to him that her father's touchings were not improper.<sup>31</sup> S.G. stated that, after Mr. Camreta consistently rejected the answers she gave, she eventually began to say yes to whatever Mr. Camreta asked.<sup>32</sup> Mr. Camreta did not obtain a court order, a warrant, or consent from Ms. Greene for the interview of S.G. at her school.<sup>33</sup>

At the end of the school interview, Mr. Camreta suspected that S.G. was the victim of abuse by her father and sent her back to her classroom.<sup>34</sup> Next, Mr. Camreta visited the Greenses' home to discuss the interview he had conducted with S.G. at her school.<sup>35</sup> Both of S.G.'s parents denied any abuse and agreed to abide by a safety plan<sup>36</sup> in which Mr. Greene would not have unsupervised contact with his daughters while an investigation was under way.<sup>37</sup> On March 6, 2003, Mr. Greene was indicted on a total of six counts of felony sexual assault against S.G. and the unrelated seven-year-old boy.<sup>38</sup>

On March 11, 2003, over two weeks after Mr. Camreta interviewed S.G. at her elementary school, Mr. Camreta petitioned the juvenile court for an order removing the children from the family home, alleging that Ms. Greene would not protect her children from Mr. Greene.<sup>39</sup> Mr. Camreta removed both of the Greene children from the family home and took them into protective custody that same day.<sup>40</sup> The juvenile court held an emergency shelter hearing the next day, and both Mr. and Ms. Greene attended with counsel.<sup>41</sup> The juvenile court placed the children in temporary protective custody, ordered medical examinations of the children, barred Ms. Greene from discussing the abuse allegations with her children, ordered Mr. Greene to avoid contact with his children, and stated that the children

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1016–17.

<sup>34</sup> *Id.* at 1018.

<sup>35</sup> *Id.*

<sup>36</sup> A safety plan is an agreement that a CPS caseworker establishes with caregivers of children suspected of abuse in order to keep the children in the home but isolated from a suspected abuser.

<sup>37</sup> *Greene*, 588 F.3d at 1018.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1018–19.

<sup>40</sup> *Id.* at 1019.

<sup>41</sup> *Id.*

should return to Ms. Greene as soon as an appropriate safety plan was established.<sup>42</sup>

On March 20, 2003, while S.G. and K.G. were still in protective custody, Ms. Greene's five-year-old daughter, K.G., was scheduled for a medical examination at a health clinic.<sup>43</sup> Ms. Greene waited in the clinic lobby, intending to be present with K.G. during the examination, but clinic employees insisted that Ms. Greene must leave the premises at Mr. Camreta's request.<sup>44</sup> Ms. Greene was not permitted access to be with or near her daughter during the medical examination. Similarly, on March 31, 2003, S.G. was scheduled to undergo her medical examination, but Ms. Greene was again refused access to be with or near S.G. during the examination.<sup>45</sup> During S.G.'s examination, S.G. told the doctors that what she had told Mr. Camreta about her father's improper touchings was not true.<sup>46</sup> The clinic determined that the results of both girls' medical examinations were inconclusive as to sexual abuse, and both children were returned to Ms. Greene's custody on the same day that S.G.'s examination occurred.<sup>47</sup>

Mr. Greene stood trial on the criminal charges of sexual abuse against the seven-year-old boy and S.G., but the jury was unable to reach a verdict.<sup>48</sup> Instead of facing retrial, Mr. Greene entered an *Alford* plea on the charge for abuse of the seven-year-old boy.<sup>49</sup> The charges against Mr. Greene for the sexual abuse of S.G. were dismissed.<sup>50</sup> As a result of CPS's child abuse investigation, Ms. Greene's daughters lived in foster care for over three weeks, interacted with Ms. Greene for only prearranged, supervised visitations, and experienced invasive medical examinations of their genitals without the comfort of their mother.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1019–20.

<sup>48</sup> *Id.* at 1020.

<sup>49</sup> *Id.* at 1020 & n.3 (stating that an *Alford* plea means that a defendant maintains one's innocence on the charge but admits that sufficient evidence exists from which a fact finder could find guilt).

<sup>50</sup> *Id.* at 1020.

## II

## CONSTITUTIONAL SOURCES OF THE RIGHTS OF PARENT AND CHILD

Families are guaranteed significant protections under the Fourteenth Amendment and the Fourth Amendment to the Constitution. These constitutional protections are deeply rooted in the historical autonomy afforded to individuals who comprise a familial unit by virtue of their relation to one another. In the Ninth Circuit, one very important note that has been overlooked by attorneys is that the proverbial door remains open to the argument that CPS conduct that serves as a basis for a child's Fourth Amendment violation can be the same conduct that serves as a basis for the parent's Fourteenth Amendment claim.<sup>51</sup> Attorneys who represent families who have been subjected to wrongful child abuse investigations by CPS should analyze CPS conduct under a number of legal theories in order to plead claims in a complaint that will give families the best opportunity to recover compensation. Strengthening existing and developing new legal avenues for families to utilize in their lawsuits against CPS will increase families' chances of recovering compensation and will serve as a proper deterrent that maintains the delicate balance of protecting children from harm against protecting the constitutional rights of parent and child.

