

Case No. 06-16039, 06-16120, 06-17000

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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JENNIFER FRANET,
Plaintiff, Appellee, and Cross-Appellant,

vs.

COUNTY OF ALAMEDA, KAREN CASTRO, and JOAN HINTZEN,
Defendants, Appellant, and Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, CASE No. CV-02-03787-MJJ
THE HONORABLE MARTIN J. JENKINS

BRIEF FOR NATIONAL ASSOCIATION OF SOCIAL WORKERS AND
ITS CALIFORNIA CHAPTER *AMICUS CURIAE* SUPPORTING
APPELLANT KAREN CASTRO

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I. STATEMENT OF IDENTITY OF *AMICI CURIAE*

Amici National Association of Social Workers and its California Chapter are professional organizations of social workers, organized to improve the quality and effectiveness of social work practice in the United States; develop and disseminate high standards of social work practice and strengthen the profession as a whole. NASW promulgates professional standards, conducts research, sponsors educational programs and enforces the NASW Code of Ethics.

The NASW and its California Chapter have significant interest in seeing that social workers' discretionary, professional determinations are appropriately protected by the courts, toward the end that social workers and others working in child protection agencies may exercise professional judgment for the benefit of children at risk free of the threat of personal liability. Such protection promotes the maintenance of professional staff within child welfare agencies and enables social work practice in public child welfare agencies to maintain high levels of professionalism.

II. BACKGROUND AND CONTEXT

Child abuse remains a distressing, pervasive and intransigent problem throughout the United States. In 2004, 3,424,354 children were the subject of child abuse reports; 443,747 of them in California. (United States Department of Health & Human Services, *Administration of Children and Families, Child Maltreatment*

2004, Washington, D.C.: U.S. Government Printing Office 2006, Table 3-1, at pp. 32–33.) In California, in 2004, 140 children died as a result of maltreatment. *Id.*, Table 4-1. Shockingly, in 83.4% of all reported instances of child abuse in that year, a parent, acting alone or with another person, was the perpetrator of the abuse. *Id.* at p. 28.

In the year 2005, in California, 496,186 children (ages 0 through 17) were referred to protective services agencies (some more than once) for maltreatment, and with respect to 109,327 of those children (or 22%), cases of child abuse were substantiated. Child Welfare Services (CWS/CMS) Reports, *Child Welfare Services Reports for California*, University of California at Berkeley Center for Social Services Research (2006), available at <http://cssr.berkeley.edu/CWSCMSreports/>. In Alameda County, for that same period, 13,936 children were referred, and 926 cases (13.8%) were substantiated. *Id.*¹

It is because of the tragic reality of child abuse, and the supporting statistics, that local governments, such as Defendant County of Alameda, have established and maintained child protection agencies. The California Legislature specifically

¹ Sadly, the numbers are undoubtedly an understatement. One judge has noted the reality imposed by governmental constraints: “The reason why only strong cases have reached this court is not hard to postulate. Child Protective Services, like other government programs, is overtaxed; as a result, the authorities can take note only of the most flagrant situations.” *In re Micah S.*, 243 Cal.Rptr. 756 (1988) (Brauer, J., concurring).

intended to seek to ameliorate this situation through the child welfare mechanism under which the acts that form the basis of this litigation occurred.

[T]he purpose of the provisions of this chapter relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.

Cal. Welf. & Inst. Code § 300.2.

Social workers form a major part of this governmental effort to protect children—too often from the abuses of their own parents. Yet, child welfare agency social workers frequently do not receive the support they need to perform the difficult tasks involved in the enforcement of child abuse and neglect laws. The professional staff of social service agencies are dramatically overworked and underpaid. While the Child Welfare League of America recommends a caseload of 12–15 children per caseworker, and the Council of Accreditation recommends that caseloads not exceed 18 cases per caseworker, a recent national survey showed that social service workers handled, on the average, between 24 and 31 children. (*Child Welfare: HHS Could Play a Greater Role in Helping Child Welfare Agencies Recruit and Retain Staff*, General Accounting Office (GAO-03-357, March 2003) at p. 14 (citing American Public Human Services Assoc., *Report from the Child Welfare Workforce Survey: State and County Data and Findings, May 2001.*))

