

No. 06-20763

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GARY W GATES, JR; MELISSA GATES ; Individually and as next friends to Sarah Gates, Derodrick Gates, Travis Gates, Raquel Gates, Cynthia Gates, Cassandra Gates, Timothy Gates, Andrew Gates, Alexis Gates, and Marcus Gates; GARY WILTON GATES; GEORGE GATES; SCOTT GATES
Plaintiffs-Appellants,

vs.

TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES;
ET AL.

Defendants-Appellees

On Appeal from the United States District Court
Southern District of Texas, Houston Division
USDC No. 4:02-CV-495

**BRIEF OF THE AMERICAN CIVIL LIBERTIES FOUNDATION OF
TEXAS, TEXAS EAGLE FORUM, LIBERTY LEGAL INSTITUTE,
TEXAS HOME SCHOOL COALITION, AND
LIBERTARIAN PARTY OF TEXAS**

Marc A. Levin
State Bar No. 24039611
Attorney for Amici Curiae
The Levin Firm, P.L.L.C.
919 Congress, Suite 1140
Austin, TX 78701
Telephone (512) 477-6703
Facsimile (512) 477-6701

Corporate Disclosure Statement

The *Amici* filing this brief are non-stock corporations. They are not owned by any parent corporation, and there is no publicly held corporation that holds any stock in any of the *Amici*.

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Interest of the <i>Amici</i>	1
Introduction and Background.....	3
Argument.....	6
I. Warrantless Search and Seizure Violated the Gates' Rights to be Free From Unreasonable Searches and Seizures.....	6
II. Defendants' Actions in This Case and Their Policy and Practice Fail to Satisfy Heightened Procedural Due Process Requirements Triggered by Liberty Interest in Family Integrity.....	16
III. Defendants' Conduct Was Contrary to Texas Law.....	22
Conclusion.....	24
Certificate of Service.....	26
Certificate of Compliance.....	27

TABLE OF AUTHORITIES

CASES

<i>Alabama v. White</i> , 496 U.S. 325 (1990).....	12
<i>Brokaw v. Mercer County</i> , 235 F.3d 1000 (7th Cir.2000).....	11
<i>Calabretta v. Floyd</i> , 189 F.3d 808 (9th Cir. 1999).....	9
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988).....	18
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971)	7
<i>Darryl H. v. Coler</i> , 801 F.2d 893, 900 (7th Cir.1986)	7
<i>Doe v. Heck</i> , 327 F.3d 492 (7th Cir.2003).....	18
<i>Dubbs v. Head Start, Inc.</i> , 336 F.3d 1194 (10th Cir. 2003)	8
<i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council</i> , 485 U.S. 568 (1988).....	23
<i>Good v. Dauphin County</i> , 891 F.2d 1087 (3d Cir.1989).....	11
<i>Hatch v. Dep't for Child., Youth & Their Families</i> , 274 F.3d 12 (1st Cir.2001)...	17
<i>Hooks v. Hooks</i> , 771 F.2d 935 (6th Cir.1985).....	12
<i>Illinois v. Rodriguez</i> , 497 U.S. 177 (1990).....	13
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977).....	19
<i>Interest of J.F.C.</i> , 96 S.W.3d 256 (Tex.2002).....	17
<i>J.B. v. Washington County</i> , 127 F.3d 919 (10th Cir.1997).....	11
<i>Jordan v. Jackson</i> , 15 F.3d 333 (4th Cir.1994).....	11, 17

<i>Lewis v. Anderson</i> , 308 F.3d 768 (7th Cir.2002).....	19
<i>Lewis v. Stolle</i> , 538 U.S. 908 (2003).....	19
<i>Mabe v. San Bernardino County</i> , 237 F.3d 1101 (9th Cir.2001).....	17
<i>Marshall v. Barlow's, Inc.</i> , 436 U.S. 307 (1978).....	7
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	16
<i>Roe v. T.P.D.R.S.</i> , 299 F.3d 395, (5th Cir.2002)	7,8
<i>Roska v. Peterson</i> , 304 F.3d 982 (10th Cir.2002)	6, 9
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973).....	13
<i>Southerland v. Giuliani</i> , 4 Fed.Appx. 33 (2d Cir.2001).....	22
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972).....	16
<i>Strail v. Dept. of Child., Youth and Families of Rhode Island</i> , 62 F.Supp.2d 519 (D.R.I.1999).....	22
<i>Tenenbaum v. Williams</i> , 193 F.3d 581 (2d Cir.1999)	8, 15
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	16
<i>Tx. St. Employees Union v. T.D.M.H.M.R.</i> , 746 S.W.2d 203 (Tex.1987).....	11
<i>United States v. Jenkins</i> , 46 F.3d 447 (5th Cir.1995)	6
<i>United States v. Gonzales</i> , 121 F.3d 928 (5th Cir.1997).....	13
<i>United States v. Little</i> , 18 F.3d 1499 (10th Cir.1994).....	15
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980)	6
<i>United States v. United States Dist. Ct.</i> , 407 U.S. 297 (1972).....	6
<i>Vernonia Sch. Dist. 47J v. Acton</i> , 515 U.S. 646 (1995).....	10