*A. Fourteenth Amendment Protections*

The Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment protects parents' liberty interest in the care, custody, and control of their children.<sup>52</sup> The Due Process Clause says that no state shall "deprive any person of life, liberty, or property, without due process of law."<sup>53</sup> Not only has the Court consistently guarded the parent-child relationship from arbitrary governmental interference, this protected liberty interest is one of the oldest unenumerated rights recognized by the Court under the Due

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<sup>51</sup> *Greene v. Camreta*, No. Civ. 05-6047-AA, 2006 WL 758547, at \*6 n.1 (D. Or. Mar. 23, 2006) (explaining that Count 3 of the Greenes' complaint alleged that Mr. Camreta's school seizure was a violation of S.G.'s Fourth Amendment rights and rejecting the Greenes' argument raised only in response to the defendants' motions for summary judgment that Count 3 also alleged that the school seizure violated S.G.'s Fourteenth Amendment rights).

<sup>52</sup> *Troxel v. Granville*, 530 U.S. 57, 77 (2000) (Souter, J., concurring).

<sup>53</sup> U.S. CONST. amend XIV, § 1.

Process Clause.<sup>54</sup> The Court has discussed this right as a tradition in the “history and culture of Western civilization” that protects parental decision making concerning the upbringing and education of children.<sup>55</sup> Part of Western civilization’s concept of the family is the idea that it is a unit wherein parents have broad authority over their children.<sup>56</sup> Yet the parents’ interest in the care, custody, and control of their children is not absolute because the government has a *parens patriae*<sup>57</sup> interest in promoting children’s welfare in abuse-free environments.<sup>58</sup>

The Due Process Clause protects both an individual’s procedural rights—to notice and an opportunity to be heard when parental rights may be affected<sup>59</sup>—and substantive rights to make decisions on behalf of their child.<sup>60</sup> In the family law context, the government may deprive individuals of the fundamental right of care, custody, and control only when the state has substantial reason to separate family members from one another:

Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.<sup>61</sup>

When CPS assesses allegations of child abuse, it must continually evaluate the substance and credibility of evidence.<sup>62</sup> The procedural

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<sup>54</sup> *Troxel*, 530 U.S. at 65 (plurality opinion); *see also* *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>55</sup> *Wisconsin*, 406 U.S. at 232.

<sup>56</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

<sup>57</sup> *Parens patriae* is a doctrine by which the government has the authority to act on behalf of an individual who cannot legally act on their own behalf.

<sup>58</sup> *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

<sup>59</sup> *Troxel*, 530 U.S. at 65–66 (plurality opinion) (citing *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997), for the proposition that the Fourteenth Amendment’s Due Process Clause “guarantees more than fair process” because it includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests”).

<sup>60</sup> *Id.* at 66.

<sup>61</sup> *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000).

<sup>62</sup> OFFICE ON CHILD ABUSE & NEGLECT, CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS ch. 6 (2003), available at <http://www.childwelfare.gov/pubs/usermanuals/cps/cpsf.cfm> (instructing CPS workers that “[a]fter interviewing all parties and gathering all relevant information, CPS caseworkers must determine whether maltreatment has occurred and can be substantiated”).

requirements for interfering with parents' interests of care, custody, and control of their children will vary depending on the degree of impact of the government action on the liberty interest.<sup>63</sup> Thus, procedural requirements will be stricter when the government seeks to permanently terminate parental rights, compared to when the government seeks to adjust a parent's custody or visitation order.<sup>64</sup>

In the Ninth Circuit, parents are entitled to significant protections under the Fourteenth Amendment to exercise autonomy over their children. In *Wallis v. Spencer*, a case involving a § 1983 lawsuit brought by a family based on a botched CPS abuse investigation, CPS received a report from a therapist regarding a patient who was being hospitalized in a psychiatric facility and had an extensive history of dissociative and multiple personality disorders.<sup>65</sup> The patient told her therapist about wild allegations that her minor nephew was endangered by an impending secretive satanic sacrifice.<sup>66</sup> In addition to having a history of psychiatric conditions, the patient had previously lodged a false child abuse claim against her sister's family regarding this specific nephew, which caused strain and eventual termination of a relationship between the hospitalized patient and her sister's family.<sup>67</sup> CPS used the hospitalized patient's allegation about satanic sacrifice as a basis to initiate a severely flawed child abuse investigation in which both of the Wallis's children were separated from non-abusive parents for over two months and subjected to invasive medical examinations of their genitals.<sup>68</sup> CPS removed the children from the family home without a warrant, court order, or any indication that the children were in imminent danger, and subjected the Wallis children, ages two and five, to invasive medical examinations without parental knowledge or consent.<sup>69</sup>

In *Wallis*, the Ninth Circuit stated that parents have the right not to be separated from their children by the government without due process of law except in emergencies.<sup>70</sup> The court explained that the evidence CPS obtained to substantiate child abuse in no way provided a basis for removing the children from the care of their mother

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<sup>63</sup> See *Santosky*, 455 U.S. at 753–54.