And the compensation of social workers significantly trails that of other professionals who work with children. For example, national wage surveys reported that in 2000, the average compensation of elementary and middle-school teachers was about \$42,000 annually. During the same period, the average compensation of social service agency workers was about \$33,000. *U.S. Department of Labor, Bureau of Labor Statistics, 2000 National Occupational Employment and Wage Estimates*, as reported in GAO-03-357 at p. 12. The GAO reported that 70 percent of front-line case workers had been victims of violence or threats of violence in the line of duty. *Id.* at p. 13 (citing American Federation of State, County, Municipal Employees, *Double Jeopardy: Caseworkers At-Risk Helping At-Risk Children: A Report on the Working Conditions Facing Child Welfare Workers*, 1998.)²

Overworked and underpaid, social workers are leaving their jobs at governmental social services agencies in droves. The G.A.O. reported that “turnover of child welfare staff—which affects both recruitment and retention efforts—has been estimated at between 30 percent and 40 percent annually nationwide, with the average tenure for child welfare workers being less than 2 years.” GAO-03-357 at p. 5. This high turnover has a serious, debilitating effect on

² The G.A.O. reported that in one state, peer exit interviews disclosed that 90% of child protective services employees reported that they had experienced verbal threats; 30% had experienced physical attacks, and 13% had been threatened with weapons. GAO-03-357 at p. 13.

protecting children. The G.A.O. reported: “In every state we visited, caseworkers said that staffing shortages and high caseloads have had detrimental effects on their abilities to make well-supported and timely decisions regarding children’s safety.”

Id. at p. 20.

Yet too often, timely decisions must be made for the protection of children. The qualified immunity that is provided for government officials (including social workers employed by child welfare agencies) in the exercise of their discretionary functions is specifically intended to eliminate part of the risk social workers encounter on a daily basis in making decisions critical to the health, safety, and frequently, the very lives of children.

The courts have recognized that actions for damages “may be the only realistic avenue for vindication” of constitutional rights when public officials overstep their authority, but the law also recognizes that “permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.” *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1971)). The intent is to protect public officials who act reasonably in the exercise of their discretionary functions in the context of the extant circumstances. Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v.*

Briggs, 475 U.S. 335, 341 (1986), and the Supreme Court has cautioned against second-guessing social workers' decisions "in favor of deference to the judgment of reasonable [social workers] on the scene." *Saucier v. Katz*, 533 U.S. 194, 205 (2001). Thus, the inquiry, in most instances, need not entail excruciating factual determinations.

The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the constraints on particular ... conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine ... will apply to the factual situation the officer confronts. An officer might correctly perceive all the relevant facts but have a mistaken understanding as to whether a particular [course of conduct] is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Id. at 205.

As noted, the purpose of the qualified immunity is not only to immunize a public official from liability, but also from the burdens of litigation. Both are factors in chilling the exercise of a public official's discretionary functions. To achieve those objectives, however, the determination of whether the immunity applies should be made as early in the proceeding as possible.

III. ARGUMENT

A. The trial court erred in submitting the issue of qualified immunity to the jury.

Because the Plaintiff is asserting that her Constitutional rights were violated by the conduct of Alameda County's social worker, the question of whether the social worker enjoys a qualified immunity arises. Qualified immunity is intended to protect government officials who make reasonable mistakes of law in carrying out their discretionary decision-making powers from having to defend themselves at trial. *See Harlow*, 457 U.S. at 818.³ In this case, the district court erred by refusing to decide the question of whether a social worker was entitled to qualified immunity and instead sending this "essentially legal question" to the jury. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The court believed that it could properly refuse to decide the immunity question based on its conclusion that a reasonable jury could find that Ms. Castro had violated the Plaintiff's constitutional rights. The district court's decision, which relied heavily on this Court's opinion in *Mabe*