White v. Pierce County, 797 F.2d 812 (9th Cir. 1986).....9
Wooley v. City of Baton Rouge, 211 F.3d 913 (5th Cir.2000).....8, 11, 17, 21
Wyman v. James, 400 U.S. 309 (1971)9

TREATISE

Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment*, § 8.3
(3d ed.2002).....14

BRIEF OF *AMICI CURIAE*
**AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS,
TEXAS EAGLE FORUM, LIBERTY LEGAL INSTITUTE, TEXAS HOME
SCHOOL COALITION, AND LIBERTARIAN PARTY OF TEXAS**

INTEREST OF THE *AMICI*

The American Civil Liberties Union (ACLU) is a national non-profit, public-interest organization that exists to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. Since its founding in 1920, the ACLU has vigorously defended the Bill of Rights to the United States Constitution. The ACLU has over 16,000 members in the State of Texas. *Amicus*, the American Civil Liberties Union Foundation of Texas (ACLU Foundation of Texas), was founded in 1938 and is the eighth largest affiliate of the national organization. The ACLU of Texas is actively involved in defending the Bill of Rights in Federal and Texas courts, at the Texas legislature, and in local communities throughout Texas.

The Eagle Forum was formed by Phyllis Schlafly and has been leading the pro-family movement with strength and decisiveness since 1972. It has earned recognition from the national and local media as well as from U.S. Presidents and local elected officials. *Amicus* Texas Eagle Forum is a part of the national Eagle Forum. Its mission is to enable conservative and pro-family men and women to participate in the process of self-government and public policy-making so that

America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise.

Amicus Liberty Legal Institute (LLI) is a 501(c)(3) organization that was founded in 1997 to protect religious freedoms and First Amendment rights for individuals, groups and churches. LLI offers its assistance pro bono to ensure all individuals and groups can thrive without the fear of governments restricting their freedoms. Liberty Legal consists of staff attorneys and a network of over 120 dedicated litigators committed to successfully battling in the courts for: religious freedoms, student's rights, parental rights, and the definition of family. Headed by Kelly Shackelford, an accomplished attorney and former adjunct professor at the University of Texas School of Law, the Liberty Legal Institute is headquartered in Plano, Texas with affiliate offices located in Dallas, Houston, Austin, Midland, Lubbock and San Antonio.

Amicus Texas Home School Coalition (THSC) is a statewide organization that serves and protects Texas home school families by helping its members if they have problems with government officials related to their right to teach their children at home - including written or verbal intervention and, when necessary, legal assistance. THSC opposes any government regulation of home education and is committed to protecting the right of Texas parents to teach their children at home. Under the leadership of its President and former National Republican

Committeeman from Texas Tim Lambert, THSC monitors the Texas legislature and other government agencies that have the power to adopt policies that would negatively impact Texas home school freedoms.

Amicus Libertarian Party of Texas is the state's third largest political party. Founded in 1971, the Party's officeholders include its Chairman Patrick Dixon, who in 2005 was elected to the Cedar Park City Council. The Libertarian Party of Texas platform advocates that "respect for individual rights is the essential precondition for a free and prosperous world, that force and fraud must be eliminated from human relationships, and that only through freedom can peace and prosperity be realized." The platform also states: "Libertarians support legislation or judicial rules that forbid the execution of "no-knock" warrants unless there is probable cause that they are necessary to avoid death or serious injury to an innocent person."

INTRODUCTION AND BACKGROUND

This case involves adoptive parents Gary Gates and Melissa Gates (the Gates) and a warrantless raid of their home and seizure of their children by the Defendants Texas Department of Family and Protective Services (CPS), Fort Bend County Sheriff's Office (Sheriffs) and the related individual defendants (Defendants). Amici urge the Court to reverse the lower court's decision to grant summary judgment for the Defendants. Summary judgment was in error because

this raid and subsequent actions by the Defendants violated the Gates' Fourth Amendment right to be free from unreasonable search and seizures, their heightened procedural due process rights triggered by their paramount liberty interest under the U.S. Constitution to direct the upbringing of their children, and their analog rights as recognized by the Texas Constitution. Furthermore, Amici ask this Court to determine that Defendants' routine practice of conducting such warrantless seizures of children, even in the absence of any immediate danger of physical abuse or emergency, is contrary to Texas law.

