No. _____

In The
Supreme Court of the United States

JOHN LOUDERMILK and TIFFANY LOUDERMILK, *et al.*,

Petitioners,

v.

JOSEPH ARPAIO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James R. Mason, III
Counsel of Record
Michael P. Farris
Darren A. Jones
Peter Kamakawiwoole
HOME SCHOOL LEGAL DEFENSE ASSOCIATION
One Patrick Henry Circle
Purcellville, Virginia 20132
(540) 338-5600
jim@hslda.org
michaelfarris@hslda.org
darren@hslda.org
peterk@hslda.org

Counsel for Petitioners

Dated: June 12, 2015

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

In this civil-rights case, respondent child-protective-services (CPS) investigators demanded entry to petitioners' home sixty-one days after receiving an anonymous report of safety hazards inside the home. When petitioners said no, respondents threatened to take the petitioners' children into foster care. Petitioners called their attorney. He tried to persuade the investigators that they lacked justification to enter the home or seize the children. When the CPS investigators refused to back down, petitioners allowed them inside to prevent them from taking the children. There were no hazards.

The Ninth Circuit assumed that the search violated the Fourth Amendment. But in conflict with the Third and Sixth Circuits it held that the attorney's involvement was legally dispositive and not just one fact to be weighed along with the threat to take their kids.

The questions presented are:

1. Whether the voluntariness of consent to search a home depends on all of the facts, and that no single criterion is controlling, including the involvement of an attorney.

2. Whether threatening to take custody of children as a tactic to gain cooperation during a CPS investigation violates the right to family integrity under the Fourteenth Amendment, as the Third and Seventh Circuits have held.

PARTIES TO THE PROCEEDING

The Petitioners are John and Tiffany Loudermilk, individually and as parents and next friends of Brittany Renee Nash, Dakota James Loudermilk, Kristin Grace Loudermilk, Faith Rose Loudermilk, and Montana Vaughn Loudermilk, minor children.

The Respondents are Julie Rhodes, in her official capacity as Assistant Attorney General for the State of Arizona; and Rhonda Cash and Jenna Cramer, in their official capacity as protective services workers employed by the Arizona Department of Economic Security, Administration for Children, Youth and Families, Child Protective Services.

CORPORATE DISCLOSURE STATEMENT

Petitioners John and Tiffany Loudermilk, individually and as parents and next friends of Brittany Renee Nash, Dakota James Loudermilk, Kristin Grace Loudermilk, Faith Rose Loudermilk, and Montana Vaughn Loudermilk, minor children, hereby state that no corporations are petitioners in this suit, and that there is no parent corporation or publicly held company that owns 10% or more of the corporate stock of any petitioner in this suit.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, *Loudermilk v. Arpaio*, 592 Fed. Appx. 596 (9th Cir., February 4, 2015), is reproduced in the appendix to this petition, Pet. app. 1a. The opinion of the district court, *Loudermilk v. Arpaio*, No. CV 06-0636 (D. Ariz., September 18, 2012), is reproduced at Pet. app. 5a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 2015. Pet. app. 1a. The Court of Appeals denied Petitioners' motion for rehearing en banc on March 16, 2015. Pet. app. 60a. The mandate was issued on April 3, 2015. Pet. app. 62a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment guarantees that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

Section 1 of the Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

This case also involves two provisions of the Arizona Revised Statutes, ARIZ. REV. STAT. § 8-803 and ARIZ. REV. STAT. § 8-821, which are reproduced at Pet. app. 64a and Pet. app. 67a, respectively.

STATEMENT OF THE CASE

I. Material Facts

John Loudermilk is a carpenter. John and his wife, Tiffany, bought property in a rural neighborhood in Maricopa County, Arizona. John began building the Loudermilks' dream home as time and resources permitted. Before the house was completely finished, the Maricopa County Planning and Development Department permitted the Loudermilks and their five children to move in. Pet. app 24a.

On January 10, 2005, Tiffany found a business card belonging to a child-protective services (CPS) investigator[1] on her front door. Tiffany called

[1] This first investigator, Brenda Cagle, is not a party.

the investigator the following day and learned that CPS had received an anonymous telephone call on January 7, 2005, alleging that "Dad is a handyman" who built the home but the home had not been completed and "[t]here is exposed wiring and wall sockets" throughout the house. Pet. app. 23a.

The CPS investigator said that she wanted to interview the Loudermilks' children and come inside the house. Tiffany originally agreed, and set a date with the CPS investigator in early March for the interviews and home search. Pet. app. 24a.