<sup>64</sup> *Id.*

<sup>65</sup> *Wallis*, 202 F.3d at 1131.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1132–35.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1136.

because the source of danger was alleged to be that of only the children's father.<sup>71</sup> The court stated that a close family member's disclosure of abuse usually lends more credence to an allegation than a stranger's report of abuse; however, CPS's decision to act on the allegations of a hospitalized family member, based on the nature of the allegations and factual uncertainty of information that CPS possessed at the time of removal, was extraordinary.<sup>72</sup> The court emphasized that, absent threat of destruction of material evidence or medical need, CPS must both notify parents and seek judicial authorization before subjecting children to an invasive medical examination.<sup>73</sup> The court discussed that reason may exist to exclude parents from a child's medical examination in some circumstances, but stated that the parent has a right to be nearby, such as in a waiting room, during the examination.<sup>74</sup> The court emphasized that the constitutional claims of each family member should be assessed separately and recognized a corresponding parent-child liberty interest protected by the Fourteenth Amendment.<sup>75</sup> Of particular importance, the court made sure to clarify that parents can sue CPS for Fourteenth Amendment violations based on conduct that includes subjecting children to invasive medical examinations.<sup>76</sup>

#### *B. Fourth Amendment Protections*

The Fourth Amendment to the Constitution provides another source of protection to families, the children in particular, that may be implicated by CPS conduct. The Fourth Amendment guarantees people the right "to be secure in their persons . . . against unreasonable searches and seizures" by government officials.<sup>77</sup> The Supreme Court incorporated Fourth Amendment protections to the states through the Due Process Clause of the Fourteenth Amendment.<sup>78</sup> When a law enforcement official engages in a significant interview of a child or subjects a child to a physical examination for evidence of abuse, the official's conduct may

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<sup>71</sup> *Id.* at 1140–41.

<sup>72</sup> *Id.* at 1140.

<sup>73</sup> *Id.* at 1141.

<sup>74</sup> *Id.* at 1141–42.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1141.

<sup>77</sup> U.S. CONST. amend. IV.

<sup>78</sup> *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

implicate the child's Fourth Amendment search and seizure rights.<sup>79</sup> Generally, a search involves any investigation by CPS officials in the discharge of their duties where information or evidence is obtained in furtherance of the investigation.<sup>80</sup> CPS officials have engaged in a seizure for Fourth Amendment purposes if a reasonable person, in light of all of the circumstances of the incident, would not believe that he or she is free to leave.<sup>81</sup>

Twenty-six years ago, the Supreme Court addressed the constitutionality of a search conducted by public school officials who searched a minor student's purse on school grounds after the student was caught smoking cigarettes in the school bathroom.<sup>82</sup> In *New Jersey v. T.L.O.*, the Supreme Court held constitutional a vice principal's search of a fourteen-year-old student's purse that revealed marijuana, smoking paraphernalia, cash, and a list of names of people who owed the student money.<sup>83</sup> The Supreme Court held that the search by school officials was constitutional in the absence of a search warrant or probable cause because a contrary result would hamper the ability of schools to discipline students in the officials' control.<sup>84</sup> Subsequent Supreme Court decisions have upheld the narrowness of *T.L.O.*, distinguishing searches conducted by school officials acting under their own authority from searches conducted in conjunction with a law enforcement entity.<sup>85</sup>

In the Ninth Circuit, the landmark Fourth Amendment case in the child abuse investigation context is *Calabretta v. Floyd* from 1999, which applied traditional Fourth Amendment protections to CPS conduct in child abuse investigations, meaning that CPS must obtain a search warrant or parental consent or determine that special exigency exists before engaging in a search of seizure.<sup>86</sup> In *Calabretta*, a CPS caseworker received a report that a neighbor's child was screaming in

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<sup>79</sup> *Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003); *see also* *White v. Pierce Cnty.*, 797 F.2d 812, 813–14 (9th Cir. 1986).

<sup>80</sup> *Heck*, 327 F.3d at 510; *Greene v. Camreta*, No. Civ. 05-6047-AA, 2006 WL 758547 at \*3–4 (D. Or. Mar. 23, 2006) (explaining that, because S.G.'s school counselor escorted her to Mr. Camreta's interview in a private office, Mr. Camreta's interview of S.G. was a seizure because S.G., as a reasonable nine-year-old child, would not feel free to leave the interview).

<sup>81</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>82</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

<sup>83</sup> *Id.* at 327–28.

<sup>84</sup> *Id.* at 340.

<sup>85</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009); *Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001).

<sup>86</sup> *Calabretta v. Floyd*, 189 F.3d 808, 813–14 (9th Cir. 1999).

the middle of the night, saying “no Daddy, no.”<sup>87</sup> Based on this information, the CPS caseworker and a police officer visited the family home, entered the home without consent, and conducted interviews and examinations of the children.<sup>88</sup> The CPS caseworker suspected that the children were victims of abusive spanking, spoke to the children in a bedroom out of parental presence, and asked a twelve-year-old child to remove the three-year-old’s pants to expose the child’s buttocks.<sup>89</sup> The mother of the children heard the three-year-old crying and rushed in to the bedroom, where the CPS caseworker then ordered the mother to remove her child’s pants.<sup>90</sup> The mother hesitated but complied with the CPS caseworker’s instructions, and the child’s buttocks revealed no apparent bruises, markings, or other signs of abuse.<sup>91</sup> The Ninth Circuit held that it was settled law that CPS caseworkers are barred from entering family homes for the purpose of a child abuse investigation without a warrant, exigent circumstances, or parental consent.<sup>92</sup> In 2009, ten years after the *Calabretta* decision, the Ninth Circuit analyzed the Fourth Amendment implications of Mr. Camreta’s seizure of S.G. in her public elementary school without parental consent, court order, or exigent circumstances.

