No. 07-35554

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC MUELLER, *et al.*,

Plaintiffs-Appellees,

v.

APRIL AUKER, *et al.*,

Defendants,

and

DALE ROGERS,

Defendant-Appellant.

Appeal from the U.S. District Court
for the District of Idaho
The Hon. B. Lynn Winmill

PLAINTIFFS-APPELLEES' BRIEF IN OPPOSITION

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Statement Of Jurisdiction

Plaintiffs-appellees (hereinafter, the "Muellers") agree that the court below had subject matter jurisdiction over this case, and that this Court has jurisdiction over the order dated February 26, 2007 (the "February 2007 Order"), and the subsequent order denying Rogers's motion for reconsideration (the "June 2007 Order") to the extent that the court below denied Rogers's motion for summary judgment on the ground of qualified immunity. Since the facts underlying Rogers's motion were disputed, this Court's jurisdiction depends upon its assuming that the version of events offered by the nonmoving party (the Muellers) is correct. *E.g.*, *Prison Legal News v. Lehman*, 397 F.3d 692, 698 (9th Cir. 2005).

The Muellers dispute that this Court has jurisdiction over the February 2007 Order (or the June 2007 Order) to the extent that it granted (or reaffirmed the granting of) the Muellers' motion for partial summary judgment, only on liability, against Rogers on the claim that he failed to give Eric Mueller notice of the deprivation of his rights or the impending medical procedures. That part of the order is plainly not final. *White v. Lee*, 227 F.3d 1214, 1240 (9th Cir. 2000) (order granting partial summary judgment on liabilty in *Bivens* action individual federal officials "are not appealable final orders" and, absent special circumstances, would not be appealable). Nor does it, independent of the denial of Rogers's motion for

summary judgment, deprive Rogers of his right to avoid trial.

Thus, this Court has jurisdiction over the part of the February 2007 Order granting the Muellers' motion for partial summary judgment on liability against Rogers only if it has pendent appellate jurisdiction because it is "inextricably intertwined" with the part denying Rogers's motion for summary judgment. This Court has "consistently interpreted `inextricably intertwined' very narrowly." *Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000). Two issues are not "inextricably intertwined" if the Court must apply two different legal standards to each issue. *Id.* at 1285. Rather, the theories must be so connected that this Court "must decide the pendent issue in order to review the claims properly raised on interlocutory appeal" or "resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Id.*

There are significant factual disputes over the relevant events, and the two summary judgment motions at issue must be assessed under different factual predicates. Despite Rogers's claim that he "does not seek to argue any factual dispute" (Brief of Appellant Rogers ("Rogers Br.") 1), his recitation of the facts is based upon *his* version of the facts rather than the facts relevant to the denial of his motion for summary judgment. But reversing the order granting the Muellers'

motion does not require reversal of the order denying Rogers's motion. *Both* motions could have been denied in the court below; thus, it is not true that this Court *"must* decide the pendent issue in order to review" the denial of Rogers's summary judgment motion. For the same reason, resolution of Rogers's appeal of the denial of his motion -- and, particularly, an affirmance of the order denying that motion -- would not "*necessarily* resolve[] the pendent issue."[1]

Curiously, Rogers claims that the order *granting* him qualified immunity over his decision to remove Eric Mueller's parental rights is "inextricably intertwined" with the order denying him qualified immunity over his failure to provide Eric Mueller with notice. Rogers Br. 36. While the Muellers disagree with that assessment, this Court would have jurisdiction over that grant of qualified immunity if Rogers were correct, and, accordingly, the Muellers will briefly address that issue.

The February 2007 Order was entered on February 26, 2007; to the extent it constituted a "judgment," it was entered on July 26, 2007. Rules 54(a),

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[1] To be sure, this Court has exercised jurisdiction over a grant of partial summary judgment on liability, where the defendant had asserted a defense of qualified immunity. But the key to such cases is that the facts were undisputed. *White v. Lee*, 227 F.3d 1214, 1240 (9th Cir. 2000); *Duran v. City of Douglas*, 904 F.2d 1372, 1376 (9th Cir. 1989).

58(b)(2)(B), Fed. R. Civ. P. The June 2007 Order was entered on June 7, 2007. Rules 58(a)(1)(D), 58(b)(1), Fed. R. Civ. P. Rogers filed a notice of appeal on July 3, 2007.