The Gates have thirteen children, eleven of whom were adopted, including four through CPS. (Docs. Supp. 1, 4852-53). On February 11, 2000, the Defendants raided the Gates' home without a warrant or consent and interrogated and removed their children in a jail wagon. (Docs. Supp. 1, 4572, pp. 16-18). The children were brought to CPS offices where they were interrogated yet again and then scattered to various foster homes. (Doc. Supp. 1, 4850). Additionally, CPS removed the Gates' oldest child, Gary Wilton Gates, from a National Honor Society dance at the school on February 11, 2000, and took him to CPS offices to be interrogated, again without a warrant. (Doc. Supp. 1, 4858).

After the children languished in foster homes over the weekend, Judge T.O. Stansbury of the 328th District Court on the following Monday ordered CPS to return the children to the Gates. (Docs. Supp. 1, Vol. 2, 5753; 5044). Later, a 25-

page report by an expert social worker commissioned by State District Judge T.O Stansbury concludes that “Melissa and Mr. Gates are loving, caring parents who have shown ample evidence that they are able and willing to commit their personal time and resources towards seeking the help of experts, friends, and spiritual counselors, in order to gain and secure the best quality of life possible for their children.” Report by Helen Curlick, L.M.S.W., Exhibit E to the Plaintiff’s First Amended Complaint, Doc. 253. On June 22, 2000, Jay P. Bevan, Ph.D., a clinical psychologist jointly agreed upon by both CPS and the Gates, found:

The Gates have availed themselves repeatedly of professional assistance when they deemed it necessary, and have been open to input from these professionals....I have never said this about anyone I have ever evaluated: I admire the Gates. I would not hesitate to place my own children in their care. The Gates have no need for CPS or CASA services.

Psychological Evaluation of Dr. Jay Bevan, June 22, 2000, Exhibit W to Plaintiffs’ First Amended Complaint, p. 22.

Despite these findings, CPS persisted in its case to terminate the Gates’ parental rights, before dropping it seven months after the raid. (Doc. Supp. 1, Vol. 2, 5147). Moreover, CPS picked up Alexis Gates on January 25, 2001 without consent, warrant, or court order and removed her to the Child Advocates facility for interrogation. (Docs. Supp. 1, Vol. 2, 5063). Again, in April 2003, despite no consent, warrant, or court order, CPS took into custody several home-schooled Gates’ children from the YMCA. (Docs. Supp. 1, 4860-61).

ARGUMENT

I. Warrantless Search and Seizure Violated the Gates' Right to Be Free From Unreasonable Searches and Seizures

The Defendants removed the Gates' children from their home without a warrant in a jail wagon, thereby effecting a seizure of them. *See Roska v. Peterson*, 304 F.3d 982, 992 (10th Cir.2002) (holding that 12-year-old boy was seized by a social worker while being removed from his home because he was "not free to leave"). Additionally, Gary and Melissa Gates themselves were also seized. A person has been "seized" within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). During the raid, both parents were confined in one portion of the house or on the patio while their children were interrogated.

"Simply put, warrantless searches are per se unreasonable, and therefore unconstitutional, unless they fall into one of the few specifically established and well-defined exceptions to the general rule." *United States v. Jenkins*, 46 F.3d 447, 451 (5th Cir.1995). "[P]hysical entry into the home is the chief evil against which the ... Fourth Amendment is directed." *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972). The Supreme Court has explicitly recognized the

“distinction between searches and seizures that take place on a man’s property – his home or office – and those carried out elsewhere,” *Coolidge v. New Hampshire*, 403 U.S. 443, 474, (1971), holding that “a search or seizure carried out on … [private] premises without a warrant is per se unreasonable, unless the [government] can show that it falls within one of a carefully defined set of exceptions based on the presence of ‘exigent circumstances.’” *Id.* at 474-75. The prohibition against unreasonable searches and seizures protects against warrantless intrusions during civil as well as criminal investigations by the government. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978). Thus, the strictures of the Fourth Amendment apply to child welfare workers, as well as all other governmental employees. *Darryl H. v. Coler*, 801 F.2d 893, 900 (7th Cir.1986).