### III

#### SECTION 1983 LITIGATION FOR CPS VIOLATIONS OF FAMILIAL RIGHTS

State and local authorities establish agencies responsible for protecting vulnerable members of the community, such as children and the elderly, from abuse and neglect. One branch of these agencies typically investigates reports of child abuse. CPS caseworkers receive reports of child abuse, screen the credibility of reports, investigate abuse, remove children from abusive environments, and initiate appropriate family and criminal law actions against abusers, often in coordination with local law enforcement agencies.<sup>93</sup> When a CPS child abuse investigation wrongfully

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<sup>87</sup> *Id.* at 810.

<sup>88</sup> *Id.* at 810–12.

<sup>89</sup> *Id.* at 811.

<sup>90</sup> *Id.* at 811–12.

<sup>91</sup> *Id.* at 812.

<sup>92</sup> *Id.* at 813.

<sup>93</sup> OFFICE ON CHILD ABUSE & NEGLECT, *supra* note 62 (describing the considerations and factors evaluated by CPS caseworkers in child abuse investigations).

intrudes on a family's constitutional rights, the family may decide to initiate a § 1983 lawsuit against CPS to recover compensation for enduring constitutional violations. However, when a family files a § 1983 lawsuit, defendants may be entitled to assert the affirmative defense of qualified immunity for unconstitutional conduct before the lawsuit proceeds to trial.<sup>94</sup> Thus, a finding of qualified immunity precludes a plaintiff from obtaining compensation and may preclude the plaintiff from litigating the action entirely.<sup>95</sup>

#### *A. Section 1983 Lawsuits*

A § 1983 lawsuit is a legal remedy available to individuals pursuant to a federal statute that waives the government's immunity from suit for civil rights violations. Congress permits individuals to file suit against the government under 42 U.S.C. § 1983 to seek redress for violations of constitutional rights committed by government officials.<sup>96</sup> Section 1983 of Title 42 provides:

Every person who, under color of . . . State or Territory . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .<sup>97</sup>

Before filing suit against CPS, attorneys representing families should identify whether the parent or child's constitutional rights have been violated, whether the Fourth or Fourteenth Amendment protections were violated, and which CPS conduct violated the individual's rights. Even where there are constitutional violations, families may be barred from recovery if the court accepts the defense that the state actors qualify for qualified immunity. Therefore, attorneys should plead that CPS violated family members' constitutional violations in a manner that gives family members the best opportunity to recover compensation in light of anticipated qualified immunity defenses.

#### *B. Impact of Qualified Immunity*

Qualified immunity is an affirmative defense to a civil action that may be asserted against public officials engaging in a discretionary

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<sup>94</sup> Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

<sup>95</sup> *Id.*

<sup>96</sup> Rogers v. Cnty. of San Joaquin, 487 F.3d 1288, 1290–91 (9th Cir. 2007); Kelson v. City of Springfield, 767 F.2d 651, 654–55 (9th Cir. 1985).

<sup>97</sup> 42 U.S.C. § 1983 (2006).

function of their employment.<sup>98</sup> Public official defendants are immune from § 1983 lawsuits “[u]nless the plaintiff’s allegations state a claim of violation of clearly established law.”<sup>99</sup> Qualified immunity balances two important competing interests: “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>100</sup> The Supreme Court has established a two-pronged test for determining whether public official defendants are immune from suit for wrongful conduct: (1) whether the plaintiff alleges a violation of a constitutional right and (2) whether the plaintiff’s right was clearly established at the time.<sup>101</sup> A “clearly established” right is one that is “sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>102</sup>

Although qualified immunity is technically an affirmative defense, in the Ninth Circuit, the plaintiff bears the burden of demonstrating that the right allegedly violated was clearly established at the time of the incident.<sup>103</sup> If the court determines that government officials are entitled to qualified immunity, the damages claims against the officials can be dismissed without a court ever deciding the merits of the suit.<sup>104</sup> In such an instance, the case would be dismissed before a family is able to tell their story to a jury. The Court’s two-pronged test is intended to avoid a practical problem of qualified immunity: that the legal standards will be unclear governing whether official conduct violated a clearly established right.<sup>105</sup>

Attorneys representing families harmed by CPS should frame the allegations in a § 1983 complaint in a manner that most persuasively shows that a reasonable official would understand that the conduct violated a “clearly established” right. For example, in *Greene*, the Ninth Circuit rejected the argument that Mr. Camreta should have known that S.G.’s Fourth Amendment right to be free from unreasonable seizure at her school was “clearly established” because

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<sup>98</sup> Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

<sup>99</sup> Mitchell, 472 U.S. at 526.

<sup>100</sup> Pearson v. Callahan, 555 U.S. 223, 231 (2009).

<sup>101</sup> Id. at 232, 236.

<sup>102</sup> Anderson v. Creighton, 483 U.S. 635, 640 (1987).

<sup>103</sup> Galen v. Cnty. of Los Angeles, 477 F.3d 652, 665 (9th Cir. 2007) (citing Davis v. Scherer, 468 U.S. 183, 197 (1984)).

<sup>104</sup> Pearson, 555 U.S. at 231.