³ Although federal, rather than California law applies in this case, by way of comparison it is useful to note that a social worker is immune from liability for any of her discretionary acts under California law. *See* Cal. Gov. Code § 820.2 ("Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.") Application of this immunity, which frees social workers of the fear of personal liability, is intended to encourage "the continuing exercise of [a social worker's] discretion in favor of the protection of minor children." *See Alicia T. v. County of Los Angeles*, 271 Cal. Rptr. 513, 519 (Cal.App.1990).

v. San Bernardino County, 237 F.3d 1101 (9th Cir. 2001), appears to have been based on statements in *Mabe* that conflate the qualified immunity analysis with the merits issue of whether a government official acted unreasonably in removing a child from an abusive situation without a warrant. Because *Mabe* conflicts with the analysis subsequently laid out by the Supreme Court in *Saucier*, 533 U.S. at 200, this Court should take the opportunity to clarify that where there are no material disputes of fact about what information the social worker had at the time she made her decision and what action she took, a district court must determine as a matter of law whether a social worker is entitled to qualified immunity on a motion for summary judgment whether or not a reasonable jury might conclude that she violated the plaintiff's constitutional rights.

1. Qualified immunity is a question of law that should be decided by the judge.

The question of whether a social worker is immune from suit is a question of law that should be decided by a judge, and the district court erred in this case by submitting the matter to the jury. The purpose of the qualified immunity doctrine is to prevent government officials from ever having to go to trial. *Saucier*, 533 U.S. at 200. It reflects an effort to balance a citizen's right to sue for constitutional violations with the need to avoid the harm that such suits may cause government officials and society at large. *See Harlow*, 457 U.S. at 807. Qualified immunity from suit is necessary "to protect officials who are required to exercise their

discretion and the related public interest in encouraging the vigorous exercise of official authority,” *id.*, along with the public interest in reducing the inevitable social costs of “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office,” *id.* at 814. In order to ensure that these interests are protected, qualified immunity applies even where it appears that a government official may have violated the plaintiff’s constitutional rights—so long as the state of the law at the time was such that a reasonable official objectively could have believed that her actions were constitutional.

The Supreme Court has set out a two-step inquiry that makes clear that it is the judge who must determine whether an official is entitled to qualified immunity: First, the court must examine the relevant law at the time of the official action and decide whether, taking the Plaintiff’s factual allegations as true, there was a constitutional violation. *Saucier*, 533 U.S. at 200. If not, “there is no necessity for further inquiries concerning qualified immunity,” *id.* at 201, (and presumably the claims of constitutional violations would be dismissed). If the court finds that a Constitutional violation could be made out, then the court must determine whether that law was defined with sufficient clarity that a reasonable official should have known that her actions were unconstitutional. *Id.* Both of these questions are questions of law. *See Mitchell*, 472 U.S. at 526 (noting that the question of whether

an official is entitled to qualified immunity is an “essentially legal question”); *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998) (stating that the qualified immunity analysis “raises questions concerning the state of the law at the time of the challenged conduct—questions that normally can be resolved on summary judgment” by a judge). The first step in this two-part inquiry does not require the court to actually resolve the ultimate question of whether there was in fact a constitutional violation, it only asks the court to determine, as a matter of law, whether on the facts alleged, the Plaintiff has adequately claimed a violation of a constitutional right. To leave this initial question for the jury’s determination at the conclusion of a trial on the merits, as the district court did in this case, defeats the purpose of the qualified doctrine and denies government officials of the protection from suit to which they are entitled.

Furthermore, the essentially legal nature of the question of whether a government employee is entitled to qualified immunity places it beyond the competence of the jury. *See, e.g., Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir. 2003) (“the ultimate legal determination of whether qualified immunity attaches” to a government official’s actions “is a question of law better left for the court to decide. . . . Juries are hardly suited to make decisions that require an analysis of legal concepts and an understanding of the inevitable variability in the application of highly generalized legal principles.”); *Willingham v. Crooke*, 412 F.3d 553,

559–61 (4th Cir. 2005) (holding that it was reversible error to require a new trial to submit the question of qualified immunity to the jury); *Fishbein v. City of Glenwood Springs*, 469 F.3d 957, 960 (10th Cir. 2006) (stating that where material facts are undisputed, the court should not submit the question to a jury but—drawing all reasonable inferences in favor of the plaintiffs—must determine, as a matter of law, whether the officers are entitled to qualified immunity).