Before the appointed date, the Loudermilks joined the Home School Legal Defense Association (HSLDA).[2] An HSLDA staff attorney wrote a letter to the CPS investigator notifying her that relevant Maricopa County officials had permitted the family to occupy the home. The letter also asked the CPS investigator to reveal all of the allegations made in the anonymous report. When the CPS investigator refused to disclose all of the allegations, the Loudermilks decided to cancel the March appointment.

Respondent Rhonda Cash was the assigned investigator's supervisor. Ms. Cash received and reviewed the initial anonymous report on January 7. Ms. Cash assigned the case to the investigator and then monitored the progress of the investigation. When the assigned investigator went out, she would always come back immediately and tell Ms. Cash what had occurred on a particular case. The

[2] Counsel of record is also an employee of HSLDA.

investigator did this during her investigation of the Loudermilks.

The investigator told Ms. Cash that the Loudermilks were being uncooperative. Ms. Cash did not tell the investigator to get a court order to protect the children after the investigator first met resistance. Instead, Ms. Cash told the investigator "to make a couple more attempts." When the investigator told Ms. Cash that she had gone back and the Loudermilks were refusing to open the door, Ms. Cash did not direct the investigator to get a court order. Ms. Cash knew that an attorney had intervened on behalf of the Loudermilks, but she still not direct the investigator to get a court order to get into the home.

On March 9, 2005, more than two months after receiving the anonymous report, the CPS investigator assigned to the Loudermilks called in sick. That day, Respondent Cash decided to "go and hit this report of Brenda's," by which she meant she was going to attempt to complete the investigation by going to the Loudermilks' home unannounced. Pet. app. 25a. Ms. Cash and another CPS investigator, Respondent Jenna Cramer, were planning to conduct an unrelated task near the Loudermilks' home anyway.

En route to the Loudermilks' house, the respondent CPS investigators requested that an officer from the Maricopa County Sheriff's Office accompany them.[3] Ms. Cash said, "I instructed

[3] The MCSO Deputies were parties but were awarded summary judgment because they withdrew their threat to enter the home without a warrant. *Loudermilk v. Danner*, 449 Fed. Appx. 693, 695 (9th Cir., September 12, 2011).

Jenna [Cramer] to call the police because they were refusing access." Ms. Cramer called the police "to let the policeman know that we were going out to investigate a report; that a worker had been out prior and been unable to gain access." The dispatch report said that "Subj[ect]'s refused to let CPS look inside." Ms. Cash readily admitted in her brief below that deputies are called "when a family might be uncooperative," and said, "We do it all the time."

Respondents Cash and Cramer met MCSO Deputy Ray and a volunteer member of the Sheriff's Office "posse," before they arrived at the Loudermilks' home. Pet. app. 25a. After parking their cars in the Loudermilks' driveway, Ray, Ms. Cash, and Ms. Cramer went to the front door, where Deputy Ray and Ms. Cash took turns knocking on the door. When John and Tiffany came to the balcony above the front door, Ray told them, "We need to see the inside of the house." John said, "You're not allowed to come into my house."

In response, one of the CPS investigators told Ray, "We have got to get into that house so we can see the conditions—the living conditions." Ray again demanded that he needed to get inside. Ms. Cash then addressed Tiffany, saying, "We're from CPS, and we need to come into your house and look around."

Ms. Cash then told Tiffany that if they were not allowed inside the home "to get to the bottom of this," they would have to take the children for up to 72 hours. Ms. Cash then addressed John, telling him that she had the authority to take the children if she

could not determine their safety, but "if you let us inside the house we can get this over quickly but we have to see inside the house."

Two more deputies arrived at the Loudermilks' home in separate police vehicles with a second unidentified posse member. Pet. app. 28a. Ray then contacted Sergeant Sousa by radio and asked him to come to the Loudermilks' home. *Id*.

Sergeant Sousa concluded that the deputies 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. *Id.*

Distressed by the investigators' insistence, John and Tiffany called their attorney, T.J. Schmidt from HSLDA. Pet. app. 29a. Schmidt recommended to Mrs. Loudermilk that they bring the children to the front porch so that the CPS investigators could verify that they were healthy. Pet. app. 30a.

