No. 12-17259

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN LOUDERMILK AND TIFFANY LOUDERMILK, et al.,	)	**ON APPEAL FROM DISTRICT COURT CASE # 2:06-CV-00636-PHX-ROS District of Arizona, Phoenix**
Plaintiffs-Appellants,	)	
v.	)	
JOSEPH ARPAIO, et al.,	)	
Defendants-Appellees.	)	

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants John and Tiffany Loudermilk and their children (collectively "Loudermilks") brought an action in the district court pursuant to 42 U.S.C. § 1983 to redress the deprivation of the Loudermilks' Fourth and Fourteenth Amendment constitutional rights caused by the Appellees, who are two CPS investigators (Social Workers). The district court had jurisdiction over the Loudermilks' claims pursuant to 28 U.S.C. § 1331, which provides for original jurisdiction in the district court over all civil actions arising under the Constitution, laws, or treaties of the United States, and pursuant to 28 U.S.C. § 1343(3) and 1343(4), which provide for original jurisdiction in the district court of suits brought pursuant to 42 U.S.C. § 1983. The district court granted the Social Workers' motion for summary judgment and issued a final judgment on September 18, 2012. Appellants timely filed a notice of appeal on October 10, 2012. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Child Protective Services (CPS) received an anonymous report that the inside of the Loudermilks' newly-built home was unsafe for children due to incomplete construction. Three days after receiving the anonymous report an investigator went to the house and left her business card. The investigator later sought the Loudermilks' consent to inspect the inside of the home, which the Loudermilks denied. Their attorney informed the investigator that the county building department had permitted the Loudermilks to occupy the house.

Sixty-one days after receiving the anonymous report, the investigator called in sick. Her supervisor, Defendant Rhonda Cash, decided to go to the Loudermilks' home with another social worker, Defendant Jenna Cramer, in part because Cash was going to be training Cramer on another matter in the area anyway. Cash also intended to show Cramer "how these things were done" at the Loudermilks' home. En route, they asked a sheriff's deputy to meet them. This is routinely done by CPS workers when lack of cooperation is expected.

Cash and Cramer could see that the exterior of the home was still being worked on, but it was not unduly hazardous for children. When Cash told the Loudermilks that she needed to see inside the home they said no and called their attorney. For the next forty minutes he attempted to persuade the Social Workers that they lacked legal justification to enter the home without a warrant.

Defendant Cash eventually said that if she was not immediately allowed inside she would take the Loudermilks' children into state custody. The attorney attempted to persuade the Social Workers that they lacked legal justification to seize the children, but they would not relent. After one of the Social Workers began to fill out a state-custody form the Loudermilks allowed the officials inside to prevent them from removing the children. Nothing inside the home was found to be hazardous and the investigation was closed.

The questions presented are:

1. Was the warrantless search of the Loudermilks' home justified by exigent circumstances?
2. Could a reasonable trier of fact conclude that the Loudermilks' "consent" was **not** voluntary?
3. Could any social worker in these circumstances reasonably believe that the Loudermilks' "consent" **was** voluntary?
4. Did the unjustified threats to remove the children violate the Fourteenth Amendment right to family integrity?

STATEMENT OF THE CASE

The Section 1983 complaint in this case alleged that two separately-represented groups of government agents violated John and Tiffany Loudermilk's right under the Fourth Amendment to be free from the unreasonable search of their home. The first group consists of Appellees Rhonda Cash and Jenna Cramer, who were two state-employed social workers, and Julie Rhodes, who was an Assistant Attorney General for the State of Arizona. The other defendants were four deputy sheriffs with the Maricopa County, Arizona, Sheriff's Office ("Deputies"). The complaint also alleged that the State Defendants/ Appellees violated the Loudermilks' right to family integrity under the Fourteenth Amendment when they unjustifiably threatened to take the Loudermilks' children into state custody as a tactic to coerce consent. [1]

Both sets of defendants moved to dismiss the case, which was denied, and then moved for summary judgment, arguing that they were eligible for qualified immunity. The district court denied both summary-judgment motions.

The Deputies alone pursued an interlocutory appeal from the district court's denial of their motion for summary judgment and the district court stayed further proceedings pending the outcome of that appeal. In an unpublished opinion, this court reversed the district court and held that the Deputies were entitled to

[1] After discovery was completed, the Loudermilks agreed that a failure-to-train claim against Maricopa County Sheriff, Joseph Arpaio, should be dismissed.

qualified immunity. No. 10-15980, D.C. No. 2:06-cv-00636-ECH, September 12, 2011 (ER 406-410). This Court denied the Loudermilks' petition for rehearing and rehearing en banc, and the Supreme Court denied their petition for certiorari.

On remand, the district court permitted the State Defendants/Appellees to renew their motion for summary judgment, which it granted. The district court held that they were entitled to qualified immunity on the alternative grounds that no constitutional violation occurred because exigent circumstances justified the warrantless entry, and even if the actions of the Social Workers violated the constitution, "a reasonable CPS worker would not have known consent was not voluntary where the parents consulted with counsel before allowing entry into their residence." District Court Order at 9 (Excerpt of Record 0040, 9). The Loudermilks timely appealed.

STATEMENT OF FACTS

On January 7, 2005, at 12:56 a.m., Child Protective Services ("CPS") received an anonymous telephone call alleging, among other things, that "Dad is a handy man and he built the home the family is living in. The home has not been completed. There is exposed wiring and wall sockets throughout the home." (ER-0369, ¶ 2). The CPS Summary Report notes that the on-call investigator was *not* contacted; the police were *not* contacted; there had been no previous report involving either the parents or the children; and there were "[n]o known worker safety issues although dad owns a gun for protection." (ER-0369, ¶ 3).

The Field Investigation was assigned to CPS Agent Brenda Cagle at 2:25 p.m. that same day. (ER-0033, 15). Three days later, on January 10, 2005, the Loudermilks discovered Cagle's business card on their front door. (ER-0033, 15-17). It can be inferred that Cagle had been to the home and seen the exterior of the home when she left her card. Tiffany Loudermilk called Cagle on January 11, 2005, and was told that CPS had received an anonymous report that the home was not completed and was unsafe for children. (ER-0033, 17-19). Cagle wished to privately interview the children and search the interior of the home. (ER-0082, 9-10). Tiffany initially agreed but no appointment was made. (ER-0033, 19-20). Weeks went by before Cagle called back to schedule an appointment, and a meeting was scheduled to take place on or about March 2, 2005. (ER-0034, 4).

In the meantime, the Loudermilks joined the Home School Legal Defense Association ("HSLDA"). (ER-0033, 21-22). Thomas J. Schmidt, an HSLDA staff attorney, wrote a letter dated February 7, 2005 to Ms. Cagle, notifying her that the Maricopa County Planning and Development Department had given the Loudermilks an occupancy permit before allowing them to move into the home. (ER-0033, 23-25). It is not clear from the record that a document called "occupancy permit" exists, but occupancy is not allowed and the electricity will not be turned on until the house passes a final safety inspection. (ER-0314, 16-20). There is no evidence in the summary-judgment record suggesting that any CPS agent ever followed up to verify that the home had passed the final safety inspection. Indeed, they considered that information to be irrelevant. (ER 0254, 11-16).

In his letter, Schmidt also requested to know *all* of the allegations against the Loudermilks. (ER-0033, 25-26). Schmidt relied on the federal "Keeping Children and Families Safe Act of 2003," which requires that "a representative of the child protective services agency shall, at the initial time of contact with the individual subject to a child abuse investigation, advise the individual of the complaints or allegations made against the individual." 42 U.S.C. § 5106a(b)(2)(A)(xviii). (ER-0341, 20-22). Only during discovery did the Loudermilks learn that the anonymous report included additional allegations unrelated to the safety of the home, such as

having no food in the refrigerator, and "the parents claim the children are home schooled all though (sic) there were no books, paper, pens, or pencils in the home." (ER-0033-0034, 27-3).

Cagle refused to provide all of the allegations. Accordingly, Mrs. Loudermilk decided to cancel the meeting. (ER-0034, 5-6). A few days prior to the meeting date, Schmidt informed Cagle that the meeting was off. (ER-0093, 15-17).

Rhonda Cash, Cagle's supervisor, had been kept appraised of the status of the investigation for the two month period since the anonymous report had been received. (ER-0228, 7-11). On March 9, 2005, Brenda Cagle called in sick. (ER-0262, 5). That same day, Cash decided to accompany another subordinate, CPS Agent Jenna Cramer, on an unrelated "dissolution" matter. Cagle had never done that particular task before and Cash wanted to "kind of show her the ropes." (ER-0228, 12-14).