Statement Of The Issues

1. In the February 2007 Order, the court below denied Rogers's motion for summary judgment on grounds of qualified immunity on Eric Muellers' claim that his rights had been violated by Rogers's failure to give notice. Was it correct?

2. Does this Court have jurisdiction over any other part of the February 2007 Order?

Statement Of The Case

This action commenced on August 5, 2004 with the filing of the original complaint. ER 774[2] (Doc. No. 1). The original defendants were the City of Boise and various police officers working for the City (Rogers, Tim Green, and Ted Snyder); agents of the Idaho Department of Health and Welfare (the

[2] "ER" will refer to Rogers's Excerpts of Record. "SER" will refer to the Muellers' Supplemental Excerpts of Record. A parenthetical following an "ER" or "SER" cite is intended to identify the specific parts of the page being relied upon, *e.g.*, "(¶ __)," "(Tr.__)" or "(RTA___)" to identify a specific paragraph, deposition transcript page, or request to admit.

"Department") *viz.*, April Auker, Barbara Hamon, Linda Rodenbach, Kimberly Osadchuk, and Janet Fletcher (the "individual State Defendants"); Macdonald; and St. Luke's Regional Medical Center ("St. Luke's"). The second amended complaint subsequently added two additional representatives of the Department in their official capacities: Karl B. Kurtz, the director of the Department, and Ken Diebert, the head of the Division of Family & Community Services. ER 187 (¶ 4).

After an amended complaint was filed in October 2004 (SER 01131-47), each of the defendants, including Rogers, moved for immediate dismissal of the action. SER 01120. The court below denied Rogers' motion in its entirety in a memorandum decision and order filed April 13, 2005. SER 01057-99. (It also denied, with some exceptions, the motions of the other defendants.) The court's case management order set a discovery cut-off of February 28, 2006. ER 781 (Doc. No. 96).

On July 26, 2005, Rogers and the other police officers moved for summary judgment, and, two days later, sought a protective order staying discovery. SER 01025-27. Although Rogers's attorneys knew ahead of time that the Muellers intended to oppose his summary judgment motion in part because discovery had just commenced, and that the Muellers would submit an affidavit pursuant to Rule

56(f) (SER 01006-07), they nonetheless obligated the Muellers to put in its full set of opposing papers. Shortly thereafter, Rogers moved to withdraw his motion. SER 00959-61. The court below granted that request. SER 00957-58.

Pursuant to the schedule set forth in the case management order, the Muellers moved to amend their complaint in October 2005. That motion was granted in April 2006, and the Muellers filed their second amended complaint on April 27, 2006. SER 00880; ER 186-205.

The Muellers moved for partial summary judgment on liability against the City, Rogers, and the State Defendants in the spring of 2006. Various defendants also moved for summary judgment at that time. Those motions were resolved by the February 2007 Order, which, in relevant part, granted Rogers's motion, except for the claims that he had failed to provide Eric Mueller with pre- and post-deprivation notice (the "Notice Claims") that are now on appeal. Similarly, the Muellers' motion for partial summary was denied, except that it was granted with respect to the Notice Claims against Rogers and the individual State Defendants. The City's motion was granted in part and denied in part.

The Muellers, the City, Rogers, the State Defendants, and Macdonald all

moved for clarification and/or to amend the judgment. The court below resolved that motion in a memorandum decision and order dated June 7, 2007. That order denied the motions for the most part, except that it granted the individual State Defendants' motion to the extent that they sought to be relieved of all individual liability. The court also made clear that there were triable issues of fact as to the claims for injunctive relief against both the City and the official capacity State Defendants. ER 754-64.

Statement Of Facts

Rogers claims that his brief provides a "version of the facts . . . gleaned from the District Court's findings in [the February 2007 Order]." Rogers Br. 3. Actually, the facts set forth in Rogers's brief are quite different from the ones described in the opinion of the court below, but it hardly matters. The facts pertinent to Rogers' motion for summary judgment are the facts in the record, with all disputed facts (and reasonable inferences from undisputed facts) resolved in the Muellers' favor. Since this court reviews a summary judgment motion *de novo*, those facts are also the relevant ones here.