<sup>105</sup> Wilson v. Layne, 526 U.S. 603, 609 (1999) (explaining that clarity in the legal standards for official conducts benefits both officers and the public).

there was no case law regarding child abuse investigations that was “directly applicable,” as *Calabretta* and *Wallis* “both involved children seized or searched in their homes.”<sup>106</sup> Although the Ninth Circuit stated that a plaintiff does not need to show that a right was clearly established with a case “directly on point,” the court concluded that neither *Calabretta* nor *Wallis* reasonably put Mr. Camreta on notice that the warrantless school interview of a child could violate the Fourth Amendment.<sup>107</sup> Considering that qualified immunity can eliminate a family’s ability to recover compensation and that the courts might interpret prior precedent narrowly, like the court did with respect to *Calabretta* and *Wallis* because of factual differences in the location of the seizure in *Greene*, attorneys will best serve families by pleading the allegations in a complaint in a manner that demonstrates that the family members’ rights were as clearly established as possible.

#### IV

#### THE NINTH CIRCUIT’S FOURTH AMENDMENT HOLDING IN *GREENE* IS VACATED

In *Greene*, the Ninth Circuit held that Mr. Camreta’s school interview violated S.G.’s constitutional rights under the Fourth Amendment, relying partly on its earlier *Calabretta* decision, which involved an unconstitutional CPS examination of a child at a family home.<sup>108</sup> The Ninth Circuit held “that in the context of the seizure of a child pursuant to a child abuse investigation,” the Fourth Amendment requires that CPS caseworkers and law enforcement officials obtain either a warrant, court order, parental consent, or determine that exigent circumstances exist.<sup>109</sup> Although this holding was the only aspect of the Ninth Circuit’s *Greene* decision that was vacated by the Supreme Court, attorneys in the Ninth Circuit should analyze three arguments that the Greene family raised against CPS when drafting a § 1983 complaint on behalf of a family.

First, the Ninth Circuit held that Mr. Camreta violated Ms. Greene’s clearly established rights under the Fourteenth Amendment’s interest in the care, custody, and control of her

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<sup>106</sup> *Greene v. Camreta*, 588 F.3d 1011, 1031 (9th Cir. 2009).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1022–23.

<sup>109</sup> *Id.* at 1030.

children.<sup>110</sup> “The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct—real or imagined—of the other parent.”<sup>111</sup> The court held that CPS violated Ms. Greene’s substantive due process rights to be present with her children during the invasive medical examination of each daughter.<sup>112</sup> The Ninth Circuit explained that Ms. Greene’s Fourteenth Amendment rights to comfort her children were at their “apex” during the medical examinations, and Mr. Camreta’s decision to exclude Ms. Greene from not only the medical examinations but also the entire clinic facility violated Ms. Greene’s clearly established rights.<sup>113</sup> The Ninth Circuit reversed the district court’s finding that Mr. Camreta was entitled to summary judgment on Ms. Greene’s Fourteenth Amendment claims because Ms. Greene successfully proved that her right to be near or present with her children for the medical examinations was clearly established.<sup>114</sup>

Second, the Ninth Circuit held that CPS similarly violated S.G. and K.G.’s Fourteenth Amendment rights to be comforted by Ms. Greene during the medical examinations.<sup>115</sup> The Ninth Circuit reiterated the importance of protecting the child’s right of family association to be near “the love, comfort, and reassurance of their parents” during medical examinations, invasive examinations of a child’s genitals in particular, unless there is valid reason to exclude the parents.<sup>116</sup> The Ninth Circuit cited *Wallis* when it reaffirmed the importance of protecting the Fourteenth Amendment rights of family members: “The interest in family association is particularly compelling at such times, in part because of the possibility that a need to make medical decisions will arise, and in part because of the family’s right to be together during such difficult and often traumatic events.”<sup>117</sup>

Third, the Ninth Circuit explained in a footnote that it essentially agreed with the district court’s conclusion that Ms. Greene could not proceed under the theory that Mr. Camreta’s school interview of S.G. was a violation of Ms. Greene’s Fourteenth Amendment rights

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<sup>110</sup> *Id.* at 1037.

<sup>111</sup> *Id.* at 1036 (quoting *Wallis v. Spencer*, 202 F.3d 1126, 1142 n.14 (2000)).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1036.

<sup>116</sup> *Id.* (quoting *Wallis*, 202 F.3d at 1142).

<sup>117</sup> *Id.* (quoting *Wallis*, 202 F.3d at 1142).

because this was not explicitly pleaded in the complaint.<sup>118</sup> The court explained in a footnote that “[t]he Greenes have not argued that the school seizure of S.G. violated [Ms. Greene’s] familial rights under the Fourteenth Amendment, although they have made such a claim with respect to the subsequent removal order and physical examinations.”<sup>119</sup> The court’s footnote may suggest that the Greenes could have proceeded under this legal theory had an allegation been included in the complaint.