However, even in those cases where there are disputes of material fact regarding the official’s conduct or the circumstances that she faced when making her decision to act, the court should submit the factual disputes to the jury as interrogatories, and then the court itself must determine whether immunity applies based upon the jury’s factual determinations. *See, e.g., Willingham*, 412 F.3d at 559-60; *see also Stephenson*, 332 F.3d at 80–81.

The district court in this case refused to decide the issue of qualified immunity on Ms. Castro’s motion for summary judgment since it found that “there exists a question of material fact as to whether a reasonable social worker could have believed that her conduct was lawful *because it is unclear whether [the child] faced an immediate threat of physical injury.*” (See order 4/27/05, 11, 26-28) (emphasis added). The record makes clear that there were no disputes about what the social worker did or what information she had when she acted. Therefore, there were no real disputes of material fact, and the district court’s uncertainty about

whether a jury would find that circumstances were sufficiently exigent to permit the social worker to remove the Plaintiff's child without a warrant had no bearing on the immunity determination and was an improper basis on which to refuse to grant summary judgment on the question of qualified immunity. Contrary to the district court's assumption, qualified immunity is not barred when there has been a violation of a constitutional right; neither is it barred when there exists a question about whether there has been such a violation. For the purpose of qualified immunity, even if the court determines that, if permitted to go to trial, a jury might ultimately conclude that there was a constitutional violation, the court must nevertheless dismiss the case if the state of the law was such that a reasonably competent official would not have known that her conduct was illegal. *Harlow*, 457 U.S. at 818. The whole purpose of immunity is to eliminate the social worker's liability even when her conduct violates the plaintiff's constitutional rights. It is antithetical to the very concept of immunity to make the determination of whether immunity applies contingent on a factual finding that the defendant's conduct did not abridge the plaintiff's rights.

Because the district court relied heavily on *Mabe v. San Bernardino County, Dep't of Public Social Services*, 237 F.3d 1101 (9th Cir. 2001), its decision that the case had to be submitted to the jury may have been based on statements in *Mabe* conflating the qualified immunity analysis with the question on the merits of when

a social worker can constitutionally remove the child without a warrant. In *Mabe*, a parent sued county social workers, alleging that they had removed her child without a warrant in violation of her constitutional rights. The social workers moved for summary judgment on grounds of qualified immunity. This Court looked to its prior decision in *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000), for the appropriate standard on the merits issue of whether the social workers had violated the plaintiff's constitutional rights. However, in doing so, *Mabe* improperly applied the *Wallis* merits standard to the question of whether the social workers were entitled to qualified immunity. *Mabe*, like the district court in this case, concluded that summary judgment could not be granted on the immunity question because "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 child] faced an immediate threat of serious physical injury.*" *Mabe*, 237 F.3d at 1109 (emphasis added).

This statement in *Mabe* reflects a misunderstanding about the kind of disputed material facts that must exist before the court can permit the case to go to trial. It is only genuine questions of material fact regarding "whether the conduct allegedly violative of the right actually occurred" that "must be reserved for trial." See *Willingham*, 412 F.3d at 559-60 (4th Cir. 2005) (finding disputes of material fact in an arrest without probable cause case, where the police claimed that the

plaintiff took actions that obstructed their work and the plaintiff claimed that she did not take those actions); *see also Stephenson*, 332 F.3d at 80–81 (finding disputes of material fact in an excessive force case, where there were factual disputes about whether the Plaintiff was armed and whether the officer issued a warning before shooting him). In *Mabe*, there appears to have been no dispute about what conduct occurred or about what information the social worker had when she acted—instead the only question was whether that conduct was constitutionally permissible under those circumstances. This is the very threshold determination that the court is required to make in deciding whether the official is entitled to qualified immunity. If the court finds that under the circumstances alleged the conduct violated the Plaintiff’s constitutional rights, the court must then proceed to the question of whether, despite the apparent violation, the official is entitled to qualified immunity.