B. Idaho's Statutory Provisions

Idaho's Child Protective Act ("CPA") and criminal code has a number of relevant provisions, which are set out in full in the Appendix to this brief. The most important of these are former I.C. § 16-1612 and related provisions on "emergency removal," and former I.C. § 16-1616, permitting the ordering of emergency medical treatment.[3]

Section 16-1612 was labelled "Emergency Removal." Section 16-1612(a)(1) provided that "a child may be taken into shelter care by a peace officer or other person appointed by the court . . . where the child is endangered in his surroundings and prompt removal is necessary to prevent serious physical or mental injury to the child . . . " *See also* 2001 Idaho Session Laws, Chapter 107, reproduced in the Appendix hereto at A10 (changing "custody" in § 16-1612 to "shelter care").

The term "shelter care" was defined in the CPA as "*places* designated by the [D]epartment for the temporary care of children pending court disposition or placement." I.C. § 16-1602(31) (emphasis added). In practice, though, the

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[3] In 2005, the Idaho Legislature renumbered a significant number of provisions in the CPA. Where a provision set forth in the Appendix has been redesignated, there is an indication of the designation for the current version next to the designation in 2002. This brief will refer to the provisions as they read and were designated in 2002.

Department does not designate any places as "shelter care." SER 00099 (ll. 16-18). Its regulations regarding standards for child care licensing defines shelter care as "[t]he temporary or emergency out-of-home care of children in a foster home or residential facility." IDAPA § 16.16.02.006.41. (The medical center operated by St. Luke's in Boise is a hospital. It is not a foster home or a residential facility. SER 00197-205.)

Section 16-1613 provided that a peace officer who takes a child into shelter care under § 16-1612 "shall immediately: (1) Take the child to a place of shelter, and (2) Notify the court of the action taken and the place to which the child was taken, and (3) . . . Notify *each* of the parents, guardian or other legal custodian that the child has been taken into shelter care, and that the child may be held for a maximum of forty-eight (48) hours . . . within which time there must be a shelter care hearing" (emphasis added). Section 16-1614(b) similarly provided that "*[e]ach* of the parents or custodian from whom the child was removed shall be given notice of the shelter care hearing" (emphasis added). The italicized words in those provisions were added in 1996, as part of broader changes to the CPA to ensure more rigorously the rights of both parents. *See* Appendix at A3, setting forth excerpts from 1996 Idaho Session Laws, Chapter 272.

Section 16-1616 was labelled "Authorization of emergency medical treatment." Section 16-1616(a)(2) provided that the court "may authorize medical or surgical care for a child," regardless of whether the child was under the court's authority, when "[a] physician informs the court orally or in writing that in his professional opinion, the life of the child would be greatly endangered without certain treatment and the parent, guardian or other custodian refuses or fails to consent." Section 16-1616(b) provided that an informal hearing be granted for the parents in such situations if time permitted. The record demonstrates that judges hearing applications under this provision are on-call and can be reached at home; that they hear such applications over the phone; and that they resolve them within about one half-hour. ER 135 (Tr. 27-28), 609 (Tr. 10).

Two other CPA provisions deserve brief mention. First, I.C. § 16-1606(d) permitted a court to place an "endorsement" on the initial summons of a case if the petition that commenced a CPA matter indicated that "the child should be removed from his present condition or surroundings" because continuation therein "would be contrary to the welfare of the child." The endorsement would "vest[] legal custody with the [D]epartment." In the court below, Rogers agreed that such an endorsement could be obtained in a matter of hours. ER 209-10 (¶ 16) & ER 575-

79.

Second, the definition of "neglected" in the CPA (I.C. § 1602(24)) provided that "no child whose parent . . . chooses . . . treatment by prayers through spritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected," but states that a court may still act for such a child under I.C. § 16-1616. (I.C. § 16-1616(c) provides that a court "shall take into consideration" such spiritual treatment in making any order.) As a consequence of this definition, the Department will not itself order medical treatment when a parent refuses to consent to that treatment on religious grounds. SER 00096-97, 00161. That is, under such circumstances, the Department will *always* call a judge pursuant to I.C. § 16-1616.[4]

Finally, Idaho's criminal code also addresses child neglect. Specifically, I.C. § 18-1501(a) states that "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death . . . having the care or custody of any child, willfully causes or permits such child to be placed in such situation that its person or health is endangered" has committed a crime punishable by 1-10 years in

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[4] It is also Department practice that its employees may utilize I.C. § 16-1616 to obtain a judge's order when authorization for medical treatment "may be in question," including when a parent does not consent. SER 00103-06, 00180.

prison. I.C. § 18-1501(b) has an analogous misdemeanor provision for circumstances other that those likely to produce great bodily harm or death.