In 2011, the Supreme Court reviewed the Ninth Circuit’s holding in *Greene* that S.G.’s Fourth Amendment rights were violated, which was the first case addressing the issue of state intrusion on family autonomy in the child abuse investigation context in over twenty years.<sup>120</sup> The Attorney General of Oregon, John Kroger, petitioned the Supreme Court for certiorari to reverse the Ninth Circuit’s holding because it “creates the very real risk that children will go unprotected because child-protection workers and law-enforcement officers cannot interview them about allegations of child sexual abuse.”<sup>121</sup> An overwhelming majority of states concurred with Oregon that the Ninth Circuit’s Fourth Amendment holding in *Greene* was critically harmful to CPS’s ability to effectively investigate child abuse. Forty-one additional states, including every state within the Ninth Circuit, joined to file an amicus brief to the Supreme Court in support of a reversal of the Ninth Circuit’s Fourth Amendment holding.<sup>122</sup>

In *Camreta*, the Supreme Court vacated the Ninth Circuit’s Fourth Amendment holding because Mr. Camreta’s issue on appeal was deemed moot.<sup>123</sup> The Supreme Court held that the issue was moot because S.G. no longer had a “plaintiff’s usual stake in preserving the court’s holding” because the Greene family had relocated to Florida and S.G. was then months away from becoming an adult on her

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<sup>118</sup> *Id.* at 1022 n.6.

<sup>119</sup> *Id.*

<sup>120</sup> See *Idaho v. Wright*, 497 U.S. 805 (1990).

<sup>121</sup> Petition for Writ of Certiorari at 13, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (No. 09-1454), 2010 WL 2190432 at \*13.

<sup>122</sup> Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners at 1–2, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478), 2010 WL 5168883 at \*1–2 (including the states of Arizona, Alabama, Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).

<sup>123</sup> *Camreta*, 131 S. Ct. at 2033–34.

eighteenth birthday.<sup>124</sup> Because the Greene family had no intention of returning to Oregon and S.G. was nearly an adult, the Court concluded that S.G. “faces not the slightest possibility of being seized in a school in the Ninth Circuit’s jurisdiction as part of a child abuse investigation.”<sup>125</sup> In other words, the Ninth Circuit’s Fourth Amendment holding in *Greene* was vacated on a purely procedural basis, and the Court did not analyze the merits of the issue. The other holdings from *Greene* continue to bind CPS agency conduct in the Ninth Circuit. However, regarding the Ninth Circuit’s vacated Fourth Amendment holding, a panel of judges on the Ninth Circuit could again impose the same strict Fourth Amendment requirement in the context of child abuse investigations.

## V

### LEGAL THEORIES OF LIABILITY AGAINST CPS FOR CONSTITUTIONAL VIOLATIONS

To maximize opportunity for recovering compensation for families whose constitutional rights have been violated by CPS conduct in the course of child abuse investigations in the Ninth Circuit, attorneys should methodically consider the manner in which alleged government intrusions in family autonomy might be framed and pleaded in the complaint. Attorneys should articulate all of the potentially viable ways in which specific wrongful CPS conduct may have violated family members’ rights. Next, attorneys should consider all of the ways in which the conduct may have violated whose and which constitutional rights, especially in light of the plaintiff’s burden to demonstrate that the plaintiff’s right was “clearly established” if the defendants assert qualified immunity. Regarding whose constitutional rights have been violated by wrongful CPS conduct, constitutional violations should be evaluated in one of three ways: as rights of the parent, the child, or both the parent and child.

First, CPS action can be challenged as intruding upon the parents’ liberty interest in an autonomous family relationship guaranteed by the Fourteenth Amendment. In § 1983 lawsuits that allege constitutional violations by CPS, the Fourteenth Amendment may be implicated in child abuse investigation lawsuits because a parent’s right to care, custody, and control of a child has been violated. The Greenes, for example, successfully proved to the Ninth Circuit that

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<sup>124</sup> *Id.* at 2034.

<sup>125</sup> *Id.*

Mr. Camreta violated Ms. Greene's Fourteenth Amendment rights by excluding Ms. Greene from her daughter's medical examinations.

In the Ninth Circuit, the right to care, custody, and control has been extended to apply specifically to a child's medical care and treatment in the context of a child abuse investigation under *Wallis*.<sup>126</sup> The right to care, custody, and control of children protects parents' rights to make vital medical decisions on behalf of their children, rather than the state making these decisions.<sup>127</sup> Even where valid reason exists to exclude parents from being physically present while their child is undergoing medical treatment, the Ninth Circuit holds that parents have a right to be in a nearby waiting room.<sup>128</sup> The Ninth Circuit emphasized that the autonomy of the parent-child relationship is especially important when a child is subjected to a medical procedure that is potentially invasive or upsetting.<sup>129</sup>

Second, CPS action might implicate an interrogated child's Fourth Amendment right to be free from unreasonable search and seizure, such as S.G.'s right to be free from seizure at her school, which was the issue the Supreme Court granted certiorari to in *Camreta* but did not address on its merits. A CPS interview of a child may be considered a Fourth Amendment seizure in the child abuse investigation context depending on the reasonableness of CPS action in light of the facts and circumstances. Further, when CPS subjects a child to medical or physical examinations for the purpose of discovering evidence of abuse, the examination might constitute a Fourth Amendment search of the child. Thus, the Fourth Amendment issue is framed from the perspective of the child's autonomy that is violated, independent of the parent-child right to care, custody, and control.