This other unrelated matter happened to be in the same general area as the Loudermilks' home. (ER-0228, 13). Cash told Cramer that since they were going to be in the area anyway, "I want to go and hit this report of Brenda's." (ER-0228, 5-6). Cash decided to "take the lead" at the Loudermilks' home. (ER-0228, 14-15).

On the way to the Loudermilks' home Ms. Cramer called the Maricopa County Sheriff's Office to request an officer to accompany them. (ER-0262, 18).

Cramer told the dispatcher that a CPS worker had been unable to get into the home. (ER-0034, ¶ 1).

Deputies are often asked to accompany CPS workers when a family is "uncooperative." (ER-0303, 20-21). According to Defendant Assistant Attorney General Rhodes, "It's necessary at times to call in law enforcement if you have *an uncooperative family*. They can assist in removing, if necessary, the children from the home." (ER-0303, 20-23)(emphasis added).

Cash and Cramer were joined at the Loudermilks' home by Defendant MCSO Deputy Ray and another man, since determined to be a volunteer member of the "posse." (ER-0147, 9-10). Both Ray and the posse member were in MCSO uniforms. (ER-0108, 23-24). Both pairs parked their cars in the Loudermilks' driveway. (ER-0264, 9-12).

Ray, Cash, and Cramer went to the front door, where Ray and Cash took turns knocking on the door. (ER-0034, 15). When John and Tiffany came to the balcony above the front door, Ray told them, "We need to see the inside of the house." (ER-0034, 16-18). Mr. Loudermilk responded, "You're not allowed to come into my house." (ER-0151, 12).

Ray looked at the Social Workers and one of them said, "We have got to get into that house so we can see the conditions—the living conditions." (ER-0151, 19-23). Ray repeated his demand that he needed to get inside. (ER-0153, 22-24).

When Mr. Loudermilk again declined to allow them inside, Ray said to Mr. Loudermilk that "I would arrest him for obstructing us from getting to see the people inside the house to make sure they were okay." (ER-0154, 20-22).

CPS Agent Cash told Tiffany, "We're from CPS, and we need to come into your house and look around." (ER-0110, 20-22). Tiffany asked what it was about and Cash responded, "We just need to talk to you. We need to come in." (ER-0110-0111, 25-1). When Tiffany again asked what it was about, Cash became a little upset and said, "We've got a warrant to take your kids." (ER-0111, 3-5). There was no such warrant. She also told Tiffany that if they weren't allowed inside the home "to get to the bottom of this," they would have to take the children for up to 72 hours. (ER-0122, 7-12). Cash told John that she had the authority to take the children if she could not determine their safety and "If you let us inside the house we can get this over quickly but we have to see inside the house." (ER-0034, 21-22; ER-0269, 2-4).

After Cash, Cramer, and Ray spoke to John and Tiffany, MCSO Officers Gagnon and Danner arrived in separate police vehicles. (ER-0035, 1-2). Gagnon was in uniform and was also accompanied by an armed, uniformed posse member whose identity has not been determined. (ER-0177, 3-5). Danner, who is a D.A.R.E. officer, was wearing "training" gear, which consisted of an MCSO polo shirt and badge. (ER-0165, 12-15). Danner spoke with Ray on the porch.

Officer Ray contacted his patrol sergeant, Sergeant Sousa, by radio and asked him to come to the Loudermilks' home. (ER-0162, 6-9). After Sergeant Sousa arrived and conferred with Ray, he concluded that they had no authority to arrest Mr. Loudermilk, there were no exigent circumstances to justify a warrantless search of the Loudermilks' home, and that they would need a warrant to enter the home over the Loudermilks' objection. (ER-0190, 9-12; ER-0193, 14-18). However, he never communicated his conclusions to either the Loudermilks or his deputies. (ER-0191, 5-8)

The Loudermilks called Attorney Schmidt and Ms. Cash called then-Assistant Attorney General Rhodes. (ER-0035, 8-9). Cash, Cramer, and Rhodes claim privilege with respect to their conversations. (ER-0234, 20-21). But CPS Agent Cramer began filling out a Temporary Custody Notice ("TCN") to remove the children because they "couldn't gain access" to the home. (ER-0035, 4-5). A Temporary Custody Notice is a form that a CPS agent in the field gives to a parent when they decide to take a child into custody for up to 72 hours without prior judicial authorization. No court order or other review is necessary to issue a TCN. (ER-0221, 13-14). Before taking a child into temporary custody, CPS agents are trained to consult with their Attorney General, because after removal the AG will need to prepare a dependency petition to be filed with the court before the 72 hours is up. (ER-0307, 4-19).

Schmidt spoke with Deputy Ray, who told him he was there to assist CPS and that if the Loudermilks did not allow them access to their home and the children, they had enough evidence to obtain a court order "in five minutes." (ER-0319, 8-9). After speaking with Deputy Ray, Schmidt spoke to Mrs. Loudermilk and recommended that she bring the children to the front porch so that the deputy and CPS workers could see them and verify that they were healthy and happy, which she did. (ER-0362, ¶ 3; ER-0237, 11-23).

Schmidt also spoke to Cash. (ER-0035, 12). Cash told Schmidt that she had spoken with her lawyer, and if they were not permitted to enter the home, she would take the children into temporary custody for up to 72 hours. (ER-0035, 12-14). She told Schmidt that CPS agents had authority to take children into temporary custody under Arizona law and that if he disagreed with that he should take it up with the Legislature. (ER-0233, 21-23). She then repeated that if she was not allowed into the home, CPS policy required her to remove the children into temporary custody, handcuffing the parents if they did not let her in. (ER-0324, 11-13). Cash ended her conversation by telling Schmidt that he should talk to AG Rhodes. (ER-0234, 9-12).

Schmidt then called Rhodes and attempted to persuade her that there was no justification for entering the home without a warrant or for taking the children into custody. Rhodes disagreed. Rhodes told Schmidt that the Loudermilks were

required by law to let CPS search their home. (ER-0035, 23-26). Rhodes told Schmidt that CPS has "greater leniency" than police when conducting investigations. (ER-0331, 2-6). Rhodes reiterated to Schmidt several times that the CPS agents must enter the home. (ER-0332, 17-21).

The two attorneys discussed federal and state cases and Arizona statutes relating to CPS investigations. Schmidt pointed out that the Ninth Circuit in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), had ruled that CPS investigations were subject to the normal rules of the Fourth Amendment. Rhodes responded that Arizona statutes had been upheld by state court. (ER-0363, ¶ 5).

Rhodes told Schmidt that if the Loudermilks did not allow the CPS agents into the home they had legal authority to take the children into temporary custody under Arizona statutes. (ER-0331, 6-10). After some discussion about the Arizona statute and the factual predicate necessary for taking temporary custody of a child, Rhodes told Schmidt that "we could argue those facts at the 48 hour hearing." (ER-0338, 13-15). Rhodes again said that if the Loudermilks persisted in refusing to allow CPS agents into the home they would be able to take the children into custody. Schmidt said he would relay her position to the Loudermilks and Rhodes hung up abruptly. (ER-0333, 3-9).

Attorney Schmidt then spoke to Mr. Loudermilk about his conversations with CPS Agent Cash and Assistant Attorney General Rhodes. He told Mr.

Loudermilk that he did not agree with Cash and Rhodes that they had adequate legal grounds to either enter their home or take their children into temporary custody. He told Mr. Loudermilk that they were, however, insistent that if they were not allowed into the home they could take the children. (ER-0036, 8-10).

Schmidt told Mr. Loudermilk that he believed their Fourth Amendment rights were being violated, but that Mr. Loudermilk would have to decide for himself what course of action to follow next. (ER-0036, 11-14). Mr. Loudermilk said that he didn't want his children to be taken into custody and that he felt that he had no other option than allowing the search of his home. (ER-0077, 7-16). Mrs. Loudermilk believed that the children would be immediately removed if she did not allow them to search her home. (ER-0137, 4-5). Mr. Loudermilk believed that he would be arrested and the children removed if he did not allow them to search his home. (ER-0077, 15-16).

There was no further communication to the Loudermilks from any CPS worker or deputy subsequent to Assistant Attorney General Rhodes' statement to Schmidt that the children would be immediately removed without a court order if the CPS workers were not allowed in the home.