C. The Events Of August 12-14, 2002

On the evening of August 12, 2002, the Mueller family -- Eric Mueller, his wife, Corissa Mueller, their two-year-old son, Von, and their five-and-a-half-week-old daughter, Taige -- was at home in Boise, Idaho. ER 263l (¶ 2). Corissa was an informed participant in the healthcare of her family. She consulted regular (allopathic) physicians when their expertise was relevant, SER 00938 (Tr. 58-60), and had given birth to Taige using the services of a midwife, Karen Erickson. SER 00936 (Tr. 50-51). Erickson, who was also a naturopathic physician, SER 00940 (Tr. 68-69), provided post-natal care for Corissa and Taige for the first six weeks after Taige's birth. SER 00950 (Tr. 108-09).

1. The Initial Treatment At St. Luke's And Corissa's Decision To Defer Certain Prophylactic and Diagnostic Procedures

Following Erickson's advice, Corissa regularly checked Taige's temperature during those first six weeks. SER 00950 (Tr. 107-09). When she did so that evening, Taige's temperature was 99 degrees. SER 00951 (Tr. 110). When

Corissa checked Taige's temperature an hour later, it was 100.8 degrees. *Id.* (Tr. 111-12). She phoned Erickson and told her this, and Erickson recommended she take Taige to the emergency room. *Id.* (Tr. 112).

Corissa arrived with Taige at the emergency room at St. Luke's Regional Medical Center ("St. Luke's") in Boise shortly after 10:00 p.m. ER 23 (¶ 3). Erickson had told her what to expect from an emergency room doctor: a recommendation of a series of standard laboratory tests, including a spinal tap to check for meningitis, and the automatic administration of antibiotics. SER 00951 (Tr. 112-13). Erickson did not state that this was any "standard of care," and, in fact, she advised Corissa to hold off on consenting to the spinal tap and the antibiotics until she knew the results of the other tests. SER 00951-52 (Tr. 113-14). Eric Mueller remained at home to care for Von. ER 14 (¶ 2).

Just after Corissa and Taige Mueller first entered St. Luke's hospital in Boise on August 12, 2002, Corissa was asked to sign, and did sign, a form stating: "I am aware the practice of medicine is not an exact science, and I understand no guarantees have been made to me regarding the results of treatments or examinations." SER 00486.

At about the same time, Corissa gave the hospital the name of her husband, stated that he was Taige's father, gave the hospital the address where she and her husband lived, and gave the hospital their home telephone number. ER 6 (¶ 2), ER 10.

At the hospital, Taige's temperature was measured at 101.3 degrees. ER 23 (¶ 3), SER 00974. The emergency-room doctor, Macdonald, recommended performing a complete blood count (CBC), a metabolic panel, a blood culture, a urinalysis, a urine culture, a lumbar puncture, a chest x-ray, and a stool sample; setting up an IV to provide fluids; and giving Taige antibiotics. SER 00507 (¶ 4), 00602-03, 00607, 00609. Corissa consented to have blood drawn from Taige for a CBC, a metabolic panel, and a blood culture; to have urine taken to perform a urinalysis and a urine culture; to have a chest x-ray taken; to have a stool sample taken; and to set up an IV for Taige to receive fluids. After she gave her consents, blood was drawn from Taige, urine and a stool sample were taken from Taige, a chest x-ray was taken, and an IV was set up for Taige to receive fluids. SER 00507-08 (¶¶ 5-9), 00604-09, 00611.

When it came to Macdonald's recommendation that he perform a lumbar puncture, and administer antibiotics, Corissa decided to hold off. ER 599 (Tr. 83);

ER 25 (¶ 14). (A lumbar puncture is a diagnostic test, primarily designed to determine if the patient has meningitis. It is performed by placing a needle in the patient's spinal column and removing spinal fluid. SER 00595-96.) Before these steps, which she believed harbored their own risks, were taken, she wanted to observe whether Taige's condition either improved or deteriorated. ER 23 (¶ 2), SER 1134-35 (¶¶ 10-16), 00384 (Tr. 163-65). It was her belief that Taige had a cold because everyone in her family had just had one. ER 594 (Tr. 112-13), SER 00950 (Tr. 108).