Third, because of the unique status of parent and child recognized under the law, attorneys might encounter facts that permit the family to argue that the same CPS conduct violates both the parents' and the child's constitutional rights. For example, when CPS conduct violates the parents' Fourteenth Amendment right to care, custody, and control, attorneys could argue that the same CPS conduct also violates the child's Fourteenth Amendment right to remain in parental care, custody, and control. The Ninth Circuit has discussed the right

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<sup>126</sup> *Wallis v. Spencer*, 202 F.3d 1126, 1142 (9th Cir. 2000).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

to care, custody, and control as an associational right that applies to both parents and children—each has the right to be together as an autonomous familial unit.<sup>130</sup> Thus, children have a Fourteenth Amendment right, the corollary of parents' rights under the Fourteenth Amendment, to remain in the care, custody, and control of their parents, free from government interference, unless the state has sufficient reason to interfere in the family relationship. Although the Ninth Circuit has recognized an associational aspect of the right of parental care, custody, and control by holding that children have a corresponding liberty interest to be surrounded by the love, comfort, and reassurance of their parents,<sup>131</sup> the notion that children have an interest to remain in parental control under the Fourteenth Amendment is not as widely utilized as the parental right to care, custody, and control. Courts are not specifically rejecting this argument; rather, it appears that attorneys are not drafting Fourteenth Amendment violations in § 1983 complaints with specific allegations that the same CPS conduct violates the Fourteenth Amendment rights of both the parent and the child.

## VI

### SECTION 1983 LITIGATION POST-CAMRETA

When considering filing a § 1983 suit against CPS in the wake of the Supreme Court's *Camreta* decision, attorneys for families harmed by CPS investigations in the Ninth Circuit should plead the three arguments raised in the family's complaint in *Greene*, as well as consider three additional arguments, which are discussed below.

#### A. *The Greenes' § 1983 Complaint*

The first constitutional violation alleged by the Greene family in its § 1983 complaint was that Mr. Camreta subjected S.G. to a two-hour interview at her elementary school without parental consent, warrant, court order, or exigent circumstances, in violation of S.G.'s Fourth Amendment rights.<sup>132</sup> Although the Supreme Court vacated the Ninth Circuit's Fourth Amendment holding that was favorable to harmed families, attorneys should argue, when applicable, that CPS conduct violated a child's Fourth Amendment rights in order to

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Joint Appendix at 26, *Camreta*, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478), 2010 WL 5096737 at \*26 (Count 3 of the Complaint).

redevelop a strict Fourth Amendment standard for CPS conduct in the child abuse investigation context. With *Greene* having been vacated, attorneys in the Ninth Circuit may only rely on Fourth Amendment case law where CPS's conduct involved a search or seizure of a child in the family home without a warrant, court order, exigent circumstances, or parental consent.<sup>133</sup> If the Fourth Amendment violation, however, occurs at a location other than the family home, such as a public school, there is currently no Ninth Circuit case law directly on point. Nonetheless, based on the sound reasoning in *Greene*, it is plausible that another panel of judges in the Ninth Circuit will re-establish a strict Fourth Amendment requirement that protects children's right to be free from unreasonable search and seizure, whether in a public school, private school, daycare center, or other factual circumstance.

Second, the Greene family alleged that Ms. Greene's Fourteenth Amendment due process rights were violated because Mr. Camreta's removal of her children interfered in her right to care, custody, and control.<sup>134</sup> Notice that the family raised a Fourteenth Amendment violation argument against Mr. Camreta for removal of the children from the perspective of the parent only, not the child.<sup>135</sup> Third, the Greene family alleged that Mr. Camreta and the clinic that performed the medical examinations violated the Fourteenth Amendment rights of Ms. Greene and her two daughters to be together during the medical examination by excluding Ms. Greene from the premises.<sup>136</sup>

#### *B. Additional § 1983 Complaint Allegations for Consideration*

In addition to the arguments advanced in *Greene*, attorneys should consider pleading three additional arguments. First, attorneys should argue that the same CPS conduct can violate both a child's right to care, custody, and control protected by the Fourteenth Amendment as well as the child's Fourth Amendment right to be free from unreasonable search and seizure. Though the Greenes clearly alleged against the school district that the school interview violated S.G.'s Fourth and Fourteenth Amendment rights,<sup>137</sup> the Greenes did not allege that Mr. Camreta or the sheriff violated S.G.'s Fourteenth

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<sup>133</sup> *Wallis*, 202 F.3d at 1136; *Calabretta v. Floyd*, 189 F.3d 808, 812–13 (9th Cir. 1999).

<sup>134</sup> Joint Appendix, *supra* note 132, at 27 (Count 5).

<sup>135</sup> *See id.*

<sup>136</sup> *Id.* at 28 (Count 7).

<sup>137</sup> *Id.* at 25–26 (Count 2).

Amendment rights during the school interview.<sup>138</sup> The Greenes' complaint could have included an allegation that Mr. Camreta's school interview violated S.G.'s Fourteenth Amendment right to remain in the care, custody, and control of her parents.

In fact, counsel for the Greenes unsuccessfully argued in responding to the defendant's motions for summary judgment that S.G.'s Fourth Amendment violation claim against Mr. Camreta for the school interview implicitly included an allegation of a violation of S.G.'s Fourteenth Amendment rights.<sup>139</sup> The district court rejected this argument, finding that even if the Greenes pleaded the school interview as a violation of S.G.'s Fourteenth Amendment rights, it would still analyze the interview only as a violation of S.G.'s Fourth Amendment rights.<sup>140</sup> The court denied the Greene family the ability to recover under the Fourteenth Amendment because "the challenged conduct falls under a more specific constitutional right," which is the Fourth Amendment in this case.<sup>141</sup> The court's ruling was based on two cases involving § 1983 actions, each brought by a plaintiff against the government for investigatory conduct in pursuit of suspected criminal defendants.<sup>142</sup> The district court decided that the cases were dispositive of the allegations Ms. Greene filed on behalf of S.G.,<sup>143</sup> despite the fact that S.G. was a suspected victim of crime.