The Supreme Court has made clear in both *Saucier*, 533 U.S. at 200–06 and *Anderson*, 483 U.S. at 643–44 that the factual question of whether a government actor behaved reasonably for the purposes of determining whether she violated the Plaintiff’s constitutional rights is distinct from the legal question of whether the government official reasonably believed that her activities were lawful for the

purposes of determining whether she is entitled to qualified immunity.⁴ *See also, Mitchell*, 472 U.S. at 527-28 (noting that “a claim of qualified immunity is conceptually distinct from the merits of the plaintiff’s claim that his rights have been violated”); *Crawford-El*, 523 U.S. at 589 (distinguishing between the factual question of a government employee’s intent and “the separate qualified immunity question whether the official’s alleged conduct violated clearly established law, which is an essentially legal question.”) (internal punctuation omitted).

In a child removal case, the factual question regarding the possible Fourth Amendment violation looks to whether an official had a reasonable belief that the child faced an immediate threat of serious bodily injury and whether the scope of the official’s intrusion was reasonably necessary to avert that specific injury. *Wallis*, 202 F.3d at 1138. This substantive question, while a necessary part of the court’s initial inquiry as to whether the Plaintiff has claimed a constitutional violation, need not be finally resolved by the judge or a jury in order to decide whether, assuming that the violation occurred, the state of the law was such that the social worker should have known that her actions were unconstitutional. In Ms. Castro’s case, as in *Mabe*, there were no material disputes of fact—no one claimed

⁴ Although these cases were decided under the Fourth Amendment, the standard for a claimed violation of the right to family association under the Fourteenth Amendment is the same as the Fourth Amendment analysis when the case involves the removal of children. *See, e.g., Wallis*, 202 F.3d at 1137 n.8. Consequently, the Supreme Court’s discussion of the qualified immunity analysis that is appropriate in a Fourth Amendment case is applicable here.

that the child was not taken away without a warrant or that Ms. Castro did not have a factual basis for her belief that the child was being abused. Therefore, it was up to the district court to decide if, taking the Plaintiff's allegations as true, the Plaintiff had made out a constitutional violation, and if so, whether the law was so clearly defined that Ms. Castro should have known that her conduct was illegal. The district court did not do so because it apparently believed that *Mabe* required that the question on the merits had to be finally resolved before the question of qualified immunity could be addressed. Thus there is a need for this Court to clarify *Mabe* in light of *Saucier*, so that social workers who frequently have to make these decisions for the safety and well-being of children will not be forced to go to trial in every case where it is possible that a constitutional violation occurred. This is improper under Supreme Court precedent, and failure to clarify this procedure would cause significant harm to the child welfare system.

2. **Where the cases discussing the removal of children from abusive homes without a warrant are highly fact-dependent, the law is not "clearly established" and a social worker is entitled to qualified immunity for such removals.**

The Supreme Court has noted that where the law defining a constitutional right is heavily fact-dependent such that the "result depends very much on the facts of each case," the case law can "by no means" be said to "clearly establish" that an official's conduct violated the constitution in a given case where the facts fall reasonably within the realm of conduct that the cases have found to be

constitutional. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004); *see also Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987) (overruled on other grounds) (holding that a right subject to a balancing test such as the right to family association, which must be balanced against the state’s interest in protecting children from abuse, “can rarely be considered ‘clearly established,’ at least in the absence of closely corresponding factual and legal precedent”). In such circumstances, where there is a “hazy border” between what is acceptable and unacceptable, the second *Saucier* test—whether the legal rights and duties are clearly established—must always be answered in the negative and the immunity always would apply. *See Brosseau*, 543 U.S. at 201.

