Case No. 12-15080

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMIE KIRKPATRICK, et. al.
Plaintiff - Appellant

vs.

AMY REYNOLDS; ELLEN WILCOX; and LINDA KENNEDY, et al.
Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
Case No. 3:09-cv-00600-ECR

APPELLEES ELLEN WILCOX AND LINDA KENNEDY'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

FEDERAL RULES OF APPELLATE PROCEDURE

NEVADA REVISED STATUTES

I. INTRODUCTION AND RULE 35 STATEMENT

Two weeks ago, a divided three-judge panel of this Court overruled in-part a District Court decision granting summary judgment in favor of two defendant social workers, Appellees Ellen Wilcox and Linda Kennedy [1] , on the basis of qualified immunity. The challenged conduct was the exigent, warrantless removal of a two-day old infant from custody of her natural mother - who at the time of removal was (1) homeless, (2) jobless, (3) addicted to methamphetamine, (4) who had been using methamphetamine during the entire pregnancy, (5) who had two other children removed from her custody because of a manifest inability to care for them, and (6) who the nurses at the hospital witnessed providing inadequate care for the infant.

The Panel decision, which is attached to this Petition as Addendum No. 1, concluded that the facts as alleged, construed in a light most favorable to the Appellants, suggested that a "reasonable juror might find that a reasonable social worker could not have determined that the child was in imminent danger of serious bodily injury in the time that it would have taken to obtain a warrant." *See* Add. No. 1, at 27. Under the Ninth Circuit case of *Rogers v. Cnty. of San Joaquin*, 487 F.3d 1288, 1295 (9th Cir. 2007), the Majority held that the constitutional right at issue

[1] The Panel decision affirmed summary judgment in favor of Appellee Amy Reynolds, on the basis that the Appellants failed to alleged any facts that Ms. Reynolds was involved in the alleged constitutional deprivation at issue.

"was 'clearly established' at the time of the challenged conduct." *Id*. at 27. Accordingly, the Majority found that Wilcox and Kennedy were not entitled to qualified immunity and that the case should be remanded for trial. *Id*. at 27, 37. Judge Kozinski authored a partial dissent to the Panel decision, specifically with respect to the application of qualified immunity.

Wilcox and Kennedy now seek en banc rehearing of this matter, on the basis that the Panel decision with respect to qualified immunity conflicts with prior decisions of the United States Supreme Court. [2] Moreover, the case of *Rogers v. Cnty. of San Joaquin* and its progeny, as utilized in the Panel decision, breaks with the Supreme Court's general Fourth Amendment precedent [3] and with precedent established by other circuit courts [4]. As such, en banc rehearing is necessary to "secure and maintain uniformity of the court's decisions." FRAP 35(a)(1).

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[2] *See Taylor v. Barkes*, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78, 81 (2015); *see also Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085, 179 L. Ed. 2d 1149, 1161 (2011); *Hunter v. Bryant*, 502 U.S. 224, 229 (1991); *see Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

[3] *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *see also United States v. Snipe*, 515 F.3d 947, 953 (9th Cir. 2008); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *United States v. Banks*, 540 U.S. 31, 36 (2003).

[4] *See Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003); *see also Gomes v. Wood*, 451 F.3d 1122, 1130 (10th Cir. 2006); *Gates v. Tex. Dep't of Protective & Regulatory Servs*., 537 F.3d 404, 429 (5th Cir. 2008).

Additionally, as a separate and independent basis, en banc rehearing is warranted because the Panel decision involves issues of exceptional importance and directly implicates the government's traditional and transcendent interest in acting as *parens patriae* to protect the well-being of children. *See* FRAP 35(a)(2).