Attorneys should revive this argument because the district court's ruling on this issue seems at odds with Ninth Circuit case law regarding both parent and child Fourteenth Amendment rights to care, custody, and control. Recall that in *Camreta*, the Supreme Court vacated only the Fourth Amendment holding, so the Ninth Circuit continues to be bound by its holding in *Greene* that Mr. Camreta violated Ms. Greene's Fourteenth Amendment rights by excluding her from her daughters' medical examinations despite the existence of a court order for the medical examinations. In addition to *Greene*, there

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<sup>138</sup> See *id.* at 26 (Count 3 alleged violations against Mr. Camreta and the sheriff for violating S.G.'s Fourth Amendment rights during the school interview, while omitting an allegation that the school interview violated S.G.'s Fourteenth Amendment right to remain in parental care, custody, and control; Count 4 alleged violations against the sheriff for violating S.G.'s Fourth Amendments during the school seizure.).

<sup>139</sup> *Greene v. Camreta*, No. Civ. 05-6047-AA, 2006 WL 758547, at \*6 n.1 (D. Or. Mar. 23, 2006).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at \*6.

<sup>142</sup> *Id.* (citing *Albright v. Oliver*, 510 U.S. 266, 272–75 (1994); *Graham v. Connor*, 490 U.S. 386, 394–95 (1989)).

<sup>143</sup> *Id.*

is older Ninth Circuit precedent in *Wallis* that the Fourteenth Amendment guarantees that parents have a right to be with their children during medical procedures, and children have a corresponding right to be near their parents during medical procedures absent valid reason.<sup>144</sup>

Next, attorneys may argue that the same CPS conduct that violated the parent's Fourteenth Amendment rights also violated the child's Fourteenth Amendment rights, due to the unique constitutional protection that has been historically afforded to parent and child. The Greene family's complaint did not contain an allegation that the school interview violated either Ms. Greene's or S.G.'s associational Fourteenth Amendment rights. Although the Ninth Circuit has recognized the associational aspect of the Fourteenth Amendment with regard to the child less frequently, arguing that both children and parents can file suit for violations of family autonomy under the protections of the Fourteenth Amendment is a viable legal claim that should not be overlooked when drafting a § 1983 complaint against CPS.

Finally, attorneys should argue that CPS conduct that violates a child's Fourth Amendment rights is the same wrongful conduct that also violates a parent's Fourteenth Amendment right to care, custody, and control of children. The Greene family alleged only that Mr. Camreta's school interview violated S.G.'s Fourth Amendment rights and did not allege that Mr. Camreta's school interview interfered with Ms. Greene's Fourteenth Amendment right to the care, custody, and control of her children.<sup>145</sup> The Ninth Circuit noted in a footnote that the Greenes failed to specifically plead this allegation against the defendants regarding the school interview,<sup>146</sup> which is unfortunate because the family contemplated using this theory against a different aspect of CPS's conduct in the child abuse investigation, namely the removal and medical examinations of K.G. and S.G. This issue has never been argued in the Ninth Circuit, so attorneys should look for opportunities to incorporate this legal theory into case law so that families have a greater opportunity to recover compensation. For this argument, it seems logical that the Ninth Circuit might be more inclined to reestablish strong protections for the autonomy of the relationship between parent and child, especially when the factual

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<sup>144</sup> *Greene v. Camreta*, 588 F.3d 1011, 1036–37 (9th Cir. 2009).

<sup>145</sup> See Joint Appendix, *supra* note 132, at 26 (Count 3).

<sup>146</sup> *Greene*, 2006 WL 758547, at \*6 n.1.

circumstances of CPS's unconstitutional conduct violated the rights of a young child or a non-abusive plaintiff-parent, which was the factual circumstances for the plaintiffs in *Greene, Wallis, and Calabretta*.

#### CONCLUSION

It is clear that CPS agencies and caseworkers serve a difficult and crucial role in society in carrying out the mission of protecting the nation's children from neglect and abuse. However, liability gaps exist whereby some undeserving family members are being separated from one another and traumatized by government actors while those responsible are able to escape punishment and accountability. Obtaining compensation for victims of wrongful child abuse investigations may begin to provide families with a small semblance of validation or closure. The way in which attorneys frame CPS's conduct, in terms of whose and which rights are violated in anticipation of qualified immunity defenses, is vital to drafting a § 1983 complaint that gives families the best odds of recovering compensation.

#### ADDENDUM

As of May 1, 2012, the Greenes continue their legal fight for compensation in a federal court in Oregon on the two claims that the Ninth Circuit reversed and remanded, which were against Mr. Camreta for alleged misrepresentations in obtaining the removal order and against the health center for Fourteenth Amendment violations during the performance of the medical examinations on S.G. and K.G.<sup>147</sup>

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<sup>147</sup> Interview with counsel for the Green family, Mikel R. Miller, Attorney at Law, Law Office of Mikel R. Miller (May 1, 2012).