In response to Rhodes' repetition of the prior demands, Mr. Loudermilk told the assembled CPS agents and MCSO deputies that they could come into his house. The two CPS agents and Ray, Danner, and Sousa entered, searched the

entire house, and also verified that the family had food. They left about five to ten minutes later. (ER-0036, 24-25). Before leaving, CPS Agent Cash told the Loudermilks that the report was false and that they would be receiving a letter saying the case had been closed because the allegations were unfounded. (ER-0036, 26).

As they drove away, CPS Agents Cash and Cramer had a conversation about their search of the Loudermilks' home. Cramer testified, "Really our discussion was we couldn't understand why they made such a big deal out of such a very small thing in the sense we could have been in and out of the home quickly, seen the allegations weren't true, and instead of that, it turned into a drawn out affair." (ER-0281-0282, 24-3).

SUMMARY OF THE ARGUMENT

Even though this Court held in an unpublished opinion that the Sheriff's Deputies were entitled to qualified immunity, that opinion is not "law of the case" with respect to this appeal about the actions of the Social Workers. First, this appeal involves completely different parties, so it is not the identical case. Second, the Deputies were called to the scene mere moments before the alleged constitutional violations occurred and relied on the information provided to them by the Social Workers. Unlike the Deputies, the Social Workers had been aware of the circumstances at the Loudermilks' home for two months and had not acted as if they believed that an emergency existed. The difference in what was known by these two sets of Defendants and the course of dealings the Social Workers had with the Loudermilks over the two-month span justifies a separate review of the actions of the Social Workers.

Under the clearly-established precedents of this Court, the Social Workers are not entitled to qualified immunity. The Social Workers' warrantless search of the Loudermilks' home was not justified by exigent circumstances. An investigative social worker had seen the exterior of the home three days after receiving the anonymous report. Neither she nor her supervisor, Defendant Cash, acted in a manner consistent with the belief, much less reasonable belief, that the condition of the *exterior* of the home was hazardous or that the exterior

corroborated the anonymous report that the *interior* presented an imminent risk to the children. Instead, nearly two months after the investigator first saw the exterior of the home, Defendant Cash made a spur-of-the-moment decision to go unannounced to the Loudermilks' home, intent on overcoming their lack of cooperation with the investigation. No social worker in these circumstances could reasonably believe that the Loudermilks' children were in such jeopardy that there wasn't enough time to apply to a neutral magistrate for a warrant to search the interior of the home. By any measure, these Defendants had ample time to seek a warrant—sixty-one days from the anonymous report or fifty-eight days from the first time the investigator laid eyes on the exterior of the home.

No social worker in these circumstances could reasonably believe that they would be constitutionally justified to remove the children from their parents' custody without a court order. Accordingly, the unabated threat to remove the children if cooperation continued to be withheld was not justified nor was it consistent with state statutory law.

When the facts in the summary-judgment record are viewed in the light most favorable to the Loudermilks, including all reasonable inferences drawn from them, a reasonable jury could conclude as a matter of fact that the Loudermilks' "consent" was not voluntary. Accordingly, summary-judgment was premature pending the resolution of the factual issues.

Additionally, under the clearly-established precedents of this Court, no social worker in these circumstances could reasonably conclude that the Loudermilks' "consent" to search their home was voluntary. The Loudermilks were not at liberty to leave or otherwise go about their business, surrounded as they were by six armed, uniformed deputies and two social workers. The unabated threat by the Social Workers to take their children into custody was not constitutionally justified by the circumstances.

Also under the clearly-established precedents of this Court, no social worker in these circumstances could reasonably conclude that the participation of the Loudermilks' attorney was an "intervening circumstance" that would purge the taint of the unconstitutional seizure. This is not a case where a wrongfully-seized person consults with an attorney and upon quiet reflection decides it would nevertheless be best to consent to a search. Instead, the Loudermilks' attorney was a passionate combatant on their behalf. He consistently and persistently attempted to persuade the Social Workers that their actions were unconstitutional—citing this Court's own case law—and were contrary to Arizona statutory law. Only when his efforts proved to be unsuccessful and the Social Workers took an unmistakable step toward following through with their threat to take the children did the Loudermilks give in. Because of the coercion and threats, no social worker could

reasonably conclude that the Loudermilks voluntarily consented to the search of their home on the advice of counsel.

The Fourteenth Amendment protects families from unjustified intrusion by government workers. The unjustified threats made by the Social Workers violated the Loudermilks' right to family integrity.

ARGUMENT

I. Standards of Review.

A. This Court Reviews the Grant of Summary Judgment on Qualified Immunity Grounds *de Novo*.

This Court reviews a district court's decision to grant summary judgment on qualified-immunity grounds *de novo*, considering all facts in dispute in the light most favorable to the nonmoving party. *Crowe v. County of San Diego*, 608 F.3d 406, 427 (9th Cir. 2010). "Summary judgment is appropriate only 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Stoot v. City of Everett*, 582 F.3d 910, 918 (9th Cir.2009), quoting Fed.R.Civ.P. 56(c). "In doing so, all justifiable inferences are to be drawn in favor of the plaintiffs." *Crowe*, 608 F.3d at 427.

In evaluating a grant of qualified immunity, this Court must ask two questions: "(1) whether, taking the facts in the light most favorable to the nonmoving party, the officers' conduct violated a constitutional right, and (2)

whether the right was clearly established at the time of the alleged misconduct." *Glenn v. Washington County*, 673 F.3d 864, 870 (9th Cir. 2011) (citing *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001), overruled in part by *Pearson v. Callahan*, 555 U.S. 223 (2009)). Either question may be addressed first, and if the answer to either is "no," then the officers cannot be held liable for damages. *Pearson,* 555 U.S. at 236.

Whether governing law was clearly established is a legal determination, and is reviewed *de novo*. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Whether specific facts constitute a violation of established law is a legal determination reviewed *de novo*. *Armendariz v. Penman*, 75 F.3d 1311, 1317 (9th Cir. 1996) (en banc).

B. This Court Reviews, *de Novo*, the District Court's Determination that Exigent Circumstances Were Present.

Whether probable cause to believe exigent circumstances existed in a given situation, "and the related questions, are all questions of fact to be determined by a jury." *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir.2000). Accordingly, "[s]ummary judgment in favor of the defendants is improper unless, viewing the evidence in the light most favorable to the plaintiffs, it is clear that no reasonable jury could conclude that the plaintiffs' constitutional rights were violated." *Id*.

"When examining the validity of a warrantless search and seizure, exigent circumstances present a mixed question of law and fact reviewed *de novo*." *Mabe*

v. San Bernardino County, Dep't of Public Social Services, 237 F.3d 1101, 1106 (9th Cir. 2001); *see also United States v. Hudson*, 100 F.3d 1409, 1417 (9th Cir.1996) (same).

C. Whether Consent to a Search was Voluntary is a Question of Fact.

Summary judgment on the issue of the voluntariness of consent to search is improper when there is a genuine issue of material fact about whether the plaintiffs' consent was voluntary. *Crowe*, 608 F.3d at 438. Summary judgment on qualified-immunity grounds is improper unless the evidence in the record "demonstrates that a reasonable officer would have thought that the [Loudermilks] freely and voluntarily consented to the searches." *Id.* This Court reviews the district court on that issue *de novo*. *Id.* at 427.

D. This Court's Unpublished Decision Regarding the Deputies is not "Law of the Case" for the Social Workers.

Related to the standard for appellate review is whether this Court's unpublished decision about the Deputies, who alone pursued an interlocutory appeal of the district court's denial of the first round of summary-judgment motions, is "law of the case." The district court's new order granting the Social Workers' summary-judgment motion on qualified-immunity grounds does not explicitly say that it depended on the law-of-the-case doctrine. But the district court relied heavily on this Court's unpublished decision reversing the district court's earlier conclusion that the Deputies were *not* entitled to qualified immunity.

It is apparent from this reliance that the district court considered this Court's decision about the Deputies to be dispositive for the Social Workers, at least in part. See District Court Order at 8-9 (concluding that the Ninth Circuits' "reasoning applies to CPS Agents Cash and Cramer").

Under the law-of-the-case doctrine, however, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the *identical case*." *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993) (cert. denied 508 U.S. 951 (1993)) (emphasis added). This is not the "identical case" insofar as it involves different parties and different claims. It is one thing to say that the Deputies were entitled to rely on the limited information provided to them by the Social Workers. It is another matter entirely to ignore the fact that the Social Workers had considerably more information, acquired over two months' time, that was not made available to the Deputies.

This additional information would have made it clear to any reasonable official that there was insufficient evidence to justify either a warrantless entry of the home or an emergency removal of these children. There was no credible evidence of an emergency sufficient to invoke the exigent-circumstances doctrine.