In *Roe v. Texas Dept. of Protective and Regulatory Services*, 299 F.3d 395, 407-08 (5th Cir.2002), this Court held that a social worker must demonstrate probable cause and obtain a court order, obtain parental consent, or act under exigent circumstances to justify the visual body cavity search of a juvenile in the home. In so holding, the Court declined an invitation to apply the special needs doctrine to weaken the level of Fourth Amendment protection in this context, partly because the Court found that CPS searches are so intertwined with law enforcement. *Id.* at 407. The Court in *Roe* recognized that to hold otherwise

would essentially reduce the privacy rights of parents and their children to those of prisoners, commenting that "[t]he [Supreme] Court only rarely [in the prisons setting] has permitted 'special needs' searches in the face of a person's strong subjective privacy interests." *Id.* at 406. The *Roe* decision cited with approval *Tenenbaum v. Williams*, 193 F.3d 581, 605 (2d Cir.1999), in which the 2nd Circuit ruled that warrantless seizures could be justified only "where the state officers making the search or seizure have reason to believe that life or limb is in immediate jeopardy." *Roe*, 299 F.3d at 407. The Court went on to emphasize that Texas Family Code Section 261.303 expressly envisions that, absent exigent circumstances occasioned by physical abuse, a court order shall be obtained for entry into the premises where the child suspected of being abused is located. *Roe*, 299 F.3d at 407; *See also Wooley v. City of Baton Rouge*, 211 F.3d 913, 925-26 (5th Cir.2000) (noting that a warrant, probable cause, or a reasonable belief that a child is in imminent harm is necessary to justify the seizure of a child from the home under the Fourth Amendment).

The overwhelming majority of circuit courts have agreed with the Fifth Circuit in declining to judicially carve out a "special needs" exception to the Fourth Amendment in the context of child abuse investigations. *See Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003) (holding that the Fourth Amendment's presumptive requirements apply to child maltreatment

investigations both inside and outside of the home); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1240-42 (10th Cir. 2003) (holding that the warrantless entry of a home to remove a child was a violation of the Fourth Amendment, because there were no exigent circumstances and the special needs exception should not be applied in this context); *Calabretta v. Floyd*, 189 F.3d 808, 814 (9th Cir. 1999) (no social worker exception to normal search and seizure law exists and Fourth Amendment's presumptive requirements apply to child maltreatment investigations); *White v. Pierce County*, 797 F.2d 812, 815-17 (9th Cir. 1986) (disallowing the warrantless entry into a home, even to investigate child abuse, unless exigent circumstances are present and noting, “[c]hild abuse is a heinous crime. So are murder and rape. Just as the repulsiveness of the latter two crimes does not affect the constitutional restrictions placed on police officers, neither should our repugnance to the former crime cause us to condone police procedures that infringe constitutional protections.”).

Even if this Court was inclined to reverse course and hold that the special needs exception could apply in narrow circumstances, the facts in this case do not fall within such circumstances for several reasons. First, one basis for a special needs exception would be the distinction between the civil authority of social workers and school personnel and the policing and prosecution function of law enforcement. *See Wyman v. James*, 400 U.S. 309, 388 (1971) (distinguishing

search and entry by welfare caseworker because police were not involved); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (resting the approval of the public school drug testing program in part on the fact that “the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function”). However, there was no delineation in the search and seizure at issue here, as the CPS workers entered with the Sheriff’s deputies, the Sheriff’s deputies detained the parents during the interrogation, and the Sheriff’s deputies hauled the children away in a jail wagon. (Doc. Supp. 1, 4857). Moreover, the threat of prosecution for child abuse is serious in Texas. Under Section 22.04 of the Penal Code, the offense of injury to a child ranges from a state jail felony (up to two years in jail) to a first degree felony (up to life in prison). Second, even if a special needs exception was to be adopted, it should not apply where, as is the case here, there were numerous less invasive alternatives available to investigate this matter without resorting to a warrantless search and seizure. Because the Gates’ children were enrolled in public school, it is indisputable that CPS had ample opportunities to interview them at school, making the search and seizure of the home unnecessary. In addition to the Fourth Amendment considerations that preclude the application of a “special needs” exception to this case, the Texas Constitution protects personal privacy from

unreasonable intrusion, and this right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means. *Texas State Employees Union v. Texas Dept. of Mental Health and Mental Retardation*, 746 S.W.2d 203, 205 (Tex.1987).