II. FACTUAL AND PROCEDURAL BACKGROUND

The relevant factual and procedural background, which is recounted in detail in the Panel decision and utilized in Judge Kozinski's partial dissent, can be summarized as follows: On July 15, 2008, B.W. was born five weeks premature at a local hospital in Reno, Nevada. *See* Add. No. 1, at 5. The infant's mother admitted to hospital staff that she had used methamphetamine as recently as two days before the birth and that she had been using methamphetamine throughout the pregnancy. *Id*. Indeed, newborn B.W. tested positive for methamphetamine. *Id*. [5] On July 16, 2008, the hospital staff reported the incident to the intake unit at Washoe County Department of Social Services (WCDSS) and later that day, Appellee Ellen Wilcox, a social worker with WCDSS, arrived at the hospital to investigate. B.W.'s mother readily admitted to Wilcox that she had recently used methamphetamine, that she

[5] State law prescribed that "a child may be in need of protection if the child is identified as being affected by prenatal illegal substance abuse or as having withdrawal symptoms resulting from prenatal drug exposure." Nev. Rev. Stat. § 432B.330(4).

used methamphetamine during her entire pregnancy, and that she was homeless and unemployed. *Id*. at 5-6. Wilcox also discovered that the mother recently had two other children removed by WCDSS and that she had made no effort toward reunification. *Id*. at 6. Hospital staff also advised Wilcox that the mother was not providing adequate care for B.W., was not feeding B.W. on schedule and B.W.'s clothing was soaked with formula. *Id*.

Wilcox contacted her supervisor, Appellee Linda Kennedy, to discuss B.W.'s circumstances. Based upon the information at hand, Kennedy authorized that B.W. be placed into protective custody at the time of her discharge. *Id*. Wilcox then informed the mother that the hospital had placed an informal "hold" on the infant, at the request of WCDSS; however, the mother was still permitted to access, hold, see and feed B.W. without limitation. *Id*. On July 17, 2008, the medical staff determined that B.W. was medically ready for immediate discharge; however, since B.W.'s sole legal custodian was her mother, upon discharge B.W. was placed with the foster parent who was caring for her older siblings. *Id*.

The Appellees did not seek a warrant prior to placing B.W. into protective custody, as it is undisputed that Washoe County had no policy, training or procedure for obtaining a warrant. *Id*. at 28-33. However, less than 24 hours later, on July 18, 2008, Appellee Wilcox appeared before the Second Judicial District Family Court for

a 72-hour protective custody hearing. *Id*. at 6. After weighing the facts of the case, the Family Court determined that B.W. would remain in foster-care, due to the mother's ongoing drug use, her lack of stable housing and employment, her inability to provide for B.W., and the fact that the mother's other children had already been removed. *Id*. at 6.

Based on the foregoing undisputed facts, the Appellees moved for summary judgment on April 8, 2011, asserting, among other things, that the individual social workers were entitled to qualified immunity. On December 13, 2011, the District Court granted summary judgment in favor of the Appellees.

III. BASIS FOR REHEARING EN BANC

Under the Federal Rules of Appellate Procedure, en banc rehearing is appropriate to maintain "uniformity of the court's decisions" and/or resolve "a question of exceptional importance." FRAP 35(a). The matter at bar satisfies both prerequisites.

A. THE PANEL DECISION BREAKS WITH SUPREME COURT PRECEDENT AND THE DECISIONS OF OTHER CIRCUITS.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'

" *Pearson*, 555 U.S. at 231 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

While the relevant, dispositive inquiry for qualified immunity is beyond debate, the United States Supreme Court has repeatedly set forth certain road markers for courts to use in the *correct* application of qualified immunity. As Judge Kozinski notes in his partial dissent, as recently as June of 2015, the Supreme Court once again stressed that "[w]hen properly applied, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Taylor*, 135 S. Ct. at 2044 (citing *Al-Kidd*, 131 S.Ct. at 2085). Likewise, the Supreme Court has emphasized that when properly applied, qualified immunity "gives ample room for mistaken judgments." *Hunter*, 502 U.S. at 229. And its protection "applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 555 U.S. at 231.

While the Majority decision engaged in the traditional two-step qualified immunity analysis, the Panel decision broke with the important guidelines set down by the Supreme Court, with respect to the proper or correct application of qualified immunity. As such, en banc rehearing is warranted. *See* FRAP 35(a)(1).