The question of whether children are in “imminent danger” such that they can be removed from their parents’ custody without a warrant is just such a fact-dependent area of law. As this Court has noted, these factors include: whether it is the child herself who has made the allegation of abuse, *Mabe*, 237 F.3d at 1108, whether the abuse is ongoing, such that the child is likely to be abused if left in the home, *id.*, whether the abuse and the relationship between the child and the abuser is such that the abuse could happen at any time, *id.*, the seriousness of the abuse alleged, *id.*, whether a parent who is not actively abusing the child is nonetheless refusing to protect the child from abuse, *id.* at 1110, whether allegations are corroborated by physical evidence, *White v. Pierce County*, 797 F.2d 812, 815 (9th

Cir. 1986), and whether a parent appears to be hiding past abuse, *id.* at 816. In this case, the child herself stated that her father was touching her vagina in a way that hurt her; this statement was corroborated by the child's physical symptoms; and there was evidence that the child's mother was failing to protect her and potentially attempting to conceal the abuse. Any social worker faced with these circumstances would have been reasonable in believing that her conduct was permitted under the law. Because the relevant cases set out these multiple factors, it cannot be said that the law spelling out the rights and duties of a social worker under these circumstances is "clearly established."

B. The district court applied the wrong substantive standard for whether a social worker has unconstitutionally removed a child from an abusive situation without a warrant.

Apart from the question of immunity, the district court applied the wrong substantive standard for determining whether a social worker has improperly removed a child from an apparently abusive situation without a warrant. The district court based its conclusion that Ms. Castro's actions were unconstitutional solely on the fact that, in hindsight, Ms. Castro might have had time to get a warrant before the child was subjected to any additional acts of abuse. This Court has never adopted this approach to the exigent circumstances analysis in a child removal case, and because relying on this single criterion will make it more likely that social workers will leave children in abusive situations while they seek a

warrant, the Court should reject this attempt to establish a bright-line rule as one that risks causing significant harm to the children social workers are charged with protecting.

In this case, the district court itself agreed that the situation the children faced qualified as an “emergency” in which they were in “imminent danger.” (*See* Order 4/27/05, 7-8.) The court, however, incorrectly concluded that while the danger was sufficiently “imminent” that the children could be detained by the county and kept from the custody of their parents prior to a hearing, it was not sufficiently imminent to permit the initial warrantless removal of the children from their parents’ custody. (*Compare* 01/07/05 Order 7–8, *with id.* 10–11.) The district court erred in relying exclusively on the fact that Ms. Castro conceivably could have had time to get a warrant before the children’s parents would have caused them further harm to distinguish the facts as presented to Ms. Castro in deciding to remove the children, from the facts as presented to Ms. Castro’s co-worker in deciding to detain them. (*Id.*)

This Court permits lower courts to consider whether a social worker had time to get a warrant as one factor among many in deciding whether a child is in imminent danger. *See Mabe*, 237 F.3d at 1108. This position is consistent with the majority of circuits that have considered the matter. *See, Doe v. Kearney*, 329 F.3d 1286, 1295–98 (11th Cir. 2003) (outlining the circuit split on the issue of whether

the time to get a warrant is dispositive, and siding with the majority in determining that it is not). Only the Second Circuit, in *Tennenbaum v. Williams*, 193 F.3d 581, 596 (2d Cir. 1999), has taken the position that a social worker cannot lawfully remove a child without prior judicial authorization unless 1) the child is in imminent danger of abuse *and* 2) the social worker reasonably determines that there is insufficient time to get a court order before removing the child from that imminent danger—the position apparently taken by the district court. The *Tennenbaum* rule has been criticized as “inflexible” and inconsistent with due process jurisprudence. *See Kearney*, 329 F.3d at 1295. It is not the law of this Circuit, and the district court erred in relying on this as the sole factor in concluding that while the danger to the children was imminent and constituted an emergency, it was not sufficiently imminent to entitle Ms. Castro to summary judgment on the question of whether her actions violated the Plaintiff’s constitutional rights.