The only Fourth Amendment exception that could possibly be applicable is the presence of an emergency or exigent circumstances. In the context of removing a child from his home and family, a seizure is reasonable if it is pursuant to a court order, if it is supported by probable cause, or if it is justified by exigent circumstances, meaning that state officers have reason to believe that life or limb is in immediate jeopardy. *Brokaw v. Mercer County*, 235 F.3d 1000, 1010 (7th Cir.2000); *J.B. v. Washington County*, 127 F.3d 919, 929 (10th Cir.1997); *Good v. Dauphin County Social Svcs. for Children and Youth*, 891 F.2d 1087, 1094 (3d Cir.1989). In *Wooley v. City of Baton Rouge*, 211 F.3d 913 (5th Cir.2000), this Court noted that “danger of imminent harm” is the touchstone for whether a warrantless search and seizure may be conducted in the context of a child abuse investigation and that the officers involved must have an “objectively reasonable” belief that this danger exists. *Id.* at 926. *See also Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir.1994) (“[O]nly where a child's life is in imminent danger or where there is immediate danger of severe or irreparable injury to the child’s health (and

prior judicial authorization is not immediately obtainable) may an official summarily assume custody of a child from his parents.”).

Yet, the court below did not enter a finding that an emergency or exigent circumstances were present here, but apparently concluded that there was insufficient harm for the Gates to establish injury because the seizure of their children lasted only three days. (“That’s just not an injury. It might be impolite”, Hearing transcript, March 28, 2006, U.S. District Court Southern District of Texas, p. 34, Statement by the Court.) However, the fact the Gates’ children were later returned as a result of a court order on Monday, February 13, 2000 does not vitiate the due process violation associated with this warrantless, non-emergency search and seizure. *See Hooks v. Hooks*, 771 F.2d 935, 941 (6th Cir.1985) (requiring that any deprivation of a parent’s liberty interest in the custody of his or her children, regardless of its length, be “accomplished by procedures meeting the requirements of due process”).

The warrantless search and seizure here was also in violation of the Fourth Amendment because it was based on the tip of a Lamar ISD employee, who to this day remains unidentified due to confidentiality requirements. (Doc. Supp. 1, 4854). In the absence of grave and detailed allegations, an anonymous tip generally may not furnish the requisite exigency to enter and search without a warrant. *Alabama v. White*, 496 U.S. 325, 330 (1990).

The Defendants' apparent assertion that a third party, the Gates' housekeeper, provided consent for this otherwise illegal search and seizure is without merit. First, Mr. Gates had already told Ms. Davis earlier in the day on February 11 that he refused to allow entry into his home to interrogate his children. (Doc. Supp. 1, 4855). Moreover, "When the government seeks to justify a warrantless search on the theory that consent was lawfully obtained from a third party, rather than from the person whose property was searched or seized, the government bears the burden of proving that the third party had either actual or apparent authority to consent." *United States v. Gonzales*, 121 F.3d 928, 938 (5th Cir.1997). The government must demonstrate by a preponderance of the evidence that consent to search was in fact voluntarily given, and not the result of duress or coercion, express or implied. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). In *Bustamonte*, the Supreme Court articulated several factors that militate against a finding of voluntariness including, but not limited to, youth, lack of education, low intelligence, lack of any advice regarding constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. 412 U.S. at 226. Additionally, the apparent authority doctrine recognized in *Illinois v. Rodriguez*, 497 U.S. 177 (1990) by which a third person without actual authority to consent can be found to have consented has been limited to situations where the

officer makes an objectively reasonable error of fact. *See* Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment*, § 8.3 (3d ed.2002) (stating that “the fundamental point here is that the *Rodriguez* apparent authority doctrine applies to mistakes of fact but not mistakes of law”).

In this case, the housekeeper who answered the door stated in her affidavit that she did not consent to the search, does not speak English, and did not understand why the CPS workers and Sheriffs’ officers sought to enter the home. (Docs. Sup. 1, 4703; p. 11; 4704, p. 15; 4705, p. 19; 4707, p. 28; 4708, p. 30). All of this suggests that she did not provide informed consent for the entry and implicates many of the factors set forth in *Bustamonte* that weigh against finding informed consent. She also stated that she asked the CPS workers and officers to wait until the Gates would arrive home. (Docs. Sup. 1, 4703; p. 11). Therefore, the Defendants have not met the burden they bear under *Gonzales* and *Bustamonte* to establish by preponderance of the evidence that third party consent was in fact given or that there was an objectively reasonable error of fact on this point. At the least, this is a fact issue on which the lower court did not enter findings and on which the Gates are entitled to trial. Moreover, the housekeeper could not have possibly consented to the interrogation and seizure of the children, but only the initial search for the children. The seizure and most of the interrogation of the children occurred after the Defendants had been instructed at the home that the

parents did not consent. Therefore, even assuming third party consent was obtained for the initial entry, a Fourth Amendment violation nonetheless occurred upon the continuation of the warrantless search, interrogation and the ultimate seizure.