As the Supreme Court reiterated in *Taylor* and *Al-Kidd*, when qualified immunity is *properly* applied, the immunity will protect "all but the plainly incompetent or those who knowingly violate the law." *Taylor*, 135 S.Ct. at 2044; *Al-Kidd*, 131 S.Ct. at 2085. Here however, the Majority ignored the direction offered by the Supreme Court and imposed personal liability on Wilcox and Kennedy, when the challenged acts were anything but "plainly incompetent" or knowingly unlawful.

Even if reasonable minds may disagree as to the exact quantum of risk faced by B.W., there is no debating the undisputed facts of this case: that at the time of removal, this two-day old infant (born five weeks premature with methamphetamine in her system) had been discharged from the hospital into the sole legal custody of a mother that was homeless, jobless, addicted to methamphetamine, who had been using methamphetamine during her entire pregnancy, who had two other children removed due to her inability to care for them, and who had been providing inadequate care for B.W. while at the hospital. *See* Add. No. 1, at 5-6.

In light of these undisputed facts, which cannot be overlooked or ignored, B.W.'s removal was clearly not the result of "plain incompetence" on the part of Wilcox and Kennedy. B.W.'s removal was the result of judgment call made among fluid circumstances, with the overall objective to protect the life of a two-day old infant. Even if the Appellees made a mistake of fact or law as to the existence of

imminent danger, the Supreme Court has emphasized that the standard for qualified immunity "gives ample room for mistaken judgments." *Hunter*, 502 U.S. at 229.

The removal of B.W. was clearly not the result of "plain incompetence," nor was B.W.'s removal the result of malicious or knowingly unlawful conduct on the part of Wilcox and Kennedy. Even the Majority acknowledged that Washoe County never trained its social workers how to obtain a warrant, nor did Washoe County even have a procedure in place for social workers to obtain warrants. *See* Add. No. 1, at 32-33. Thus, even based on the conclusions reached by the Majority, Wilcox and Kennedy clearly did not "knowingly choose to violate the law." *Al-Kidd*, at 2085.

As such, neither Wilcox nor Kennedy were "plainly incompetent" or engaged in conduct that was knowingly unlawful; therefore, these social workers are immune from liability, pursuant to what the Supreme Court in *Al-Kidd* has deemed a proper application of qualified immunity. Nevertheless, despite engaging in the relevant, dispositive inquiry for qualified immunity, the Majority decision ignored the many guideposts, limitations and qualifications established by the Supreme Court. Accordingly, en banc rehearing is necessary in order to maintain uniformity with the Supreme Court's holdings set forth in *Taylor*, *Al-Kidd*, *Hunter* and *Pearson*. *See* FRAP 35 (a)(1).

Additionally, the Majority instructs that its "inquiry begins and ends" with the

Ninth Circuit decision of *Rogers v. County of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007). *See* Add. No.1, at 22. As noted by the Majority, *Rogers* mandates that the "social workers who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm *in the time that would be required to obtain a warrant*." *Id.* at 18 (citing *Rogers*, 487 F.3d at1294) (emphasis added). Based on *Rogers*, the Majority concluded that the challenged conduct implicates B.W.'s Fourth Amendment rights, as "a reasonable juror could find that Wilcox and Kennedy could not have reasonably believed that B.W. would likely experience serious bodily harm during the time it would have taken to obtain a warrant." *Id.* at 19.

As evidenced by the Panel decision, the Majority employed the rule set forth in *Rogers* (that there can be no exigent removal of a child unless there is insufficient time to obtain a court order) as a bright-line test in determining the existence of exigent circumstances. *Id.* at 22-26. However, such an application breaks with the Supreme Court's general Fourth Amendment precedent and with the decisions of other circuit courts. As such, since the bright-line application of *Rogers* was the centerpiece of the Panel's qualified immunity analysis, en banc rehearing is necessary in order to maintain uniformity among this Court's decisions. *See* FRAP 35(a)(1).