After seeing the Loudermilk children, the CPS investigators continued to demand access to the Loudermilk home. When these demands persisted, Schmidt spoke to Ms. Cash, who told Schmidt that she had spoken with the assistant Attorney General, respondent Julie Rhodes, and that she would take the children into temporary custody for up to 72 hours if she was not permitted to search inside the home. *Id.* Ms. Cash repeated that if she was not allowed into the home, CPS policy required her to remove the children into temporary custody, and

that the parents would be handcuffed if they did not let her in. Ms. Cash then told the Loudermilks' attorney that he should talk to Ms. Rhodes. *Id.*

The Loudermilks' attorney called Ms. Rhodes who reiterated several times that the CPS investigators must enter the home, and said that if the Loudermilks did not allow the CPS investigators into the home they had legal authority to take the children into temporary custody under Arizona statutes. Pet. app. 31a.

Ms. Cramer began filling out a Temporary Custody Notice ("TCN") to remove the children because they "couldn't gain access" to the home. Pet. app. 28a. No judicial review is necessary to issue a TCN. Pet. app. 29a.

The Loudermilks' attorney relayed the content of these conversations to John Loudermilk, and told John that while he did not believe that adequate legal grounds existed to either enter the home or take the children, the respondent investigators were insistent that if they were not allowed into the home they would take the children. Pet. app. 31a. He told Mr. Loudermilk that he believed their Fourth Amendment rights were being violated, but that John would have to decide for himself what course of action to follow next. *Id.*

Faced with the unrelenting ultimatum that the respondent CPS investigators would physically remove the children from the home unless they were admitted, together with a significant show of force, John felt that he had no option but to allow the

search of his home. He believed that he would be arrested and the children removed if he continued to refuse to allow them inside. Pet. app. 32a. Tiffany believed that her children would be immediately removed from the home if she did not allow the respondent CPS investigators to search her home. *Id.* Accordingly, they allowed the officials into their home to prevent the immediate removal of their children.

The two CPS investigators, respondents Cash and Cramer, and three deputies entered, searched, and left about five to ten minutes later. Pet. app. 33a. Before leaving, Ms. Cash told the Loudermilks that the report was false, the allegations were unfounded, and they would receive a letter from CPS saying the case had been closed. *Id.*

As they drove away, Ms. Cash and Ms. Cramer had a conversation about their search of the Loudermilks' home: "We couldn't understand why [the Loudermilks] 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."

II. Proceedings Below

The Loudermilks filed a complaint under 42 U.S.C. § 1983, alleging that their right under the Fourth Amendment to be free from the unreasonable search of their home had been violated by two separately represented groups of defendants: first, the Respondent CPS investigators, and second,

several deputies from the Maricopa County Sheriff's Office. Pet. app. 22a. Additionally, the Loudermilks alleged that the threats to remove their children by the CPS investigators and the assistant AG that assisted them violated their Fourteenth Amendment right to family integrity.

A. District Court (Deputies and Respondent CPS Investigators)

Both sets of defendants moved for summary judgment in the district court. Pet. app. 23a. The district court denied the motions, holding that the facts in the summary-judgment record, when viewed in the Loudermilks' favor, were sufficient to permit a finder of fact to conclude that the Deputies and CPS investigators coerced the Loudermilks into allowing them into the home. Pet. app. 41a. The district court also concluded that the Fourth and Fourteenth Amendment rights of the Loudermilks were clearly established defeating any claim of qualified immunity. Pet. app. 24a. The Deputies alone pursued an interlocutory appeal from the district court's denial of their motion for summary judgment, under 28 U.S.C. § 1291. The district court stayed proceedings against the CPS investigators pending the outcome of the Deputies' interlocutory appeal.

B. Ninth Circuit (Deputies)

On September 12, 2011, the Ninth Circuit, in an unpublished opinion, reversed the decision of the district court and granted summary judgment to the Deputies, Pet. app. 17a, in part, because the Deputies withdrew their threat to arrest or enter

without a warrant. The Petitioners filed a motion for rehearing en banc, which was denied by the Court of Appeals on October 21, 2011, and then petitioned this Court for writ of certiorari, which was denied on March 26, 2012. *Loudermilk v. Danner*, 132 S. Ct. 1797 (2012).

C. District Court (CPS Investigators)

On September 18, 2012, the United States District Court for the District of Arizona, Judge Roslyn O. Silver, allowed the CPS investigators to renew their motion for summary judgment. Relying in part on the Ninth Circuit's ruling with respect to the Deputies, the district court granted their motion for summary judgment.