First, the initial anonymous tip was not assigned to the on-call worker, but was assigned to a field investigator more than thirteen hours after it was received. The field investigator did not act as if the anonymous report presented an

immediate threat to the life or limb of the children; she waited three days to visit the house. And after the field investigator visited the house and found that the Loudermilks were not home, she did not rush to court to get a warrant; she left her business card with a note asking for a call back. By reasonable inference, it is safe to assume that the investigator saw the exterior of the home when she left her card and was not particularly distressed for the safety of the children based on its appearance.[2] The field investigator then spent the next several weeks attempting to persuade the Loudermilks to consent to her inspection of the home.

Additionally, the investigator knew that the Loudermilks had received permission from the building department to occupy the residence even though the exterior was still under construction. That information was contained in a letter from the attorney who assisted the Loudermilks, which was part of the investigation file. In other words, the Social Workers knew that the proper government inspectors had concluded that the home was safe for both adults and children. They did not consider this information to be relevant and never bothered to check it out.

Defendant Cash did not go to work on the morning of the search intending to rush to the Loudermilks' home to protect the children from immediate harm. She only decided to go after the assigned investigator called in sick and because she

[2] The investigator was no longer in the employ of the State and was not available for deposition.

was planning to train Defendant Cramer on another matter in the same area anyway. She considered going to the Loudermilks' home to be another opportunity to train Cramer, to show her "how these things were done," rather than out of urgent concern for the safety of the Loudermilks' children. The Social Workers called the Sheriff's Office before ever seeing the home, which they routinely do when encountering "uncooperative" people, even though neither Cash nor Cramer had had any contact with the family or the home.

Additionally, the law-of-the-case doctrine is not a limitation on a tribunal's power, but rather a guide to discretion. *Arizona v. California*, 460 U.S. 605, 618 (1983). A court may have discretion to depart from the law of the case where: "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

The evidence about what the Social Workers knew is substantially different from what the Deputies knew. It would be a manifest injustice to hold that the Social Workers actions should be reviewed based on what the Deputies knew, rather than based on what the Social Workers actually knew and how they really acted during the two months after receiving the anonymous report.

The law-of-the-case doctrine does not apply to this appeal. But even if it does, this Court may nevertheless review the actions of the Social Workers in the exercise of sound discretion.

II. The Social Workers are not Entitled to Summary Judgment Based on Qualified Immunity.

A. The Warrantless Entry to the Loudermilks' Home was not Supported by Probable Cause.

"The Fourth Amendment is the guarantee of every citizen that his home will be his castle, safe from the arbitrary intrusion of official authority." *Baldwin v. Placer County*, 418 F.3d 966, 970 (9th Cir. 2005).

On March 9, 2005, it was clearly-established law in this Circuit that the Fourth Amendment is chiefly directed against warrantless entries into the home. *See United States v. Brooks*, 367 F.3d 1128, 1133 (9th Cir. 2004) (citing *Payton* for the proposition that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1056 (9th Cir. 2002) (holding that "[i]t is axiomatic that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed'"); *United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000) (same); *Hudson*, 100 F.3d at 1422 (same); *United States v. Freitas*, 856 F.2d 1425, 1430 (9th Cir. 1988) (same); *United States v. Warner*, 843 F.2d 401, 405 (9th Cir. 1988) (holding that "the home and its traditional curtilage is

given the highest protection against warrantless searches and seizures" because "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *White by White v. Pierce County*, 797 F.2d 812, 817 (9th Cir.1986) (same); *United States v. Prescott*, 581 F.2d 1343, 1349 (9th Cir. 1978) (holding that the U.S. Supreme Court "has long recognized that 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed'").

In addition to forced entry of a home being the "chief evil" prohibited by the Fourth Amendment, warrantless entry of a home is presumptively unreasonable. *See Bailey v. Newland*, 263 F.3d 1022, 1029 (9th Cir. 2001) (holding that, under *Payton*, "[i]t is clearly established Federal law that a warrantless search or seizure inside a home is presumptively unreasonable under the Fourth Amendment"); *United States v. Johnson*, 256 F.3d 895, 905 (9th Cir. 2001) (same); *Case v. Kitsap County Sheriff's Dept.*, 249 F.3d 921, 936 (9th Cir. 2001) (same); *United States v. Vaneaton*, 49 F.3d 1423, 1425 (9th Cir. 1995) (same).

It was also clearly established in this Circuit that social-worker investigations are subject to the same fourth-amendment rules of search and seizure as police officers who are investigating crime. *Compare White*, 797 F.2d at 815 (holding that it was well-established that police could not enter a dwelling without a warrant, even if probable cause existed) with *Calabretta*, 189 F.3d at 813

(holding that the Fourth Amendment's clearly established prohibition against warrantless home searches extends to social workers); *see also Wallis*, 202 F.3d at 1138; *Mabe*, 237 F.3d at 1106-7; *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1296-7 (9th Cir. 2007) (discussing the state of the law with respect to events that occurred in 2001).

In *Calabretta*, this Court summarized the state of the law and upheld the denial of a social worker's motion for summary judgment on qualified-immunity grounds. "The Fourth Amendment preserves the 'right of the people to be secure in their persons, houses ....' without limiting that right to one kind of government official." 189 F.3d at 813-14. *Calabretta* makes it clear that the normal rules of the Fourth Amendment control CPS investigations of child abuse.

"As a general rule, to satisfy the Fourth Amendment a search of a home must be supported by probable cause, and there must be a warrant authorizing the search.... Even when probable cause is shown, a warrantless search will normally be invalid unless there are 'exigent circumstances' that justify proceeding without a warrant." *Brooks*, 367 F.3d at 1133.

1. There Were No Exigent Circumstances Justifying Warrantless Entry.

In this case, the initial referral was not assigned to the on-call worker. The first time a social worker visited the home was three days after the referral. And the next time anyone went to the Loudermilks' home was 61 days after the referral.

In *Calabretta*, this Court said, "The facts in this case are noteworthy for the absence of emergency. The social worker and her department delayed entry into the home for fourteen days after the report, because they perceived no immediate danger of serious harm to the children." 198 F.3d at 813.

In *Mabe*, the defendant social worker argued that her actions in removing a child from her parent's custody was justified by exigent circumstances. 237 F.3d at 1108. The social worker in *Mabe* delayed a mere four days, "which raise[d] a serious question about [the social worker's] reasonable belief the MD was in imminent danger [four days after the initial interview], similar to the delay in *Calabretta*." *Id.*

In *Rogers*, the social workers classified the case as a "ten-day response" and in fact "waited until eleven days after the first referral to visit the house for the first time, and an additional seven days, following the first aborted visit, before returning, for a total delay of eighteen days, four days longer than in *Calbretta*." 487 F.3d at 1296. This Court concluded that no exigency existed, because "neither Royal nor the other staff members thought that the allegations required immediate action militates against a finding of exigency." *Id*.

While the *Rogers* opinion was handed down after the events in this case took place, the events in *Rogers* occurred in 2001. In other words, *Rogers* held that the law was already clearly established in 2001 (four years before this case), and that

the social worker could not get the benefit of qualified immunity on exigent-circumstances grounds due to an eighteen day delay.

And in *Camreta v. Greene*, this Court said, "The exigent circumstances exception is not applicable here. Defendants waited three days to detain and interrogate S.G. after receiving the initial report from DHS, and then returned her to her parents' custody after the allegedly incriminating interview. Such delays and actions undermine any claimed exigency." 588 F.3d 1011, 1030, n.17 (9th Cir. 2009) (vacated as moot on other grounds by *Camreta v. Green*, 131 S.Ct. 2020 (2011)) (discussing events that occurred in 2003, citing *Rogers*, 487 F.3d at 1296).

Similarly, in this case, neither the original investigator nor the other staff members – specifically her supervisor, Defendant Cash – thought that the allegations required immediate action. This clearly militates against a finding of exigent circumstances. In *Calabretta* the delay was fourteen days; in *Mabe* the delay was four days; in *Rogers* the delay was eighteen days; in *Camreta*, the delay was three days. In this case, the delay was sixty-one days. It is difficult—if not impossible—to square the holdings in *Calabretta*, *Mabe*, *Rogers*, and *Camreta* with the district court's holding in this case that there were exigent circumstances.

One presumably could argue that the condition of the exterior of the home was so hazardous that when Defendant Cash first saw it, she was fearful for the safety of the children. But that argument has never been made by anyone, and, in

any event, is inconsistent with the facts of this case. Most telling is the fact that after touring the interior of the home, the investigation was closed without any mention of a need for remediation to the exterior of the house. The only reasonable inference to be drawn from this lack of action is that the exterior was not hazardous, even though it was still being worked on.