Adopting the district court’s analysis would cause social workers who believe that a child is in significant danger of serious abuse to leave the child in an abusive situation in the hope that no further harm would come to him in the time it takes to get a warrant. When a child is facing serious abuse, it is difficult, even for trained professionals, to predict when the next attack will occur and just how serious it will be. *See, e.g., DeShaney v. Winnebago County*, 489 U.S. 189 (1989)

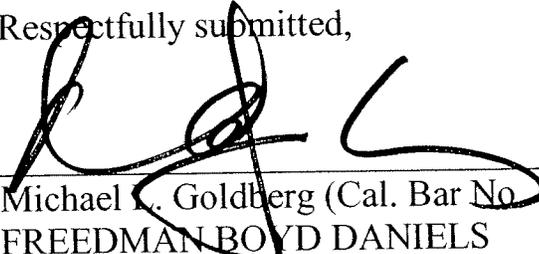
(child who had been abused by father over a period of time and was not removed from his father's custody was beaten so severely that he was permanently brain damaged); *Forrester v. Bass*, 397 F.3d 1047 (8th Cir. 2005) (children, who had been reported several times as abused, but who were not removed from their parents' custody, died after being starved and tortured). Social workers face difficult decisions in weighing the severity of the abuse, the volatility of the abusers, and the conflicting needs of children to be with their parents and to be removed from an unsafe home. Where social workers cannot be held liable for leaving a child with an abusive parent, no matter how dire the consequences of that choice, *see DeShaney*, 489 U.S. at 196–97, a rule requiring a social worker in every case to get a warrant if the child is not likely to suffer additional abuse in the time it takes to do so asks social workers to make a decision about a child's immediate welfare based solely on a predictive judgment about an abuser's unpredictable behavior. This asks too much. Social workers, fearing liability, are likely always to err on the side of leaving the child in the abusive situation. A better rule is a more flexible one that permits a social worker to take *all* relevant circumstances into account, including the possibility that there is time to get a warrant before any additional abuse occurs.

IV. CONCLUSION

Social workers face the daily challenge of making difficult decisions, balancing the welfare and safety of children with the rights of their parents, often on the spot and on the basis of information that comes from sources of varying reliability and differing perspectives and biases. Qualified immunity is an important protection, enabling social workers to make decisions that are reasonable in the circumstances. Unless immunity is applied early in the litigation, and as a matter of law, its purpose is thwarted. The error of the court below in this case underscores the need to clarify Ninth Circuit law in light of the test laid down by the Supreme Court in *Saucier*: that these are determinations to be made by the judge, and to the extent possible, early in the litigation. In addition, on the merits, the complex factual circumstances in which these decisions must be made makes the adoption of a bright-line test based on whether the social worker had time to obtain a warrant unreasonable and unrealistic.

Dated: June 25, 2007

Respectfully submitted,



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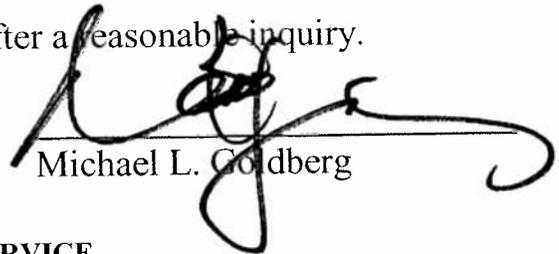
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CERTIFICATE OF COMPLIANCE WITH *FED. R. APP. P. 29(D)* AND 9TH CIR. 32-1

Pursuant to *FED. R. APP. P. 29(d)* and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points, and contains 5146 words as determined by the word count function of the word processor software used to prepare the brief (Microsoft Office Word 2003)

I certify that the information contained in this certification is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.


Michael L. Goldberg

CERTIFICATE OF SERVICE

I hereby the foregoing Brief for National Association of Social Workers and Its California Chapter Amicus Curiae Supporting Appellant Karen Castro was sent on this 25th day of June, 2007 via first class mail, postage-paid to the following:

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