The court held that "a reasonable CPS agent would not have known consent was not voluntary where the parents consulted with counsel before allowing entry into their residence." *Id.*

D. Ninth Circuit (CPS investigators)

On February 5, 2015, the Ninth Circuit, in another unpublished opinion, affirmed the decision of the district court granting summary judgment to the Respondents. Pet. app. 1a. The court assumed that the search violated the Fourth Amendment but held that "[o]ur case law does not clearly establish that consent to a limited search is involuntary when given after the consenting party has had the opportunity to consult with an attorney." Pet. app. 3a. It also held that "The Loudermilks fail[ed] to cite any controlling authority clearly establishing that

the mere threat to remove children from their parents' home violates the family's Fourteenth Amendment right to family integrity." Pet. app. 3a. The Ninth Circuit denied a petition for rehearing en banc on March 16, 2015.

REASONS FOR GRANTING THE PETITION

Introduction

There are three reasons this Court should take this case. First, it deals with one of the biggest civil-rights issues in America that has never been the subject of a case before this Court. This Court has addressed dozens of cases involving the Fourth Amendment rights of criminal defendants. But as Duke University law professor Doriane Coleman has put it, "the United States Supreme Court has yet to decide a case involving the constitutionality of child maltreatment investigations, and in particular, the Fourth Amendment's applicability to those investigations." Doriane L. Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child-welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 418 (2005).

Each year, millions of children and hundreds of thousands of families are the subjects of investigations like this one. Professor Coleman has observed that "in 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*.

Second, the Ninth Circuit treated the involvement of the Loudermilks' attorney to be legally dispositive to the factual question of the voluntariness of the Loudermilks' "consent," instead of just one factor among many.

The Ninth Circuit's approach is at odds with this Court's holding in *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), which held in the criminal context that voluntariness of consent does not "turn [ ] on the presence or absence of a single controlling criterion; each [previous case] reflected a careful scrutiny of all the surrounding circumstances." And it has created a split in the circuits. The Third Circuit, in *United States v. Molt*, 589 F.2d 1247, 1249 (3d Cir. 1978), held that even though the defendant had spoken to an attorney the other factors weighed heavily enough to support the conclusion that his consent was not voluntary. And the Sixth Circuit, in *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991), likewise weighed all of the facts and concluded that the other facts did not support coercion and that speaking to an attorney before a putative consent is just one factor among many to consider in the factual question of whether consent was coerced or not.

Third, in addition to the Fourth Amendment question involving the coercion of consent to search, this case raises an important Fourteenth Amendment question about the propriety of threatening parents with the removal of their children as a tactic to encourage "cooperation." In *Croft v. Westmoreland County of Children and Youth Services*, 103 F.3d 1123 (3d Cir. 1997), the Third

Circuit held that a CPS investigator's ultimatum to the father to move out or have his children placed in foster care violated the family's right to family integrity. The Seventh Circuit, in *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), held that an unjustified threat by CPS investigators to remove children from the custody of their parents if they failed to cooperate stated a claim under the Fourteenth Amendment. In the opinion below, the Ninth Circuit confined its inquiry to the "clearly-established" prong of the qualified-immunity analysis, and did not address whether such a threat is unconstitutional.

This reprehensible yet commonplace practice has no place in a free society. All families should be free from this unreasonable, fear-inducing tactic.

I. CPS Investigations Routinely Violate Families' Fourth Amendment Rights.

When the government attempts to justify a search based on consent in a criminal context, it must demonstrate that such consent was not "coerced, by explicit or implicit means, by implied threat or covert force," in light of "the totality of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226, 228. This same principle ought to apply in the *quasi*-criminal context of CPS investigations.

Professor Coleman has argued compellingly that the Child Abuse Prevention and Treatment Act of 1974 (CAPTA), 42 U.S.C. §§ 5101-5116, encourages CPS agencies to employ a "take no chances" approach to investigations. Coleman at 428

n.32. CAPTA offers states federal funds if they will establish, *inter alia*, provisions and procedures "for an individual to report known and suspected instances of child abuse and neglect," 42 U.S.C. § 5106(b)(2)(B)(ii), "the immediate screening, risk and safety assessment, and prompt investigation of such reports," 42 U.S.C. § 5106(b)(2)(B)(iv), and "immediate steps to be taken to ensure and protect the safety of a victim of child abuse or neglect and of any other child under the same care who may also be in danger of child abuse or neglect and ensuring their placement in a safe environment." 42 U.S.C. § 5106(b)(2)(B)(vi).