It is also particularly telling that Agent Cramer called the police *before* the Social Workers went to the house because they considered the Loudermilks to be "uncooperative." It had nothing to do with seeing the exterior of the home.

2. The Anonymous Report Did Not Provide Probable Cause to Remove the Loudermilks' Children.

Since it is apparent that the exterior of the home did not present an imminent risk of harm to the children, the appearance of the exterior could not possibly corroborate the anonymous report that the interior of the home was hazardous. In *Calabretta*, this Court held that traditional Fourth Amendment analysis applies to CPS investigations. 189 F.3d at 813. The law regarding anonymous tips was clearly established long before the events in this case occurred.

Courts look to several factors to determine the reliability of an informant's tip. First, a **known** informant's tip is thought to be more reliable than an anonymous informant's tip. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000); *Adams v. Williams*, 407 U.S. 143, 146-47 (1972). That is because an anonymous informant cannot be questioned about the basis for knowing the information or

motive for providing the tip, nor can the anonymous informant be held accountable for providing false information in violation of the law. *See J.L.*, 529 U.S. at 271.

Second, the informant's tip is considered more reliable if the informant reveals the basis of knowledge of the tip. *See Spinelli v. United States,* 393 U.S. 410, 416 (1969), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983). There is nothing in this record saying how the anonymous tipster knew anything about the *interior* of the home. And anyone driving by the Loudermilks' home could have seen the non-hazardous exterior construction.

Third, a tip that provides detailed *predictive* information about future events that is corroborated by an official's observation may be considered reliable, even if the tip comes from an anonymous source. *See Alabama v. White,* 496 U.S. 325, 331-32 (1990); *Gates*, 462 U.S. at 243-45; *Draper v. United States,* 358 U.S. 307, 313 (1959). Predictive information that reveals a detailed knowledge of an individual's intimate affairs is more reliable than predictive information that could be observed by the general public, *see White,* 496 U.S. at 332, and such self-verifying detail is considerably more valuable if it relates to suspicious activities than if it relates to innocent activities, *see Gates*, 462 U.S. at 245 n. 13.

Nothing in the anonymous tip received by CPS in **January** was predictive of future events that could be observed by CPS, much less help corroborate the anonymous report that the **interior** of the home was still unsafe in **March**. It is a

reasonable inference from the CPS response in this case that the exterior of the home, while still visibly under construction, was not hazardous in January (when Agent Cagle visited and left her card), and still was not hazardous in March.

If the non-hazardous condition of the outside of the home in this case is allowed to justify the warrantless entry of the home on exigent-circumstances grounds, there is no limit to the amount of mischief a malicious anonymous tipster could create. Anytime a homeowner is safely replacing windows, adding a room to the house, or replacing worn shingles – all visible to the general public – a malicious anonymous tipster could claim that the interior of the home is unsafe. And police and social workers could claim exigency as they storm the man's castle. That is not the law and this case should not be stretched to permit that result.

Finally, probable cause must be based on facts "'so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.'" *Durham v. United States*, 403 F.2d 190, 193 (9th Cir.1968) (quoting *Sgro v. United States*, 287 U.S. 206, 210 (1932)). While the CPS Defendants in this case did not apply for a court order to enter the home, the probable-cause issue would be the same. The only difference between January, when the tip was received, and March, when the Defendants went to the home, is that they had learned in the interim that the county had permitted the Loudermilks to occupy the home. It can

scarcely be argued that the county building authorities would allow occupancy if there were any of the safety hazards listed in the anonymous report. Thus, when they arrived and saw non-hazardous construction occurring on the exterior, it was not reasonable for the CPS Defendants to believe that the safety hazards anonymously reported **two months** earlier required any kind of emergency response.

For the foregoing reasons, the CPS Defendants lacked probable cause to believe that the interior of the home presented an imminent threat of harm to the children. There were no exigent circumstances justifying the warrantless entry of the Loudermilks' home. No reasonable social worker in these circumstances, in possession of all of the information Defendants Cash and Cramer had at the time, could conclude otherwise.

The district court's conclusion to the contrary should be reversed.

3. The Social Workers Did Not Have Exigent Circumstances to Justify Warrantless Removal or the Threat to Remove the Loudermilks' Children.

"Government officials are required to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that establishes '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.'" *Mabe*, 237 F.3d at 1106

(quoting *Wallis*, 202 F.3d at 1138, citing *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).

For the same reasons that the Social Workers' warrantless entry into the home was not justified by exigent circumstances, their lawful ability to seize the children without a court order would also have been unjustified. At best, the extraordinarily stale information available to Defendants Cash and Cramer was an anonymous report about the interior of the home two months earlier, which could not reasonably be corroborated by the otherwise safe exterior of the home even though it was still being worked on.

In *Mabe*, this Court said, "Whether reasonable cause to believe exigent circumstances existed in a given situation, and the related questions, are all questions of fact to be determined by a jury." 237 F.3d at 1108. Accordingly, "[s]ummary judgment in favor of the defendants is improper unless, viewing the evidence in the light most favorable to the plaintiffs, it is clear that no reasonable jury could conclude that the plaintiffs' constitutional rights were violated." *Id*. (quoting *Wallis*, 202 F.3d at 1138). Following this standard, this Court found in *Mabe* that summary judgment was improper in *Wallis* "in part because 'a material question of fact exists regarding whether ... there was reasonable cause to believe, on the basis of the information in the possession of the ... police officer, that the ...

children faced an immediate threat of serious physical injury or death.'" *Mabe*, 237 F.3d at 1108 (quoting *Wallis*, 202 F.3d at 1138).

As was the case in *Mabe*, in this case there "exists a question of material fact here whether a reasonable social worker could have believed that her conduct was lawful because it is unclear on summary judgment whether [the Loudermilks' children] faced an immediate threat of serious physical injury." *Mabe*, 237 F.3d at 1109.

Because no social worker in these circumstances could reasonably believe that they were justified to either remove or threaten to remove the children from their parents' custody, the district court's conclusion to the contrary should be reversed.

4. The Social Workers Were Prohibited by Arizona Statutes From Threatening to Remove the Loudermilks' Children.

The relevant Arizona statute, ARIZ. REV. STAT. §8-821(B)(1), bolsters the conclusion that no social worker in these circumstances could reasonably believe that the threat to remove the children was justified. Section 8-821(B)(1) requires a CPS worker to have "probable cause" to believe that a child is "a victim or will imminently become a victim of abuse or neglect." The Arizona Legislature spoke directly to the events in this case in ARIZ. REV. STAT. § 8-803(D). "Refusal to cooperate in the investigation or to participate in the offered services *does not constitute grounds for temporary custody* of a child except if there is a clear

necessity for temporary custody as provided in § 8-821." (Emphasis added.) A reasonable official would have known that it is an unlawful act to threaten to remove the Loudermilks' children from their home for being "uncooperative."

Cash testified that "if I couldn't determine their safety because they're refusing access to the children, I do have the authority to remove the children." (ER 0240, 14-16). She also testified if "it was unknown" whether a child was in imminent danger, but the parents were not allowing access, she had the right to remove them. (ER 0241, 9-13). No reasonable person, much less a reasonable social worker, could read this straightforward statute to mean what the Social Workers said it meant. If the statute is to be interpreted that a CPS worker who "does not know" if the child is safe may assume that the child is in imminent threat of serious bodily harm and take the child into temporary custody, then the exception has swallowed the rule.

Agent Cash's interpretation of the Arizona statutes is nonsensical, contrary to their plain meaning, and contrary to the constitutional issues that animated their adoption. To credit her interpretation, a social worker would **not** need credible evidence amounting to probable cause to believe that a child was in imminent danger; instead, she would be able to seize the child based on a stale anonymous tip, unless she could confirm that the tip was false. That faulty interpretation turns the Arizona statutes and the constitutional protections on their heads.

A reasonable trier of fact could conclude that the Social Workers in this case threatened to remove the children as a tactic to overcome the Loudermilks' lack of consent rather than based on a reasonable belief that the stale anonymous report was true. That is both unconstitutional and contrary to the plain meaning of the Arizona statute that expressly forbids a social worker from taking a child into temporary custody for "[r]efusal to cooperate in the investigation." ARIZ. REV. STAT. § 8-803(A)(3).

As argued below, under the clearly-established law of this Court, the Loudermilks were unlawfully seized at the time they allowed the Social Workers into their home. And their consent was coerced by the very real threat that the Defendants were about to wrongfully take their children into foster care.