While searches and seizures of the home are entitled to uniquely strong Fourth Amendment protection, this case also raises the issue of whether government agencies may remove children from public school and the YMCA and take them to another facility for the purpose of interrogating them, all without consent of the parent, a warrant, a court order, or an emergency. The Defendants rely on Section 261.302 of the Family Code which allows "transporting the child for purposes relating to the interview or investigation." However, this provision cannot override the protections against unreasonable searches and seizures in the Texas and U.S. Constitutions. While simply asking a child questions at the school might be distinguished, the transport of that child from a school by a government agency other than the school district without parental consent constitutes a search and seizure. *See Tenenbaum v. Williams*, 193 F.3d 581, 593-94 (2nd Cir.1999). Moreover, when the person being questioned is a child, the Court should consider the circumstances from a reasonable child's perspective in deciding whether the child would have reasonably believed they were not free to leave. *See United States v. Little*, 18 F.3d 1499, 1505 n. 6 (10th Cir.1994)

(distinguishing “[c]haracteristics such as whether the person being questioned is a child or an adult” from the general rule that the particular personal traits or subjective state of mind of the defendant are irrelevant to the objective “reasonable person” test). The transport provision should be squared with the Texas and U.S. Constitutions by interpreting Section 261.302(b)(3) to apply only when, through another applicable statutory provision, CPS has properly taken possession of the child.

II. Defendants’ Actions in This Case and Their Policy and Practice Fail to Satisfy Heightened Procedural Due Process Requirements Triggered by Liberty Interest in Family Integrity

The Supreme Court has long recognized that parents have a liberty interest in familial relations, which includes the right to “establish a home and bring up children” and “to control the education of their own.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The liberties protected by the Due Process Clause include “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (the right to familial relations is “the oldest of the fundamental liberty interests recognized”). The integrity of the family unit has also found protection in the Ninth Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). “The Fourteenth Amendment guarantees that parents will not be separated from their children without due

process of law except in emergencies.” *Mabe v. San Bernardino County*, 237 F.3d 1101, 1107 (9th Cir.2001). As a general matter, the fundamental right of family integrity is inviolate. *Hatch v. Dep’t for Children, Youth & Their Families*, 274 F.3d 12, 22 (1st Cir.2001). The Supreme Court has ruled that “until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship.” *Santosky v. Kramer*, 455 U.S. 745, 760 (1982). In *Wooley v. City of Baton Rouge*, 211 F.3d 913 (5th Cir. 2000), this Court held that a woman and the child with whom she was living had “a clearly established right to maintain their relationship free from interference by state actors.” *Id.* at 924. Moreover, under the Texas Constitution, the liberty interest associated with the parent-child relationship is paramount. *Interest of J.F.C.*, 96 S.W.3d 256, 273 (Tex.2002).

The liberty interest in the integrity of family that is implicated in this case, quite aside from whether it constitutes another valid cause of action, and in addition to weighing in favor of strictly applying the full protections of the Fourth Amendment that are set forth above, requires that the Court apply the most exacting procedural due process requirements pursuant to the Fourteenth Amendment. In *Jordan v. Jackson*, 15 F.3d 333 (4th Cir.1994), the Fourth Circuit held that there is a clear and longstanding right of a parent in not having a child removed from the home without clear and compelling state interests and

appropriate due process. *See id.* at 342-43. The Court stated that “[i]t is beyond question ... that the adult Jordans’ parental rights implicated by the challenged delay [in process] are commanding and deserving of the greatest solicitude. The forced separation of parent from child, even for a short time represents a serious impingement on those rights.” *Id.* The Court further explained that “[w]here the state seeks to interfere with these essential ... or fundamental parental rights, its action must satisfy the procedural strictures of the Due Process Clause.” *Id.* It is well established that when a fundamental constitutional right is at stake, courts are to employ the exacting strict scrutiny test. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). In *Doe v. Heck*, the 7th Circuit observed:

[T]he fundamental right of parents to direct the upbringing of their children necessarily includes the right to discipline them. *Meyer*, 262 U.S. at 399, 43 (holding that the “liberty” guaranteed by the Fourteenth Amendment “denotes ... the right of the individual to ... establish a home and bring up children ... and ... enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”).²⁹ Fn29. *See* 3 William Blackstone, *Blackstone’s Commentaries on the Laws of England* 120 (1765) (noting the legality of parents and teachers giving moderate physical “correction” to the children entrusted to their care)...