In an effort to satisfy CAPTA's demands, "legal definitions of 'abuse' and 'neglect' are typically vague and overbroad, often purposefully so," to ensure that "the state can exercise wide discretion in treating targeted parental conduct as maltreatment." Coleman at 428. Through "broad legal definitions of abuse and neglect, and screening criteria that are nearly as broad," states encourage their CPS investigators to "tak[e] no chances and cast[] the widest net possible in identifying the cases that will be investigated." *Id.*

States receiving CAPTA funds are obligated to "promptly investigate" each report, 42 U.S.C. § 5106(b)(2)(B)(iv), and each investigation "typically include[s] a home visit, an interview with the child's parents or guardians, and an interview with and examination of the child." Coleman at 434. The euphemistically pleasant-sounding phrase "home visit" really means a search of the home. *See*, *e.g.*, *In*

re Petition to Compel Cooperation with Child Abuse Investigation, 875 A.2d 365 (Pa. Super. 2005).[4]

A. Most CPS investigations are ultimately determined to have been unfounded.

Because state laws essentially *require*, as a matter of course, that CPS workers interview the child and search the home upon receiving an allegation of maltreatment, agents of the government routinely "storm the castle, opening closed bedroom doors to find, talk to, examine, and remove the children; opening and looking through refrigerators and cupboards to see if the children have sufficient food to eat; opening and searching closets and drawers to check if the children have enough clothing and that no inappropriate disciplinary methods are being used in the family." Coleman at 518. This is precisely what happened to the Loudermilks: even though the alleged safety hazards in this case were exposed wiring and missing stair rails, the CPS looked inside their refrigerator and cupboards.

During these investigations, "broad discretion is given to state officials," *id.* at 437, to "determine if the report can be substantiated." *Id.* at 434. Even though state officials are generally "authorized to exercise extraordinarily unfettered discretion when they engage [in] these intrusions," 70 percent of investigations turn up no evidence of abuse or neglect. *Id.* at 442.

---

[4] Counsel of record in this case also represented the family in the Pennsylvania case.

Unfortunately, these wide nets ensnare millions of children each year. Citing statistics from 2002, the most recent available at the time, Professor Coleman noted that more than 1.8 million CPS referrals—affecting 3.2 million children—were investigated by the states. *Id.* at 433. The number of child-related investigations conducted each year has only increased in the years since Professor Coleman's article. The most recent data available from the U.S. Department of Health and Human Services is for FY 2013.[5] States reported receiving 3.5 million referrals—nearly doubled from 2002; of these, about 1.2 million (39%) were screened out as clearly baseless. Of the remaining reports, 2.1 million received some sort of disposition, and HHS estimates that these 2.1 million dispositions affected as many as 3.2 million children and their families.

The number of these intrusions is of secondary importance to their effect on the children themselves. Conducted with incredible discretionary authority, a CPS home "visit"—which "epitomize[s] deep intrusion[s] in both symbolic and actual respects"—can shatter the innocence of even the youngest of children, exposing them to a broad range of emotional responses, including "trauma, anxiety, fear, shame, guilt, stigmatization, powerlessness, self-doubt, depression, and isolation." Coleman at 520.

---

[5] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, "Child Maltreatment 2013" (2015), *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf (accessed June 4, 2015).

Moreover, in the vast majority of cases, this intrusion is ultimately found to be unwarranted. In FY 2013, approximately 3.9 million children were the subjects of at least one screened-in report. Of these, 17.5% were subjects of a "substantiated" report, and another 1.3% were subjects of an "indicated" or "alternative response victim" report. The remaining 80% of children were found to be non-victims. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, "Child Maltreatment 2013," at 20.

B. CPS investigators routinely employ threats and shows of force to coerce families into "consenting" to home "visits."

"'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). As Justice Stevens wrote in *Payton v. New York*, "the Fourth Amendment has drawn a firm line at the entrance to the house." 445 U.S. 573, 590 (1980). If that is to remain true, respect for the privacy and integrity of the home must be a primary consideration, not an afterthought. "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37 (emphasis in original).

Unfortunately, this is not the general approach of CPS investigators when they conduct

quasi-criminal child maltreatment investigations. While state officials are generally "cautioned to respect the child's dignity and the family's sanctity as they engage their thorough investigations," the fact is that "these two tasks—respecting privacy and conducting the sort of comprehensive investigation the system contemplates—are inherently irreconcilable, at least when delegated to a single official." Coleman at 439-40.