When the evidence in the summary-judgment record is viewed in the light most favorable to the Loudermilks, a reasonable jury could conclude that their "consent" was coerced. No social worker in these circumstances could reasonably conclude otherwise.

The district court's summary-judgment order granting the Social Workers qualified immunity on this ground should be reversed.

B. The Loudermilks' "Consent" was not Voluntary and No Social Worker in These Circumstances Could Reasonably Conclude Otherwise.

The district court did not find as a matter of fact that the Loudermilks' consent to the search of their home was voluntary. The summary-judgment record would permit a reasonable jury to conclude that it was not. Instead, the district court held that the Social Workers were entitled to summary judgment on qualified-immunity grounds. The district court's decision in this regard was premature because if all of the factual issues are resolved in the light most favorable to the Loudermilks, no social worker in these circumstances could reasonably conclude that consent was voluntary.

To establish the validity of consent to search, "the government bears the heavy burden of demonstrating that the consent was freely and voluntarily given." *United States v. Reid*, 226 F.3d 1020, 1026 (9th Cir. 2000) (internal citations omitted). The government must show that there was no duress or coercion, express or implied, and that the consent was not only unequivocal and specific, but was also freely and intelligently given. *Id.*

In a recent case very similar to this one, *Crowe v. County of San Diego*, this Court held that the "district court properly denied summary judgment" when there was a factual issue of whether the plaintiffs' consent was voluntary. 608 F.3d 406, 438 (9th Cir. 2010). In *Crowe*, the plaintiffs brought several Fourth Amendment

claims against police officers, including a claim of improper search due to lack of consent. The district court ruled that there was a genuine issue of material fact preventing summary judgment, since there was not sufficient evidence "to meet the government's burden of proving that any consent from the Crowes was freely and voluntarily given, nor [is the evidence] sufficient to demonstrate that a reasonable officer would have thought that the Crowes freely and voluntarily consented to the searches." *Id.*

In another recent Section 1983 case involving Fourth Amendment rights, this Court said, "[T]he district court properly denied the summary-judgment motion because there are genuine issues of fact regarding whether the officers violated [the plaintiff's] Fourth Amendment rights. Those unresolved issues of fact are also material to a proper determination of the reasonableness of the officers' belief in the legality of their actions." *Espinosa v. City and County of San Franciso*, 598 F.3d 528, 532 (9th Cir. 2010).

This Court similarly stated in *Santos v. Gates* that it was premature to decide the qualified-immunity issue "because whether the officers may be said to have made a 'reasonable mistake' of fact or law may depend on the jury's resolution of disputed facts and the inferences it draws therefrom." 287 F.3d 846, 855 n. 12 (9th Cir. 2002) (Internal citation omitted).

The central factual issues in this case are undisputed. And the legal standard for voluntary consent to search in near-identical circumstances was clearly established by this Court before the events in this case took place. In *United States v. Soriano*, 361 F.3d 494 (9th Cir. 2004), a police officer sought consent to search a hotel room. When the woman declined, he threatened to take away her children. This Court held that an unabated threat to take away a child would be sufficient to set aside a finding of voluntariness, even under the clearly erroneous standard of review. This Court considered the threat to take away the child to be the most important factor to consider when deciding whether the woman's consent was voluntary:

> We will review these five factors in the context of this case below, but there was a more important factor in the particular circumstances of this case, so we begin with that. It was the threat to take away Mukai's children which provides the most serious basis for questioning the voluntariness of Mukai's consent to the search. *If that threat had remained unabated, Mukai's consent could properly be set aside as involuntary*.

Id. at 502. (Emphasis added).

In *Soriano*, before the woman signed a consent form, a second officer assured the woman that her children would not be taken from her. The court held that while reasonable minds could differ about the effect of the second officer's assurances, the trial court's finding that consent was voluntary was not clearly erroneous because of the abatement of the threat. *Id*.

This Court has long held that "The relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit 'cooperation,' they exert the 'improper influence' proscribed by *Malloy* [*v. Hogan*, 378 U.S. 1 (1960)]." *U.S. v. Tingle*, 658 F..2d 1332, 1335 (9th Cir. 1981). *See also Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (all of the officers on the scene told defendant that her infant children would be taken from her if she did not cooperate; held, confession was not voluntary but coerced).

The Loudermilks were not faced with conflicting representations. Instead, they were faced with repeated representations that their children would be removed if they did not consent to the search of their home. Before they finally relented this threat was backed by two CPS agents, five uniformed deputies, and one uniformed sergeant at their home. And one of the CPS agents by her own admission had already begun to fill out a Temporary Custody Notice. Finally, Assistant Attorney General Rhodes communicated to Attorney Schmidt that CPS had the authority to carry out their threat to remove the children.

Unlike the Deputy Defendants, who as this Court pointed out in the unpublished opinion, had withdrawn their original threat to enter the house without a warrant (ER 0035, 2-4), the CPS Defendants never withdrew their threat to

remove the Loudermilks' children—instead, they escalated them. Because of this, a rational trier of fact could conclude from the summary-judgment record that the Defendants deliberately preyed upon the Loudermilks' parental instincts to cause the Loudermilks to fear that they would take away their children to elicit their "cooperation." The Loudermilks did the only thing any reasonable parent could have done in the circumstances: they "consented" to the search of their home in fear that their young children would be taken from them.

1. The District Court's Reliance on the Phrase "Baseless Threat" was Erroneous.

The district court also said, "[T]his is not a case in which officers use a baseless threat of the loss of the children to obtain a result entirely unrelated to the children." (ER 0040, 26-27). This statement requires some analysis, because if it means what the district court says, then CPS investigators would *always* be permitted to threaten removal of children because they are *always* investigating allegations related to children.

The district court plucked the word "baseless" out of context from Judge Berzon's dissent in *Soriano*. In that case, the majority held that threatening the defendant's girlfriend to take away her children did not negate her consent because that threat had been renounced by another officer. The majority opinion in *Soriano* did not say, as the district court in this case incorrectly implies, that the issue

turned on whether the threat was related to the children's safety or was "baseless," *i.e.* unrelated to the safety of the children.

The majority opinion was quite clear that under the clearly-erroneous standard of review, it would not upset the finding of the lower court because the second officer relieved the woman's fears of losing her children. But this Court would have overturned the lower court, even under the clearly-erroneous standard "[i]f that threat had remained unabated." *Soriano,* 361 F.3d at 502. The majority opinion did not turn on whether the threat related directly to the safety of the children but focused exclusively on whether the threat was *still operative*.

Judge Berzon dissented from that holding. She would have held that the woman was coerced even though the second officer said something different from the first. She quoted the record where the district court found that the "LAPD officer did tell her that if she refused she might be arrested and that her children would go to social workers." *Soriano*, 361 F.3d at 510 (Berzon, J., dissenting). She twice referred to the threat as "baseless." *Id.* at 510, 511. In context, it is clear that what Judge Berzon meant by "baseless" was "without legal merit," or "not justified by the circumstances." In her opinion, the threat to arrest the woman, which the officer explained would lead to her children being handed over to social workers, lacked legal merit or justification and was nothing more than a cruel tactic to

coerce her to sign the consent form. In her opinion, the taint of the threat was not purged by the second officer's conflicting statement.

Viewing this case the way Judge Berzon actually intended her use of the word "baseless" to be used, the question would be: "Did the Social Worker's threat to remove the children lack legal merit or was it unjustified in the circumstances?" If so, then any consent that followed was coerced.

Using the word "baseless" to mean "unrelated to the safety of the children" would be tantamount to giving CPS workers *carte blanche* to threaten to remove children in every investigation of alleged child neglect or abuse. By definition, every investigation they conduct is related to the safety of children. If the district court's illogical use of the word "baseless" is followed, social workers would always be justified to threaten to remove children whenever they meet resistance. The fourth- and fourteenth-amendment protections afforded to families in their own homes would be meaningless.

The threats made by Agents Cash and Cramer were completely unjustified in these circumstances – they were, in fact, baseless. Accordingly, summary judgment on qualified-immunity grounds was not appropriate because no social worker in these circumstances could reasonably conclude that the Loudermilks' "consent" was voluntary.

2. The Social Workers' Threats to Immediately Remove the Loudermilks' Children were Unjustified.

The district court's order contains a grievous error about the factual issues surrounding the consent question. According to the district court, the Social Workers were entitled to qualified immunity because they "would not have known that it was coercive to explain that taking temporary custody of the Loudermilks' children under Arizona law was a 'viable option.'" (ER 0039, 23-26, quoting this Court's unpublished decision, ER 0409).