The results of the initial tests came back at around 11:00 p.m. They were all normal, and negative for any serious disease. SER 00312-13 (¶ 3(c)); SER 00280-81; ER 22, 25 (¶¶ 2, 12); SER 01135 (¶ 16); SER 00413, 00429-33, 00891-93 (Tr. 145-150). Accordingly, Corissa continued to decline to consent to the lumbar puncture and the prophylactic administration of antibiotics. She did so based upon the knowledge of Taige gleaned during her daughter's life, her observations of her, and the results of the initial screening tests. SER 00304 (¶ 3). She would have alllowed Taige to remain in the hospital for continued observation had that been suggested. SER 00069 (ll. 7-14).

2. <u>The Police And The Department Are Called In</u>

After Corissa refused to consent to a spinal tap and antibiotics, Macdonald contacted a hospital social worker, Robert Condon, on duty in the emergency room, about Corissa. Condon, in turn, contacted the Department and Boise police officers Tim Green and Ted Snyder, who were at the hospital to investigate another matter. ER 34-35 (Tr. 160-62), ER 41-42 (¶¶ 6-8), ER 49 (Tr. 29-30), 53 (Tr. 75); SER 00906 (Tr. 28), 00909 (Tr. 35-36).

After Auker of the Department arrived at the hospital, between midnight and 12:15 a.m. (SER 00530), she met with the two police officers in a room away from Corissa. Snyder and Auker had the following exchange, recorded on Green's belt recorder:

> OFFICER SNYDER: My problem from a legal standpoint. . . I'm wondering if they'll be willing because with that kind of chance and Mom willing to treat medically if something were to happen, then we can't prove that she is neglected, being neglectful. . .
>
> APRIL AUKER: And, she is here!
>
> OFFICER SNYDER: So, I'm thinking they're probably gonna tell us that they are not gonna claim imminent danger 'cause legally we would be violating her rights to do that, and that's something that no law enforcement agency in the world wants to happen. I agree that she's not

being very smart about it, but criminally, she's not doing anything harmful to her child, except for

(Background radio noise) (Silence)

APRIL AUKER: Well, if nothing else, they could declare her and she could go to shelter care for two days and in that time she would be (medically) treated.

OFFICER SNYDER: Yeah.

APRIL AUKER: And then at shelter care the judge can say, "Oh, send her home."

OFFICER SNYDER: Yeah, that should give them enough time to get the cultures back.

APRIL AUKER: Right.

ER 532.

Snyder called his station, and at approximately 12:30 a.m. on the 13th, Detective Dale Rogers of the Boise Police Department was dispatched to St. Luke's. ER 43 (¶ 16), ER 53 (Tr. 75), ER 59 (Tr. 11). He got there about a half-hour later, around 1:00 a.m. ER 59-60 (Tr. 11-12). During the next forty minutes, Rogers did the following things in his "investigation":

* He spoke to Snyder. Snyder briefed him on what had transpired and told

him about his conversation with Auker. SER 01153.

* He spoke to Macdonald. Macdonald told him that "[t]here could be a three to five percent chance this child could have a serious bacterial infection; meningitis or sepsis" and that "[a]s many as 5 out of 100 kids, if they had meningitis and went home untreated, could potentially die." ER 372-73 (Tr. 189, 191).[5] Macdonald also told Rogers that treatment should begin "as soon as possible," but he did not specify any particular time period. ER 372-73 (Tr. 189-

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[5] Thus, Macdonald told Rogers that it was unlikely that Taige had anything serious, and that if she *did* have something serious, it was unlikely that she would suffer a serious consequence as a result. In short, the actual chances of a deadly outcome -- even assuming incorrectly that meningitis is the only kind of serious bacterial infection -- were well below 1%. The court below seemed to reject this interpretation because Macdonald did not testify that he *en haec verba* told Rogers that Taige's chances of death were "5% of 5% or .25%." ER 696 ("There is no evidence in the record that Dr. Macdonald ever used the words `5% of 5%' or `.25%' in talking with Detective Rogers. At most, these figures are teased out of some vague and confusing deposition testimony of Dr. Macdonald"). Plaintiffs had never argued that Macdonald had used those exact words, but Macdonald's testimony was perfectly straightforward, and the conclusion to be drawn from the two statements he testified making to Rogers is one that requires only rudimentary arithmetic skills. (Even if the testimony were vague, any ambiguities had to be resolved in the Muellers' favor.) Contrary to the assertion of the court below (*id.*), Macdonald never denied using any specific words in his conversations with Rogers. ER 372-373 (Tr. 189-191).