Professor Coleman notes that "[m]ost investigations, over 90 percent by some estimates, are conducted with the apparent consent of the relevant adults . . . [but] there is reason to believe that state officials do not lawfully obtain many of these consents." Coleman at 430-31. "The fact that law enforcement is also typically involved in the investigatory scheme and/or in the conduct of the investigation itself necessarily increases the process' intrusiveness." Coleman at 440. This is especially true where law enforcement are brought solely as a show of force, to intimidate a family into acquiescing with the CPS investigator's demands. Unfortunately, this is a common and longstanding practice when CPS investigators anticipate that the residents will be "uncooperative" and deny consent to the home visit. In this case, it is noteworthy that the CPS investigators summoned deputies to accompany them to the Loudermilks' home, *before* they ever got there or encountered any resistance. These respondents admitted that they "do it all the time."

"In [some jurisdictions], collaboration between the two agencies occurs to assure the safety of the CPS officials or *to maximize 'voluntary' compliance*

rates as parents are typically more likely to consent to an investigation faced with the in terrorem *effect of police presence*," *citing* Donna Pence & Charles Wilson, U.S. Dep't of Health & Human Servs., THE ROLE OF LAW ENFORCEMENT IN THE RESPONSE TO CHILD ABUSE AND NEGLECT 6 (1992). Coleman at 435 n.48 (emphasis added).

Even more alarming in this case is what the CPS investigators did after the deputies determined that the circumstances did not justify a warrantless search of the Loudermilks' home. Instead of withdrawing, the CPS investigators made a threat that any reasonable person—much less seasoned investigator—knows would strike terror in the heart of any loving parent: If you don't go along with our demands we will take your children.

The Loudermilks and their attorney confronted an impossible choice. The Loudermilks' attorney had already told CPS that they had no legal authority to enter the home or seize the children. Indeed, the opinion below assumes that the Loudermilks' attorney was correct, and that respondents' actions constituted a constitutional violation. Slip Op., Pet. app. 3a.

This case is emblematic of the larger problem of what Professor Coleman aptly calls "storming the castle to save the children." This case should be taken to clearly establish that the Fourth Amendment applies in full force to CPS investigations.

II. The Rules about the Voluntariness of Consent Developed in Criminal Cases Apply to CPS Investigations.

A. Voluntariness of consent depends on the totality of the circumstances, not a single dispositive factor.

In this case, the summary judgment record would allow the finder of fact to conclude that the CPS investigators went to the Loudermilks' home determined to get inside. They summoned deputies for the express purpose of overcoming the Loudermilks' anticipated lack of cooperation—specifically, that the Loudermilks would not voluntarily consent to the home "visit," i.e., search. When the deputies determined that involuntary entry was not justified, the respondent CPS investigators threatened to remove the children.

The record also supports a finding that the Loudermilks' attorney did not advise them to consent to the search. Instead, he told the respondent CPS investigators that they had no legal justification to either enter the Loudermilks' home or take their children into custody. When his efforts were unsuccessful, he told the Loudermilks that the investigators intended to take their children if not allowed inside and that he could not stop them. The Loudermilks both testified that they gave their putative consent to prevent the removal of their children.

The Ninth Circuit treated the attorney's involvement as being legally dispositive. "Our case

law does not clearly establish that consent to a limited search is involuntary when given after the consenting party has had the opportunity to consult with an attorney." Slip op., Pet. app. 3a. The opinion uses a strained double negative to conclude that no case has ever held that consent to search is *not* voluntary after consultation with an attorney. That odd locution is at odds with the correct analysis to be applied in cases like this under *Schneckloth*. On this record it is difficult to imagine that any rational human being, much less seasoned CPS investigators, could conclude that the Loudermilks' consent was freely given and was "not the product of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 227.

In deriving the constitutional rules about the voluntariness of consent to search in *Schneckloth*, this Court said, "the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment." 412 U.S. at 224. Reciting the many cases that led to the Fourth Amendment holding of *Schneckloth*, this Court further said, "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226.

Threatening parents with the removal of their children is certainly a "detail" that raises the distinct possibility that the parent's "consent" may have been coerced. Although not directly relied on in

Schneckloth, *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) held that where a mother confessed "only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate,'" the confession "must be deemed not voluntary, but coerced." In other words, when the state issues an ultimatum to a parent—cooperate or lose your kids—the parent's "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth*, 412 U.S. at 225. In these circumstances, it is likely that a parent's "consent" is no longer "the product of a rational intellect and a free will," *Lynumn*, 372 U.S. at 534, and "that choice cannot be said to be the voluntary product of a free and unconstrained will." *Haynes v. State of Washington*, 373 U.S. 503, 514 (1963).