Initially, the Appellees must emphasize that the Supreme Court has

"consistently eschewed bright-line rules" with respect to the application of Fourth Amendment principles and has "expressly disavowed any litmus-paper test or single sentence or . . . paragraph . . . rule, in recognition of the endless variations in the facts and circumstances implicating the Fourth Amendment." *Robinette*, 519 U.S. at 39 (internal quotation marks omitted). Nevertheless, this is precisely how the Panel decision employed *Rogers*, as a single sentence, bright-line test, holding that the availability of time to obtain a warrant was the single dispositive factor in evaluating the Fourth Amendment reasonableness of a child's exigent removal. *See* Add. No. 1, at 22-26. However, when the Fourth Amendment reasonableness inquiry has been applied in other contexts, both the Ninth Circuit and the Supreme Court have employed an objective reasonableness test that considers the totality of the circumstances - not one single factor, such as the availability of time to obtain a warrant. *See Robinette*, 519 U. S. at 39; *see also Snipe*, 515 F.3d at 953; *Stuart*, 547 U.S. at 403; *Banks*, 540 U.S. at 36 ("[W]e have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.") As such, to the extent *Rogers* establishes a bright-line rule to determine the existence of exigent circumstances

justifying child removal, the Appellees respectfully submit that *Rogers* breaks from the High Court's general Fourth Amendment reasonableness inquiry. [6] Accordingly, en banc rehearing is necessary to address this apparent departure from Supreme Court precedent.

Additionally, as employed in the Panel decision, the bright-line rule set forth in *Rogers* also breaks with the decisions of other circuit courts. In the case of *Doe v. Kearney*, the Eleventh Circuit specifically declined to make the inability of a social worker to timely obtain a court order dispositive of the exigent circumstances analysis and instead, chose to consider it as merely one factor in an overall balancing test. *Doe v. Kearney*, 329 F.3d 1286, 1297-98 (11th Cir. 2003). Likewise, the Tenth Circuit in *Gomes v. Wood* agreed that whether state officials have time to seek judicial authorization for the removal of a child should not be "the single focus" of the inquiry. *Gomes v. Wood*, 451 F.3d 1122, 1130 (10th Cir. 2006). Instead, the Tenth Circuit similarly concluded that no single factor, including the ability or inability of time to obtain a warrant, is necessarily dispositive. *Gomes*, 451 F.3d at 1130. Still

[6] Further, *Rogers* breaks from the High Court's general Fourth Amendment analysis, as the factual circumstances presented to the social workers at the time of removal were akin to establishing probable cause that would obviate any constitional requirement to obtain a warrant for removal of B.W. Accordingly, there is no reason to analyze the existence of exigent circumstances as an exception to the warrant requirement, as a warrant was not required from the beginning.

further, the Fifth Circuit has found that "the question of whether there was time to obtain a court order is only one factor that informs the reasonableness analysis; it is not a dispositive issue." *Gates v. Tex. Dep't of Protective & Regulatory Servs*., 537 F.3d 404, 429 (5th Cir. 2008). This inter-circuit conflict is within the power of this Court to resolve and presents yet another basis for this case to be reheard en banc.

Furthermore, as a separate matter, the fact that each circuit court has developed its own standard for analyzing the constitutionality of a child's exigent removal begs the question of how exactly the Panel found that *Rogers* was so "clearly established" that every reasonable official would have been on notice that taking B.W. into custody was unconstitutional. *See* Add No. 1, at 22. The Supreme Court has instructed that for purposes of qualified immunity the law and its application to a specific situation must be so clear-cut that it is "beyond debate." *Al-Kidd*, 131 S. Ct. at 2083. However, in reviewing case precedent from the Eleventh, Tenth and Fifth Circuits, the law as to the exigent removal of children is anything but "beyond debate." As such, *Rogers* alone cannot possibly have placed every reasonable official on notice that taking B.W. into custody, under the circumstances at bar, was unconstitutional. Frankly, what the Panel decision has created is a situation where the Fourth Amendment rights of children will be judged differently in San Francisco than in Atlanta, Denver or New Orleans. Accordingly, en banc rehearing is necessary in

order to address this all-important issue.