The court below did recognize the important distinction between a 3-5% chance of a serious bacterial infection and a 3-5% chance of death (ER 696-97). Thus, if Macdonald had *not* provided any indication of the chances of a serious outcome (as, apparently, the court below believed), it would only make Rogers's decision even less supported since he would then have no idea of how serious a risk Taige faced (other than Macdonald's statement that a child *could* die from an untreated serious bacterial infection, an assertion that could be make about any number of activities from swinging on a playground to crossing the street to being treated with antibiotics).

90). Macdonald and Rogers had this conversation in the presence of Snyder and Green (SER 00347 (Tr. 73-74)), but in a departure from Boise Police Department policy, the officers did not have their belt recorders turned on. SER 00129 (RTA Nos. 6-8); ER 362 (Tr. 25). Macdonald also told Rogers that the risks from the procedures he recommended were "less" than the risks of not doing these procedures. ER 321-22 (¶ 13), ER 67 (Tr. 20).

* Rogers spoke to Auker. He asked her whether the Department was prepared to take custody of Taige and would consent to the treatment Macdonald wanted if he removed Taige from her parents' care. Auker said that the Department was so prepared and would consent to treatment. SER 00131 (RTA No. 16), SER 00145.

* Finally, Rogers also spoke with Corissa. Despite threatening to take her child numerous times, he failed to convince her to consent to the immediate spinal tap and antibiotics. ER 418-19 (Tr. 167-70). Rogers also arranged for Snyder and Green to be on hand when he and Macdonald took control of Taige from Corissa. ER 361 (Tr. 19-20), ER 347-48 (Tr. 58-63).

During those same forty minutes, Rogers did not do the following:

* Though aware that Corissa was married, he did not consider calling (and did not call) Eric Mueller, though he was aware of nothing that would have prevented him from doing so. ER 90-91 (Tr. 76-77); *see also* ER 106-07 (Tr. 116-17) (claiming that city policy required him to deal only with parent present at the scene). And Rogers did not ask Corissa (nor did anyone else ask her) whether Taige's father would consent to the procedures Macdonald recommended. ER 114-15 (City's Response to Plaintiffs' Request to Admit No. 41), ER 6 (¶ 4).[6]

* Rogers never found out from Macdonald how much "less" the risks of treatment were than the risks of non-treatment, nor obtained from him any further idea of the magnitude of the net risk from not doing the procedures. ER 389 (Tr. 34).

* There is no evidence that Rogers ever asked Macdonald what a "serious bacterial infection" was, much less understood the risks that serious bacterial infections other than meningitis might involve. (In fact, most "serious bacterial

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[6] Rogers now claims that he did not consider calling Eric because there was no time to do so and because of Corissa's "adamant" refusal. Rogers Br. 8 (citing ER 503-04 (¶ 4)). He relies on an affidavit submitted on the summary judgment motions that is inconsistent with his deposition testimony. Assuming that it should be considered at all, it obviously does not preclude an issue of fact on this question. Moreover, his affidavit does not explain how he had time to speak with Auker to determine whether the Department would consent to treatment, but no time to speak with Eric Mueller to determine whether he would consent.

infections" are not life threatening at all. Only sepsis and meningitis present very serious threats, and they are among the least common "serious bacterial infections." SER 00253-55, 00258, 00270, 00281.) Rogers also did not speak with any doctors other than Macdonald about Taige Mueller's health, though aware of nothing that would have prevented him from doing so. ER 392 (Tr. 49).

* As noted above, judicial orders for emergency treatment pursuant to I.C. § 16-1616 took about one half-hour to procure over the telephone in Idaho. ER 135 (Tr. 26-28). But Rogers did not attempt to arrange for an on-call judge to order treatment over the telephone. ER 326 (¶ 49), ER 67 (Tr. 20). There is no evidence that Rogers ever asked either Macdonald or Auker why no one had done this at any time *in the three hours* since Taige had been brought into the hospital. (As noted previously, the Department's policy is to use I.C. § 16-1616 in cases where consent is an issue. *See* n.4, *supra*.)

3. The Police Separate Corissa From Taige

Just before 1:40 a.m., Rogers decided to remove Corissa Mueller physically from the room in which Taige was being treated, to take away her and her husband's parental rights, and to give Auker and the Department control over

Taige. Rogers and Macdonald then made a plan to seize Taige. They agreed that Macdonald would take the baby on the pretext of examining her, and that Rogers would then physically keep Corissa away from Taige. ER 394-95 (Tr. 57-58).