The "threats"—as this Court called them—made by the police in *Lynumn* were less direct than the threats made by the CPS investigators in this case. In *Lynumn*, the threatened loss of the children would only follow the loss of financial aid and jail at some time in the future. Not only that, but the defendant's children in *Lynumn* were not even on the scene when the threat was made; they were "over at her mother-in-laws." *Id*. at 533.

Here, the CPS investigators threatened to take the children in front of the children themselves—and actually took a step toward that end when Ms. Cramer began filling out the Temporary Custody Notice. And, like the accused in *Lynumn*, who was "encircled in her apartment by three police officers," *id.* at 534, the Loudermilks

were surrounded at their front door by six deputies and two CPS investigators.

Based on the totality of these circumstances, a reasonable jury could find that the Loudermilks' putative consent was coerced, and not voluntary. The Ninth Circuit, however, ruled that the CPS investigators who made this coercive ultimatum were entitled to believe that the putative consent was voluntary. Why? Because in this case, the parents were able to get their attorney on the phone in time for him to try to persuade the investigators that they lacked legal justification to either search their home or remove their children based on an extremely stale anonymous report. That one fact should not be legally dispositive.

To be sure, whether an accused has had the opportunity to speak to an attorney is a factor to be considered. In *Lynumn*, this Court noted that the accused "had no friend or advisor to whom she might turn." 372 U.S. at 534. Again, however, that single factor is not dispositive.

This brings us to the Third and Sixth Circuits' treatment of the voluntariness of consent *after* an attorney has been consulted. Neither court considered that additional fact to be legally dispositive as the Ninth Circuit did in this case. Both considered it to be just one more factor to be considered.

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 at 1249. The Third Circuit agreed 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. *Id.* "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.* By failing to weigh all of the factors in this case, the Ninth Circuit did exactly what the Third Circuit rejected.

Contrary to the impression given by the Ninth Circuit, the Loudermilks' attorney did *not* advise them to consent to the search. Instead, he advised them that the CPS investigators had no legal authority to either enter their home or take their children into custody, but that they intended to do so and he could not stop them.

And not only that, the Loudermilks' attorney actually spoke to the respondents and cogently argued that they lacked legal justification to enter the home or take the children. There can be little doubt that the respondents knew exactly what the attorney told the Loudermilks. Yet the Ninth Circuit glossed over this fact by noting only that the Loudermilks were able to "consult" an attorney.

The Sixth Circuit likewise has considered what effect the involvement of an attorney has on the voluntariness of consent. In *United States v. Blakeney*, 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. 942 F.2d at 1015.

The Sixth Circuit upheld the district court's decision, after reviewing all of the facts, including the fact that the person giving consent had spoken to an attorney. In *Blakeney*, however, the court found 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 *Blakeney*, however, the facts in this case fairly scream that the CPS investigators made an overt act or threat of force to induce the Loudermilks' consent. A reasonable jury could find that Ms. Cash and Ms. Cramer made promises and exercised subtle—and not-so-subtle—forms of coercion to inhibit the Loudermilks' judgment.

No reasonable CPS investigator, in light of all these circumstances, could conclude that the coercive effect of respondents' threat to immediately remove the Loudermilks' children was somehow magically purged once an attorney became involved. No reasonable reading of the record could lead to the

conclusion that the Loudermilks freely and voluntarily allowed the CPS investigators into their home. The only reasonable reading of 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 investigators into their home only to prevent the loss of their children.

Schneckloth, *Molt*, and *Blakeney* were all criminal cases. By treating the involvement of the Loudermilks' attorney as legally dispositive, the Ninth Circuit has failed to follow this Court's admonitions in *Schneckloth*, and has created a split with the Third and Sixth Circuits. This Court should grant review to ensure that the lower courts follow the Fourth Amendment rules established in the criminal context when they are confronted with similar facts in the context of CPS investigations.

Moreover, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). *Lynumn* clearly established that threatening a parent with the loss of her children if she doesn't cooperate is inherently coercive. And it was clearly established that the voluntariness of consent depends on all of the facts. The involvement of the attorney may have weighed in favor of voluntariness. But it was also clearly established that the voluntariness of consent does not "turn[ ] on the presence or absence of a single controlling criterion; each [previous case] reflected a careful scrutiny of all the surrounding circumstances," *Schneckloth*, 412 U.S. at 226.