B. THE PANEL DECISION INVOLVES ISSUES OF EXCEPTIONAL IMPORTANCE

As Judge Kozinski noted in his partial dissent, at the time B.W. was taken into custody, *Rogers* had never been applied in the context of an especially vulnerable child (such as a two-day old infant born five weeks premature with methamphetamine in her system) or in a situation where a social worker has no means of locating the child once it leaves their immediate supervision. *See* Add. No. 1, at 40. In fact, it was telling that the Majority could not cite a single Ninth Circuit case where *Rogers*' Fourth Amendment analysis was applied to a newborn child like B.W. *Id.* at 20. Instead, the Panel retreated to a case from the Second Circuit. *Id.* (citing *Kia P. v. McIntyre*, 235 F.3d 749 (2d Cir. 2000)). However, in doing so, the Majority inadvertently conceded that B.W.'s Fourth Amendment rights, within the specific context of this case, were certainly not so "clearly established" within the Ninth Circuit that "every reasonable official [in the defendant's situation] would have understood that what he is doing violates" this constitutional right. *See Taylor*, 135 S.Ct. at 2044.

Apart from citing one case from the Second Circuit, the Majority attempts to draw similarities between the five year-old and two year-old children that were

removed in *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 1999), and two-day old B.W. herein. *See* Add. No. 1, at 19-20. Frankly, it is a legal fallacy to claim that newborn B.W., who was born five weeks premature with methamphetamine in her system, was no more vulnerable that an average five year-old; nevertheless, the Panel decision found no distinction and in effect created an unworkable standard where the imminent danger analysis of *Rogers* does not take into account a child's age, health, disability or particular vulnerability. In doing so, the Panel decision retreats from the Supreme Court's admonishment in *Saucier v. Katz* that the qualified immunity analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. [7]

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[7] The Majority admits that "[a]lthough infants are uniquely susceptible to serious injury, the maternity ward of a hospital is an especially safe place." *See* Add. No. 1, at 24. However, this reference to the maternity ward overlooks the undisputed fact that B.W. was removed from her mother's custody and placed into foster-care, *when B.W. was discharged from the hospital*. *Id*. at 6. There is zero evidence that it was possible for B.W. to remain in the maternity ward after discharge. Moreover, as noted in the partial dissent, it was the Appellants' burden to "identify affirmative evidence from which a jury could find" a violation of clearly established law. *Id.* at 39 (citing *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998)). Nevertheless, the Panel decision has abandoned this standard and filled the gaps in the Appellants case with speculation.

Additionally, while the hospital did place an informal "hold" on B.W. while she was in the maternity ward, it is undisputed that the "hold" did not constitute a "seizure" under the Fourth Amendment, as the mother was permitted to access, hold, see and feed B.W. without limitation, i.e. there was absolutely no restriction of movement that would suggest to a reasonable person that he was not free to leave. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Even assuming

The Majority decision simply does not permit social workers to make reasonable but mistaken judgments with respect to the exigent removal of infant children. As such, the Panel decision not only defeats the intended purpose of qualified immunity but will cause future social workers to hesitate and consider whether a court or jury will second-guess their decision-making, when acting to protect the lives of vulnerable infants. The Panel decision directly implicates the state's traditional and transcendent interest in acting as *parens patriae* to protect vulnerable children and, as such, this case presents numerous issues of exceptional importance which demand en banc rehearing.

IV. CONCLUSION

For the reasons set forth above, the Appellees respectfully ask this Court to order this matter reheard en banc.

DATED this 24th day of July, 2015.

THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER

By: /s/ Brian M. Brown
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arguendo that the informal "hold" constituted a seizure, such a legal conclusion is certainly not "clearly established" within Ninth Circuit precedent and the specific context of this case; accordingly, qualified immunity still attaches.

STATEMENT OF RELATED CASE

Pursuant to Circuit Rule 28-2.6, I certify that there are no known related cases pending in this Court.

DATED this 24th of July, 2015.

THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER

By: /s/ Brian M. Brown

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R App. P. 32(a)(7)(B)(I) and Circuit Rule 32-1, the attached Petition for Rehearing En Banc is proportionally spaced, has a typeface of 14 points, and contains 3,737 words.

DATED this 24th day of July, 2015.

THORNDAL, ARMSTRONG,
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CERTIFICATE OF SERVICE

Pursuant to FRAP 25, I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this date I electronically filed the foregoing **APPELLEES ELLEN WILCOX, AND LINDA KENNEDY'S PETITION FOR REHEARING EN BANC**, with the Ninth Circuit Court of Appeals Electronic Filing System (CM/ECF), which served the following parties electronically:

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DATED this 24th day of July, 2015.

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No. 12-15080

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES KIRKPATRICK, et al.,
Plaintiff and Appellant,

vs.

COUNTY OF WASHOE, et al.,
Defendants and Appellees.

On Appeal from the Judgment of the United States District Court
For the District of Nevada
Honorable Edward C. Reed
District Court No. 3:09-cv-00600-ECR

APPELLANTS' OPPOSITION TO PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIR

TREATISES

CONSTITUTIONAL PROVISIONS

FEDERAL CASES

I. INTRODUCTION

A divided three-judge panel of this Court ruled that Washoe County social workers, Ellen Wilcox and Linda Kennedy, were not entitled to qualified immunity when they seized B.W. from her mother without a warrant shortly after she was born at Renown Regional Medical Center in Reno. The panel majority correctly decided this question by following well-establish precedent which put the appellee social workers on notice that a warrant was required before they could remove B.W. and place her in foster care.

Appellees urge the Court to change long-standing Circuit law requiring a warrant unless there is imminent danger of serious bodily injury. This bright line rule, although not adopted in some other circuits, is superior to the application of an amorphous balancing test which Appellees urge this Court to adopt.

There is no room for a test that would allow public officials to escape the warrant requirement in any case where they cannot demonstrate an imminent threat of serious physical harm to a child.

II. ARGUMENT

A. THE THREE-JUDGE PANEL APPROPRIATELY DECIDED THAT THE SOCIAL WORKERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY

The Fourth Amendment declares the right of the people "to be secure in their persons" against unreasonable seizures, and provides that no warrants for the seizure of a person may issue "but upon probable cause."

A "seizure" is any restraint of a person's liberty. Even stopping motorists for 10-15 seconds to inquire whether they had information about a recent hit-and-run accident has been held to be a "seizure" for Fourth Amendmentt purposes. *Illinois v. Lidster,* 540 U.S. 419, 425-426 (2004) [finding the seizure reasonable under the circumstances]. A seizure conducted without a warrant is "*per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions." (*Minnesota v. Dickerson* 508 U.S. 366, 372. (1993))

In the context of criminal law, exigencies may arise when it is necessary to prevent physical harm to a person, the destruction of evidence, or the escape of a felon. See, e.g., *Murdock v. Stout* 54 F.3d 1437, 1441 (9th Cir. 1995). Even if "exigent circumstances relieve an officer of the obligation of

obtaining a warrant, they do not relieve an officer of the need to have probable cause" for a warrantless search or seizure. (*Ibid*.) That is, "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" *Horton v. California* 496 U.S. 128, 137, fn. 7 (1990).