Doe v. Heck, 327 F.3d 492, 522 (7th Cir.2003).

The incident that precipitated the raid did not involve physical discipline, there is no lower court finding that there was physical abuse or an emergency, and there has been no allegation that Mr. Gates did anything more on any occasion than

provide “moderate physical correction.” The Supreme Court has noted “corporal punishment serves important educational interests” and “is deeply rooted in this republic’s history.” *Ingraham v. Wright*, 430 U.S. 651, 681 (1977). The 7th Circuit has ruled “even “a single hitting of a child” will not give rise to a reasonable suspicion of child abuse because: “[W]ere that the case, nearly any practitioner or case worker who has ever witnessed a slapping of a child would be under a legal duty to report the occurrence to the designated agency-and every parent who ever slapped or spanked a child would face the possibility of losing custody of the child … While one instance of child-hitting may raise a red flag, it does not immediately become a “suspicion” of child abuse.” *Lewis v. Anderson*, 308 F.3d 768, 774 (7th Cir.2002), cert. denied, *Lewis v. Stolle*, 538 U.S. 908 (2003). U.S. District Judge Lynn Hughes stated:

Also troublesome in a slightly different way is their, what I took to be negative references to Mr. Gates’ religiosity and perhaps a moral, sectarian approach to teaching children right and wrong. That simply cannot be child abuse, has no place. I agree that crucifixion as a form of child discipline could be abuse; stoning would be abuse. Having them copy scriptures that are relevant to their recent transgressions, which was described in one of the district reports [to CPS], cannot be.

Hearing transcript, March 28, 2006, U.S. District Court Southern District of Texas, p. 34, Statement by the Court.

Because Defendants tore the Gates’ children away without judicial review and no court has to this day determined that there was an immediate physical danger, the

Defendants violated the Gates' right to family integrity and did so without sufficient procedural due process of law.

Furthermore, the regular policy and practice of Defendants to treat every case as an emergency regardless of the facts and therefore, in every case they can recall, effect a warrantless search and seizure fails to provide the level of procedural due process to which the Gates and others similarly situated are constitutionally entitled. Amy Odin, one of the CPS workers involved in the seizing of the Gates children, made clear in her deposition that the standard practice in Fort Bend County is not to seek a judicial order, but rather to handle every case under Section 262.104. She stated: "I have never asked the judge beforehand. It's – I don't know any of my coworkers who have." Deposition of Amy Odin, March 14, 2000 (Exhibit I to Plaintiff's First Amended Complaint, 33:12; Docs. Supp. 1, 4505, pp. 142-43; 4506, pp. 146-48; 4897-98.). A CPS supervisor involved in the seizure of the Gates children similarly stated that, when removing children, "we usually" use Section 262.104 rather than seek a court order. Deposition of Jerry Polasek, February 14, 2001 (Exhibit B to Plaintiff's First Amended Complaint, 142:1; Docs. Supp. 1, 4505, pp. 142-43; 4506, pp. 146-48; 4897-98.).¹ In light of the deleterious effect of such unnecessary warrantless

¹ CPS may be overly aggressive in removing children due to a financial incentive. For every foster child that CPS ultimately places in an adoptive home above the state baseline for adoptions, the agency receives another \$4,000 in

searches and seizures, even when temporary, on the liberty interest in family integrity, the heightened procedural due process protections require that a parent be provided a mechanism to be fully informed of, and then dispute or even simply place into proper context the accusations against them, in advance of, or at least at the time of, the search and seizure. Neither occurred here. Instead, at every turn, the Defendants hid the ball from the Gates, not allowing them to learn of and respond to the accusations against them. Accordingly, the Gates were denied not only the opportunity for a neutral judge to decide whether a warrant was justified, but also any modicum of administrative due process in the procedures through which the Defendants' investigated the case and executed the search and seizure. As a result, the Gates had to wait from Friday evening until the following Monday for their first opportunity to hear and confront the accusations, obtain an independent review, and ultimately be reunited with their children. (Docs. Supp. 1, Vol. 2, 5753; 5044).

Furthermore, the decision below was in error to the extent it determined the seizure was harmless because the Gates' children were eventually returned. Even a temporary separation of parents from their children is destructive and triggers constitutional protections. *See Tenenbaum v. Williams*, 193 F.3d at 594 (even a

federal funds under The Adoption and Safe Families Act Of 1997. *See* Indiana Department of Child Services Summary of The Adoption and Safe Families Act of 1997, available at <http://www.in.gov/dcs/about/adoptact.html>.

temporary removal of a child “depriv[es] the parents of the care, custody, and management of their child” so that judicial authorization is necessary unless the child is immediately threatened with harm); *Southerland v. Giuliani*, 4 Fed.Appx. 33, 36 (2d Cir.2001) (noting “[w]e have never required – as the district court apparently did – that parental rights be completely or permanently terminated in order for constitutional protections to apply”); *Strail v. Dept. of Children, Youth and Families of Rhode Island*, 62 F.Supp.2d 519, 526 (D.R.I.1999) (“[T]he Supreme Court has afforded protection against temporary deprivations in the parent-child relationship as part of the right to family integrity.”).