That quotation implies that the Social Workers merely "explained" that seizing the children was hypothetically a "viable option." But those words were never spoken by anyone and are nowhere in the summary-judgment record. The words "viable option" come from a case. In *United States v. Iglesias*, 881 F.2d 1519, 1522-23 (9th Cir. 1989), this Court said "it was not impermissible for the [police officer] to inform [the homeowner] that a search warrant and grand jury subpoena were viable options."

The difference in what was actually said in this case—and the legal import of those words—is light-years removed from what happened in *Iglesias*. In this case, the summary-judgment record shows that the Social Workers explicitly said if they were not permitted to enter the home, they would take the children into temporary custody for up to 72 hours. (ER-0035, 12-14). Cash "then repeated that if she was not allowed into the home, CPS policy required her to remove the

children into temporary custody, handcuffing the parents if they did not let her in." (ER-0035, 14-17).

The words used by these Social Workers were qualitatively different from those used by the officer in *Iglesias*, and the nature of the threat in this case was not hypothetical. In *Iglesias* the police officer essentially said that if the homeowner didn't cooperate it would be a viable option for him to leave and come back with a search warrant or to serve a subpoena to make the homeowner appear at the grand jury. Saying that he would put his evidence before a neutral magistrate to get a warrant is really not cognizable as a "threat" at all compared to "do as I say or I'll take your kids right now and put them in foster care." (Paraphrase).

Unlike *Soriano*, which directly deals with the effect a threat to remove children from their parents has on the voluntariness of consent, the facts in *Iglesias* do not even once say that the police officer threatened to take the anyone's children into custody for any reason.

Iglesias was a criminal defendant who sought to have incriminating evidence suppressed. She had stored the evidence at her sister's house and the police obtained the sister's consent to search Iglesias's personal property stored there. When the sister expressed reluctance to retrieve the property the officer said that he would have the sister subpoenaed by the grand jury and that he would return with dogs and a search warrant if she didn't cooperate. In fact, the opinion says that the

police officer considered the sister to be an "'innocent bystander' and *did not threaten her in any way*." *Id*. at 1521 (emphasis added).

Later in the *Iglesias* opinion the court notes that "to support her claim that [her sister's] consent was not given voluntarily, Iglesias alleges: . . . (b) that [her sister] was vulnerable in her home and was confronted with the separation from her small child, who was present during the interrogation." *Iglesias*, 881 F.2d at 1522-23. In other words, a criminal defendant who wasn't even present "alleged" that her sister was "confronted" (whatever that means) with separation from her child, even though the sister was not a suspect, and no threat to "separate" her from her child was ever made (much less a threat to place her child in state custody). The district court's reliance on *Iglesias* is misplaced.

The threat made by these Social Workers was immediate, concrete, and unequivocal. If the Social Workers would have said they were going to see a judge at any time during the sixty-one days of this investigation, or if Agents Cash and Cramer would have left the Loudermilks' porch and gone directly to the courthouse, the Loudermilks would not now be before this Court.

3. The Social Workers Had "Seized" the Loudermilks.

Whether a person has been seized when "consenting" to a search is another factor to be considered when examining "voluntariness." *Soriano*, 361 F.3d at 502. A consensual encounter may escalate into being a seizure "when a law

enforcement officer, through coercion, physical force, or a show of authority, in some way restricts the liberty of a person," *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004) (internal quotations omitted), or "if there is a threatening presence of several officers . . . ." *United States v. Chavez-Venezuela*, 281 F.3d 897, 898 n. 3 (9th Cir. 2002) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Such a seizure occurs under the Fourth Amendment when, "taking into account all the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business" or that he "was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 437, 439 (1991) (internal quotations and citations omitted). The circumstances surrounding the encounter should be considered "from the perspective of the person seized." *Allen v. Portland*, 73 F.3d 232, 235 (9th Cir.1995).

From the Loudermilks' perspective, two CPS agents and two uniformed deputies arrived unannounced at their door two weeks after they had cancelled the meeting with Agent Cagle and two months after Cagle had first visited the Loudermilks' home to investigate an anonymous report. These officials had no court order to search the home and threatened to remove their children if the

Loudermilks declined to consent to a search. After the Loudermilks did in fact decline to consent, four more armed, uniformed officers arrived at their home. After the CPS agents conferred with their lawyer, the demands were repeated and Agent Cramer began filling out a Temporary Custody Notice.

A rational trier of fact could conclude from the summary-judgment record that a reasonably objective parent in the Loudermilks' position would not have believed that she was at liberty, was free to decline the officers' request, or was otherwise free to terminate the encounter. They were in fact "seized." Because they were seized, when they finally relented, their "consent" was not voluntary.

Accordingly, summary judgment was not appropriate.

4. The Loudermilks' Consent Was Not Voluntary Even Though They Talked With Their Lawyer.

The Loudermilks were unlawfully seized when they allowed the Social Workers into their home. The district court held that "a reasonable CPS agent would not have known consent was not voluntary where the parents consulted an attorney." (ER 0040, 9-10). The district court cited no authority for this proposition, provided no legal analysis, and gave short shrift to the actual facts surrounding the attorney's involvement. The district court's unsupported holding was contrary to this Court's clearly-established law.

As this Court and numerous others have held, merely consulting with a lawyer does not have the talismanic power to turn coercion into voluntariness. The

involvement of an attorney in consent-to-search cases usually arises in the criminal context when a motion to suppress evidence has been made on the grounds that the defendant was unlawfully seized at the time consent was given. The general rule is that consent that follows closely after an illegal seizure is invalid. There are certain factual circumstances, however, that may purge the taint of the illegal seizure. One of them may, but is not necessarily always, when the defendant is able to consult an attorney.

"Under the Fourth Amendment ... evidence obtained subsequent to an illegal investigation is tainted by the illegality and thus inadmissible, notwithstanding ... consent, unless subsequent events have purged the taint." *United States v. Bautista*, 362 F.3d 584, 592 (9th Cir.2004) (quoting *United States v. Chavez-Valenzuela*, 268 F.3d 719, 727 (9th Cir. 2001), *amended by United States v. Chavez–Valenzuela*, 279 F.3d 1062 (2002), and holding that "consent was tainted and the evidence obtained pursuant to it should have been suppressed"); see also *United States v. Hotal*, 143 F.3d 1223, 1228 (9th Cir. 1998) (holding that "consent to search that is given after an illegal entry is tainted and invalid under the Fourth Amendment").

"To determine whether a prior illegality is sufficiently connected to the subsequent consent, [this Court] looks to three factors: (1) the 'temporal proximity between illegality and consent;' (2) 'the presence of intervening circumstances;'

and (3) 'the purpose and flagrancy of the official misconduct.'" *United States v. Washington*, 490 F.3d 765, 776-7 (9th Cir. 2007) (quoting *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)).

"The lack of a significant intervening period of time does not, in itself, require that the evidence be suppressed for want of sufficient attenuation," *United States v. Wellins*, 654 F.2d 550, 555 (9th Cir.1981), but it does "bear ... directly on the probability of taint," *Delgadillo–Velasquez*, 856 F.2d at 1300.

In this case there was *no* time between the unlawful seizure/unjustified threat to remove children and the Loudermilks' "consent." In *Brown*, the Supreme Court held that less than two hours was insufficient to purge the taint. 422 U.S. at 604; *see also Taylor v. Alabama*, 457 U.S. 687, 691 (1982) (six hours insufficient); *United States v. Perez–Esparza*, 609 F.2d 1284, 1290 (9th Cir. 1979) (three hours insufficient); see also *United States v. George*, 883 F.2d 1407, 1416 (9th Cir. 1989) ("As best we are aware, no court has weighed the first factor against a defendant when his inculpatory statement followed illegal police conduct by only a few hours.")

Another factor that may purge the taint of an unlawful seizure, and render the consent to search valid, is the presence of significant intervening circumstances. "Examples include release from custody, an appearance before a magistrate, or consultation with an attorney, 'such that we would be able to say

that [a defendant's] consent to search was an *unconstrained, independent* decision' that was completely *unrelated* to [the] initial unlawful" violation." *George*, 883 F.2d at 1416 (emphasis added); *see also United States v. Wellins*, 654 F.2d 550, 555 (9th Cir. 1981) (holding that consultation with counsel for purpose of determining attenuation of taint of illegal arrest that preceded consent to search by approximately one hour and 15 minutes was just one factor when considered with all relevant circumstances, including defendant's age, experience, intelligence, emotional state at the time he consented to search, and fact that he had been advised of his Miranda rights.)