Rogers himself had never obtained a court order or court authorization for treatment pursuant to I.C. § 16-1616, ER 390 (Tr. 39), and he did not attempt to do so on August 13, 2002. Instead, as was his inveterate practice (*see* Statement of Facts, Part C, *infra*), he purported to invoke then-Idaho Code § 16-1612(a)(1), which provided that "[a] child may be taken into shelter care by a peace officer . . . without [a court] order only where the child is endangered in his surroundings and prompt removal is necessary to prevent serious physical or mental injury to the child." *See* Statement of Facts, Part A, *supra* & Appendix. Rogers purported to invoke the authority of this statute and "remove" Taige from her "surroundings" at approximately 1:40 a.m. on August 13, 2002. ER 385 (Tr. 14-15). But he did not remove Taige from her surroundings, and she was not taken to shelter care. Indeed, Rogers had no idea whether St. Luke's hospital was a "shelter care" to which a child could be taken pursuant to I.C. § 16-1612. SER 00132-33 (RTA Nos. 20-25).

Nor did Rogers "declare" Taige in "imminent danger" (a phrase that did not

appear in I.C. § 16-1612). The Department deems "shelter care" to be a type of "foster care." SER 00107-08, 00152. When a child is declared in "imminent danger," then they are in "foster care." SER 00010. Taige was not in "foster care" (and thus, not in "shelter care") until approximately 7:00 a.m. on the morning of August 13, 2002. SER 00119-20, 00208 (Verified Petition ¶ 7).

At around 1:40 a.m., as he and Rogers had planned, Macdonald asked Corissa for Taige so that he could examine her. Someone told Corissa that Taige's temperature was 101, and Corissa proceeded to try and contact Erickson to discuss this development and whether it would be appropriate at that time to proceed with either the lumbar puncture or the antibiotics. She never had that opportunity because Rogers blocked her from using the phone. ER 418-19 (Tr. 166-67, 171-72). Snyder and Green, as they had previously planned with Rogers, appeared from around the corner where they had been waiting, out of sight. ER 361 (Tr. 19), ER 347-48 (Tr. 58-63). Rogers physically blocked Corissa from going farther into the examination room, and then Snyder and Green grabbed Corissa's arms, dragged her into the hall, and, first by dragging her and then by keeping their grip on her arms and threatening to handcuff her, forced her to go down the hall about fifty to sixty feet to another, small room. Although upset, Corissa was not

hysterical, and did not scream or yell. She simply asked to use the phone to call her husband. The police did not allow her to do so. ER 26; ER 444 (Tr. 82); ER 395-96 (Tr. 60-63); SER 386 (Tr 171-73).

At no point did Rogers (or anyone else) arrest Corissa pursuant to I.C. § 18-1501. ER 7 (¶¶ 6-7), ER 324 (¶ 41), ER 67 (Tr. 20).

When Rogers invoked then-I.C. § 16-1612, he believed that after he did so, at least until the shelter care hearing, neither Corissa nor Eric Mueller would have the right to be with Taige or direct her care without permission from the Department. Rogers believed that his invocation of then-I.C. § 16-1612 placed Taige Mueller in the custody of the Department. ER 92-93, 104-05 (Tr. 78-79, 111-112); ER 113 (RTA No. 12). He acted accordingly by subsequently refusing to allow Corissa Mueller to be with her child as the procedures were administered, and by doing nothing at all to communicate with Eric Mueller.

Sometime just before 2:30 a.m., Rogers entered the room in which Corissa had been taken by Snyder and Green and gave Corissa a piece of paper with the title "Notice to Court Under 16-1613." ER 6 (¶ 5), ER 12 (notice to Court), ER 323 (¶¶ 27, 31), ER 67 (Tr. 20); ER 548-50. Neither Rogers nor any other

employee of the City of Boise ever served any document on Eric Mueller, or spoke to Eric Mueller about this case before the shelter care hearing. ER 14 (¶ 3), ER 116-17 (RTA Nos. 46-50).