A social worker can constitutionally make a warrantless seizure of a child who has not committed a crime, provided the information possessed at the time of the seizure establishes that the child is in imminent danger of serious bodily injury and the intrusion is necessary to avoid that specific injury. *Mabe v. San Bernardino County Dep't of Pub. Social Services* 237 F.3d 1101, 1106 (9th Cir. 2001). But there must be an exigency—a need for action before there is time to get a warrant. Thus in *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1295 (9th Cir. 2007) the court ruled that "severe bottle rot" of a child's teeth, malnourishment of the children in the home, and piles of dirty dishes and clothing throughout the home did not present an imminent risk of serious bodily harm,[1] and there was no exigency to excuse seizure of the children.

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[1] The social worker in *Mabe* testified she could have obtained a warrant "within hours" (487 F.3d, at p. 1295.).

As in *Rogers*, the social workers in this case failed to make a case for exigency with respect to the seizure of B.W. While they presented evidence raising concern about the mother's ability to care for B.W. due to chronic drug use, coupled with the fact that B.W. had a measurable quantity of methamphetamine in her blood at birth, suggesting that drug use continued during the pregnancy, and the fact that the mother had already lost custody of B.W.'s siblings in other proceedings, these facts alone do not create exigency during the period that B.W. was safely in the hospital under the supervision of medical professionals. And there can be no legitimate claim of exigency where the social workers were aware of the facts upon initial contact with the mother and child, and did not return until the following day to seize B.W. The failure to seek a warrant the same day, or the following day, before the social workers took it upon themselves to seize B.W. raises an inference that they had adequate time to get a warrant and chose not to do so.

The fact that B.W.'s blood tested positive for methamphetamine is not a sufficient circumstance to justify a warrantless seizure. There is no evidence that she ever manifested symptoms of methamphetamine use or withdrawal. Since she was quickly discharged from the hospital, the staff obviously con-

cluded that she needed no further monitoring, and that she was no longer medically fragile, if she ever was, despite her young age.

The dissent challenges the majority's conclusion that B.W. was sufficiently safe at the hospital, reasoning that the mother could have absconded with B.W. during the time it would take to procure a warrant. This record contains no facts that the mother attempted to leave the hospital with B.W., or even contemplated the idea, nor did she express an objection to the social workers' intervention. Likewise, there is no evidence of any history of the mother hiding her other children from social workers. The dissent's argument rests entirely upon speculative musings. The mere possibility of danger does not justify a warrantless removal. *Roska v. Peterson*, 304 F.3d 982, 993 (10th Cir. 2002).

The hospital promised to honor the hold the social workers had placed on B.W. and agreed to contact social services immediately if the mother did attempt to leave with the baby.

There is no evidence from which to draw an inference that mother posed any risk of absconding with B.W. and such an argument should have no traction on appeal from an order granting Appellees' summary judgment mo-

tion since the claim of exigency is a classic jury question. Adding force to this conclusion is the testimony of the social workers admitting that B.W. was safe at the hospital which by itself creates an issue of fact warranting a trial.

B. THIS COURT'S PRECEDENT REQUIRING A WARRANT WHEN THERE IS ADEQUATE TIME TO OBTAIN ONE IS SOUND LAW

Appellees urge the Court to revisit its rule requiring a warrant whenever there is adequate time to get one. The Court should deny the petition for re-hearing en banc because this requirement is logically sound, legally correct, and provides clarity for social workers and police officers in their day-to-day decision making.

The Second Circuit follows the same rule adopted in our Circuit. In *Tenenbaum v. Williams*, 193 F.3d 581 (2nd Cir. 1999), a social worker removed five-year old Sarah Tenenbaum from her kindergarten class without a court order or notifying her parents, or receiving authorization from them. The worker drove Sarah to a hospital where a pediatrician and gynecologist examined her for possible sexual abuse. When they found none, Sarah was returned to her parents. Although granting qualified immunity to the worker, the court found that the family's procedural due process rights had been violated pursuant to a New York City policy of removing children without seeking warrants.

Since the worker decided the day before to remove Sarah from class, she had ample opportunity to secure a warrant. "Because we now hold that it is unconstitutional for state officials to effect a child's removal on an 'emergency' basis where there is reasonable time safely to obtain judicial authorization consistent with the child's safety, caseworkers can no longer claim, as did the defendants here, that they are immune from liability because the law is not 'clearly established'." *Id*. at 596.