III. Defendants’ Conduct Was Contrary to Texas Law

The default procedure in Texas law described in Section 161 of the Family Code for terminating parental rights due to allegations of child abuse is to obtain a court order for removal of the child. Such orders can be obtained instantly on the basis of a simple affidavit from a CPS worker. CPS is also authorized to seek protective orders in cases of family violence under Chapter 82 of the Family Code. Accordingly, CPS has a full range of procedures that allow for rapid judicial review that protects the due process rights of parents. However, in this case, CPS choose to rely on Section 262.104 entitled “Taking Possession of a Child in Emergency Without a Court Order,” which provides in subsections (a) and (b) an

exception to the requirement of a court order for emergency situations when “there is an immediate danger to the physical health or safety of the child.”

This case clearly falls outside the emergency exception to the requirement of a court order set forth in Section 262.104, because there was no immediate danger to the physical health or safety of any of the Gates’ children. In fact, Defendants removed all the children from the home even though the Travis was already in the custody of CPS prior to the raid and there were no allegations of abuse of any kind with respect to many of the children that were removed. (Docs. Sup. 1, 4857).

Defendants are asking this Court to water down the clear language of Section 262.104 that requires a genuine emergency involving a child’s physical well being, but their interpretation of the statute not only contradicts the plain language but would render it inconsistent with precedents on the Fourth Amendment and the right to family integrity. The touchstone in these cases is the presence of an emergency in which the child’s life or limb is in jeopardy. Since statutes should be read to be constitutional when feasible, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), the exception to the court order requirement embodied in Section 262.104 must be construed to be inapplicable here. Moreover, Amici are concerned that CPS uses Section 262.104 routinely, thereby treating every case as an emergency

regardless of the facts. The result is that the exception has been allowed to swallow the rule, thereby subverting the statutory framework and the constitutional rights of Texas parents.

CONCLUSION

While Amici acknowledge a legitimate government role in combating child abuse, Amici represent a diverse group of Texans who are united in the belief that the constitutional rights of parents and their children should not and need not be sacrificed in this pursuit. Consequently, we ask this Court to vindicate these rights by reversing and remanding the trial court's decision so that the Gates may proceed to trial with their claims.

Respectfully submitted,



MARC A. LEVIN
State Bar No. 24039611
Attorney for *Amici Curiae*
The Levin Firm, P.L.L.C.
919 Congress, Suite 1140
Austin, TX 78701
Telephone (512) 477-6703
Facsimile (512) 477-6701

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS
Lisa Graybill, Legal Director
Texas Bar No. 24054454

1210 Rosewood Avenue
Austin, Texas 78702
Phone: (512) 478-7300
Fax: (512) 478-7303

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was sent to the following on this the 11th day of December, 2006 via mail and electronic delivery as follows:

Counsel for Appellants/Plaintiffs: Tom Sanders
P.O. Box 1860
Sugar Land, TX 77478

Counsel for Appellees/Defendants: Terrence L. Thompson
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Randall W. Morse
Mary E. Reveles
Assistant County Attorneys
Fort Bend County
301 Jackson Street, Suite 621
Richmond, TX 77469



MARC A. LEVIN
State Bar No. 24039611
Attorney for *Amici Curiae*
The Levin Firm, P.L.L.C.
919 Congress, Suite 1140
Austin, TX 78701
Telephone (512) 477-6703
Facsimile (512) 477-6701

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.2.7(c), the undersigned certifies that this brief complies with the type-volume limitations of Fifth Circuit Rule 32.2.7(b). The brief contains 5,673 words exclusive of those exempted in Rule 32.2.7(b)(3). The brief was prepared in Microsoft Word 2003 using 14 point Times New Roman, a proportionally spaced type-face. The undersigned has provided an electronic copy of the brief.



MARC A. LEVIN

State Bar No. 24039611
Attorney for *Amici Curiae*
The Levin Firm, P.L.L.C.
919 Congress, Suite 1140
Austin, TX 78701
Telephone (512) 477-6703
Facsimile (512) 477-6701