These intervening events must have a "tendency to distance the suspect from the coercive effects of the temporally proximate, constitutional violations." *Washington*, 387 F.3d at 1074. In the absence of substantial intervening events, "the suspect's desire to avoid suffering additional constitutional violations and/or a continuing unconstitutional detention, as in this case, is what may prompt the suspect to avoid further confrontation by giving consent." *Id*.

When the summary-judgment record is viewed in the light most favorably to the Loudermilks and all reasonable inferences are drawn in their favor, can there be any doubt that the Loudermilks "consented" "to avoid suffering additional constitutional violations?" The lawyer's involvement in this case was not an intervening circumstance that would tend to distance the Loudermilks from the

coercive effects of the escalating, imminent threat by the Social Workers to remove their children from their custody without constitutional justification and contrary to the plain meaning of the Arizona statutes.

Additionally, the attorney's involvement in this case was not a quiet, private consultation with the Loudermilks. He instead passionately argued with each of the Defendants and persistently attempted to persuade them that the actions they were threatening to take were both unconstitutional and contrary to the Arizona statute. As it became apparent that his efforts were unsuccessful, the Loudermilks were put to the choice of standing on their rights and losing their children or "consenting" to avoid needless harm to the children.

It bears repeating that this Court said in 1981, "The relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit 'cooperation,' they exert the 'improper influence' proscribed by *Malloy* [*v. Hogan*]." *U.S. v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981).

The law of this Court could not be any clearer on this point. No social worker in these circumstances could reasonably believe that the Loudermilks' consent was voluntary simply because their attorney was unable to stop the violations, despite his best efforts.

Other federal circuit courts are in agreement that speaking to an attorney is just one factor among many that may be considered when determining whether consent was voluntary or if it was coerced. For example, in *United States v. Molt*, the district court held that the defendant's consent to search was invalid even though the defendant consulted with his attorney immediately before consenting. 589 F.2d 1247, 1249 (3rd Cir. 1978). On appeal, the government "urge[d] that Molt's college education, his business experience, and his consultation with his attorney prior to consenting combine to create an atmosphere of voluntariness." *Id*.

The Third Circuit disagreed and held that consultation with an attorney is not the only fact to be considered in the question of voluntariness. "[W]e are unwilling to accord the importance suggested by the government to the factor of Molt's communication with his attorney prior to acquiescing in the search." *Id*. at 1252. Like this Court, the Third Circuit considered the consultation to be just one factor in the consent equation. "Certainly Molt's representation to the attorney that he had nothing to hide, the attorney's opportunity to read the statute, and the attorney's advice to Molt that he permit the inspection weigh in favor of the government's position." *Id*. Even so, the Third Circuit did not rule that consent was voluntary. "To overturn the district court's finding that Molt's consent was not voluntary would be tantamount to holding that, as a matter of law, consent based on an attorney's advice must be voluntary." *Id.*

Because "(v)oluntariness is a question of fact to be determined from all the circumstances . . . ." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973), no social worker in these circumstances could reasonably conclude that simply because an attorney was involved, the coercive effect of the clear and present danger that their children would be removed was somehow magically purged.

Contrary to the impression given by the district court's order, in this case the attorney did *not* advise the Loudermilks to consent to the search. Instead, he advised them that the government agents had no legal right to either enter their home or take their children into custody but that they intended to do so and he could not stop them.

This Court should reject the district court's unsupported conclusion for the same reasons the Third Circuit rejected the government's argument in *Molt*. The district court in this case failed to consider or analyze all of the facts, including actual threats, a growing law enforcement presence, and an actual physical step to accomplish the removal when Defendant Cramer began to fill out the form.

The Sixth Circuit likewise has considered what effect prior consultation with an attorney has on the voluntariness of consent. In *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991), the district court had denied a motion to suppress evidence seized pursuant to a consent search. On appeal the defendant argued that the consent was not voluntary. *Id*. at 1015.

The Sixth Circuit upheld the district court after reviewing all of the facts, including the fact that the person giving consent had spoken to an attorney. In *Blakeney*, however, there was "no evidence of an overt act or threat of force to induce Kutnyak's consent; and the agents did not make promises or exercise subtle forms of coercion to inhibit Kutnyak's judgment." *Id*. at 1016. The fact that Kutnyak spoke to his attorney was a factor, but was not treated by the Sixth Circuit as dispositive as a matter of law.

Unlike the facts in *Blakeny*, however, the facts in this case fairly scream that the Social Workers made an overt act or threat of force to induce the Loudermilks' consent. And the Social Workers in this case certainly did make promises and exercise subtle – and not-so-subtle – forms of coercion to inhibit the Loudermilks' judgment.

No reasonable reading of the record in this case could lead anyone to the conclusion that the Loudermilks freely and voluntarily allowed the Social Workers into their home. The only reasonable reading of the all of the facts leads inexorably to the conclusion that they were not free to leave, were not free to say no, and allowed the Social Workers into their home only to prevent the loss of their children.

III. The State Defendants Violated the Loudermilks' Fourteenth Amendment Right to Family Integrity by Wrongfully Threatening to Take Away Their Children.

This Court has repeatedly held that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . ." *Kelson v. City of Springfield*, 767 F.2d 651, 654 (9th Cir. 1985). "[E]xisting Supreme Court and Ninth Circuit precedent establish that a parent has a constitutionally protected liberty interest in the companionship and society of his or her child. The state's interference with that liberty interest without due process of law is remediable under section 1983." *Id* at 655. In *Wallis*, 202 F.3d at 1136-37 this Court said, "Parents and children have a well-elaborated constitutional right to live together without governmental interference. That right is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency." (Internal citations omitted).

In *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), the Seventh Circuit ruled that an unjustified threat by CPS agents to remove children from the custody of their parents stated a claim under the Fourteenth Amendment. Specifically, the plaintiffs in that case alleged that the CPS agents violated their Fourteenth Amendment rights by "causing the plaintiff parents to fear that their children would be removed from their custody, without any evidence giving rise to a reasonable suspicion that

the plaintiff parents were abusing their children or that the children were in imminent danger of abuse." *Id*. at 520. This case has alleged facts similar to those in *Doe v. Heck*, with the added feature that was not present in *Doe*. In *Doe*, the threat was made by phone, not at the home with several deputies present.

The Seventh Circuit concluded in *Doe* that "the defendants' threat to remove John Jr. and his sister from the custody of their parents violated the Does' right to familial relations, which includes a liberty interest in the maintenance of the family unit." *Id*. at 524. Additionally, the fact that the children in *Doe* were not actually removed from their parents' custody was not dispositive. *Id*. at 524-25.

The same can be said in this case: There was no articulable evidence arising to probable cause to believe that the children were about to be abused or neglected. There was no emergency situation or exigent circumstance to justify acting without a court order. The unjustified threats to remove the Loudermilks' children violated their fourteenth-amendment right to family integrity.

CONCLUSION

In *Calabretta*, this Court said, "The reasonable expectation of privacy of individuals in their homes includes the interests of both parents and children in not having government officials coerce entry in violation of the Fourth Amendment and humiliate the parents in front of the children." 189 F.3d at 820. By any

reasonable reading of the record in this case, the Social Workers did not honor either the letter or the spirit of this Court's clearly-established law. They went to the Loudermilks' home based on a stale anonymous report with the clear intention of getting inside that home no matter what. They had plenty of time to go to a court in the intervening sixty-one days and nothing in the record suggests that leaving the porch to go to the courthouse would have been a dangerous delay for the children.

Instead, the Social Workers in this case, led by a supervisor who went to the home with an agenda to show her subordinate "how these things were done," coerced entry, humiliated the parents in front of their frightened children, and violated the "children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents." *Id*.

In *Camreta*, 588 F.3d at 1016, this Court quoted with approval Duke Law Professor Dorothy Lambelet Coleman's seminal article, *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 (2005). That quote has a particularly poignant application to this case. "[I]n the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help." *Id*. at 417.

If the Social Workers would have followed the clearly-established law of this Court they would not have acted the way they did. Instead, they caused more harm than good.

There were no exigent circumstances justifying the Social Workers' actions and no social worker could reasonably believe that the Loudermilks' consent was voluntary. The district court's grant of summary judgment on qualified-immunity grounds should be reversed.

Respectfully submitted this 15th day of February, 2013:

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STATEMENT OF RELATED CASE

Pursuant to Circuit Rule 28-2.6, there are no related cases *pending* before this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,775 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of February, 2013, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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