The Eleventh Circuit in rejecting the *Tenenbaum* approach instead views due process as a flexible doctrine that requires a balancing of multiple factors including whether there was sufficient time to obtain a warrant. *Doe v. Kearney*, 329 F.3d 1286, 1295 (10th Cir. 2003). The Eleventh Circuit explained:

> Due process is a flexible concept, and "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Stanley*, 405 U.S. at 650-51, 92 S.Ct. at 1212 (quotation omitted). In order to properly define the interests at stake and weigh their relative importance, courts should be allowed to consider *all* relevant circumstances, including the state's reasonableness [11] in responding to a perceived danger *as well as* the objective nature, likelihood, and immediacy of danger to the child. Having considered all relevant factors, courts may then decide whether an objectively imminent danger justified the state's removal of a child without prior judicial authorization. *Kearney* at 1195.

The foregoing text from *Kearney* describes some of the relevant factors to be considered in determining whether the circumstances of the child pose an imminent risk which would justify immediate removal. Once it is determined that such a risk exists in a particular case, no warrant is required before the state may intervene to protect the child. But if there is no imminent risk of harm, then a warrant should be required in every such case. Whether there is sufficient time to get a warrant is not a question relevant to imminence of harm but instead a rule that requires judicial intervention once the social worker reasonably concludes that the child is not at imminent risk of harm.

The rule followed in this Circuit requiring a warrant if there is time to get one without endangering the child, presupposes the absence of an immi-nent of an imminent risk of harm before the rule is even applied. Our bright-line rule can be harmonized with the reasoning in *Kearney* because the question whether there is time to get a warrant is itself determined by all of the circumstances establishing whether the risk of harm to a child is imminent.

In *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006), the Tenth Circuit joins in the Eleventh Circuit's balancing test but notes that "the failure to establish that judicial authorization was impracticable will undermine the con-

tention that emergency circumstances existed. *Id*. at 1131.[2]

The problem with a balancing test is that a warrant is never needed once exigency is established by the totality of circumstances. Where such circumstances do not establish exigency, then a warrant is required in every such case. This is consistent with the law governing warrants in the criminal law context where "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" *Horton v. California*, 496 U.S. 128, 137, fn. 7 (1990). By adopting the bright-line rule, rather than a balancing test, this Court's jurisprudence is consistent with mainstream law protecting persons from illegal, warrantless seizures.

It is difficult to conceive of a set of circumstances where in the absence of exigency, and adequate time to seek a warrant, other factors legitimately could come into play to excuse the warrant requirement. Even the *Gomes* Court, which adopted the balancing test, acknowledges this when it notes "the failure to establish that judicial authorization was impracticable will under-

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[2] The *Tenenbaum* rule is discussed in a law review article contrasting *Tenenbaum* to the Tenth Circuit's rejection of *Tenenbaum* in *Doe v. Kearney*. Oswald. *They Took MyChild! An Examination of the Circuit Split over Emergency Removal of Children* from *Parental Custody*, 53 Catholic U. Law Rev. 1161 (2004).

mine the contention that emergency circumstances existed. *Id*. at 1131.

The current rule in this Circuit is faithful to the principle that warrantless seizures are presumptively unconstitutional. The clarity of the rule provides notice to social workers of what they can or cannot do. The balancing test invites consideration of other factors which are pertinent to determine if exigency exists, but it should not afford a loophole excusing a warrant even where no is shown after consideration of other relevant factors. Accordingly, this Court should follow its own sound precedent and deny Appellees' petition for rehearing en banc.

III. CONCLUSION

Based on the foregoing, Appellant respectfully requests that the petition for rehearing en banc be denied.

September 21, 2015

/s/ David J. Beauvais
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WORD COUNT CERTIFICATION

This document is drafted in 14-point Times New Roman typeface and contains 2.063 words.