This is not a case where the CPS investigator was "forced to make a split-second decision in response to a rapidly unfolding chain of events." *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012). Respondent Cash had known about the anonymous report for two months. She was only there on March 9, 2005, because her subordinate happened to call in sick. And the record reflects that she left her office determined to get inside the Loudermilks' home and was bent on overcoming what she perceived as their lack of cooperation. She was not going to take no for an answer.

B. The Ninth Circuit's decision ignores this Court's clear admonition in Tolan v. Cotton.

The Ninth Circuit's decision is also contrary to *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014), which holds that "in cases alleging unreasonable searches or seizures," courts "must take care not to define a case's 'context' in a manner that imports generally disputed factual propositions" into the clearly-established prong of qualified immunity when considering a motion for summary judgment.

Here, there are genuine issues of material fact about whether consent was coerced by Ms. Cash and Ms. Cramer. For forty minutes, the Loudermilks denied consent, even after they were threatened with arrest. They called their lawyer, who spoke to Ms. Cash in an attempt to prevent her from violating the Loudermilks' Fourth and Fourteenth Amendment rights. After the deputies withdrew their threat to arrest the Loudermilks, Ms. Cash

repeatedly threatened to take their children into state custody and Ms. Cramer began filling out a Temporary Custody Notice. When the Loudermilks finally surrendered, there were two CPS investigators and six deputies in their front yard and five government vehicles blocking their driveway.

Contrary to *Tolan*, the Ninth Circuit imported disputed issues of fact into the clearly-established prong of qualified immunity. Having assumed that the search itself was unconstitutional, the Ninth Circuit should have viewed the voluntariness question in the light most favorable to the Loudermilks. Instead, its holding ignores the intensely coercive threats and in effect held that the attorney's involvement purged all coercion as a matter of law.

III. An Unjustified Threat to Remove Children to Gain a Parent's Cooperation Violates the Right to Family Integrity Under the Fourteenth Amendment.

"[T]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). As Professor Coleman has documented extensively, CPS investigations are deeply intrusive and potentially cause harm to many children and their parents in the best of circumstances. When investigators threaten to remove children as a scare tactic to gain entry to the home, especially when based on a stale anonymous report, they deliberately prey on a parent's instincts to protect her children.

The Circuits, however, currently have divergent views on whether such a threat is actionable under the Fourteenth Amendment and 42 U.S.C. § 1983. The Third and Seventh Circuits say "yes." The Ninth Circuit, in the opinion below, says "no."

The Third Circuit in *Croft v. Westmoreland County of Children and Youth Services*, 103 F.3d 1123 (3d Cir. 1997), addressed a family-integrity claim made under the Fourteenth Amendment and 42 U.S.C. § 1983. It held that a CPS investigator's ultimatum to the father that his child would immediately be removed from the home and placed in foster care unless he left his home and had no contact with his child impermissibly interfered with constitutional right to family integrity. The court further stated,

> [A] state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.

Id. at 1126. 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, exigent circumstance, or imminent danger to justify acting without a court order.

Likewise, in *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), the Seventh Circuit relied on *Stanley* and

ruled that an unjustified threat by CPS investigators to remove children from the custody of their parents stated a claim under the Fourteenth Amendment and 42 U.S.C. § 1983. The plaintiffs in *Heck* alleged that the CPS investigators 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 an added feature that was not present in *Doe*. In *Doe*, the threat was made by phone, not in person at the home with several deputies present. And in *Doe*, the children were not privy to the phone call, while in this case, the children were present when the CPS investigators made the threats.

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. The fact that the children in *Doe* were not actually removed from their parents' custody was not dispositive. *Id*. at 524-25.

The Ninth Circuit affirmed dismissal of the Loudermilks' suit because it could not "cite any controlling authority clearly establishing that the mere threat to remove children from their parents' home violates the family's Fourteenth Amendment

right to family integrity." Slip Op., Pet. app. 3a. The court refused to even consider whether the circumstances of this case—like those in *Croft* and *Heck*—amounted to an actionable claim under § 1983. This all too common practice by CPS investigators should be stopped.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 12th day of June, 2015.

James R. Mason, III
Counsel of Record
Michael P. Farris
Darren A. Jones
Peter Kamakawiwoole
HOME SCHOOL LEGAL DEFENSE ASSOCIATION
One Patrick Henry Circle
Purcellville, VA 20132
(540) 338-5600

Counsel for Petitioners