The Notice To Court Under 16-1613 had a caption for the District Court of the Fourth Judicial District of the State of Idaho, In and For Ada County, with a title of *In The Matter of: Taige Mueller*. It stated that "the above-named child was removed by a Peace Office and taken to a place of shelter previously designated by this Court"; Rogers further "certifi[ed] that in accordance with [I.C. § 16-1613(a)(3)], I duly notified the parents, guardians or custodian of the above named child that a Shelter Care Hearing will be conducted by this Court within 48 hours . . . "; and "[b]y this Notice, the parents . . . have been informed of their right to retain and be represented by an Attorney." ER 12. In fact, Rogers had no basis for believing that Taige had been taken to a "place of shelter previously designated by th[e] Court"; and he never served the notice, nor communicated in any way, with Eric Mueller. SER 00132-33, 00138-39 (RTA Nos. 20-25, 46-50).

Shortly after Rogers entered the separate room, Auker entered and asked Corissa if she would consent to the treatment Macdonald recommended. SER 01051 (¶ 17). (It was the practice of the Department in 2002, and is the policy of

the Department today, to seek consent from the parents for medical treatment for children for whom a police officer has invoked Section 16-1612. SER 00036-37, 00096-97, 00161.) Corissa refused to consent at that time because she did not understand why her consent would be needed after Taige had been taken from her. SER 00508 (¶ 12). Although Auker wanted to explain the need for her consent to Corissa, Rogers precluded her from explaining it to her. SER 00545-46, 00551-52, 00556-67; SER 01051 (¶ 17). Auker left the room, and Corissa asked Rogers if she could speak to Auker again. Rogers would not let her, saying, "[Y]ou get one chance at this." ER 85-89.

After leaving the room in which Corissa was being kept, Auker called her supervisor, Barbara Hamon. Hamon told her that her supervisor, Linda Rodenbach, had authorized treatment. SER 00021-22, 00024. Auker then told a nurse that they had consent. ER 127 (Tr. 37-38). None of the procedures that Macdonald recommended and Corissa refused were given to Taige until after approximately 2:38 a.m. on August 13, 2002, about one hour after Rogers separated Corissa and Taige. ER 126, 128 (Tr. 36, 43). The first drug administered was dexamethasone, a steroid. ER 126-28 (Tr. 36-37, 43-44); SER 00077-79. No one had spoken to Corissa about administering steroids to

Taige. SER 00964 (¶ 2), 01138 (¶ 29); ER 377 (Tr. 209).[7]

Auker signed various authorizations for medical treatment: one for the lumbar puncture; one for "regular and emergency medical care and treatment," including any additional care for which she was unavailable to give consent; and one for a "percutaneous transluminal coronary angioplasty and/or coronary stent." SER 00211-16. After signing these consents, Auker returned to her office. SER 00558, 00560, 00732. Macdonald performed the lumbar puncture sometime after 3:06 a.m. SER 00622-23. Rogers, too, left the hospital. SER 00275.

4. Eric Mueller Is Contacted By His Wife

When Corissa was released from the conference room, she was allowed to use the phone, and she did so immediately to telephone her husband to tell him that their daughter had been taken from them. SER 00508 (¶ 13); SER 00802 (Tr. 175-77). This call took place around 3:00 a.m. ER 453 (Tr. 75); Rogers Br. 10,

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[7] Although Auker told the nurse to administer drugs, authorization had not yet been given when she said this, and the administration of drugs to Taige Mueller had to be halted shortly after it began. Such authorization was provided at a few minutes before 3:00 a.m. SER 00585; SER 00498-99 (¶¶ 26-27) & SER 00325 (¶ 12).

Apparently, part of the delay was due to the fact that Rodenbach had asked Hamon to consult with an on-call prosecutor, and have the on-call prosecutor speak with an on-call magistrate. SER 00041, 00583-84. Rodenbach and/or Hamon also consulted with another attorney. SER 00044.

34. Thus, Corissa had been in the room for in excess of one hour.[8]

After receiving this call Eric Mueller called the hospital and demanded to speak with someone. A social worker with the Department, Barbara Hamon, returned his call. ER 263l (¶ 3), SER 00732. Hamon did not ask Eric Mueller if he would consent to the lumbar puncture or the administration of antibiotics. ER 263l (¶ 3). She told him only that the state had taken custody of Taige. SER 994-95 (¶ 2).

If Eric Mueller had been called during the morning of August 13, 2002 to consent to the procedures that Macdonald had recommended, but for which his wife had not provided consent, he would have carefully considered any such

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[8] Rogers relies on Corissa Mueller's initial testimony that she believed that she had called Eric about 30 minutes after Rogers invoked I.C. § 16-1612. He falsely asserts that the court below precluded both Muellers from relying on Corissa's errata sheet, where she expressed some doubt about that estimate, on the summary judgment motions. Rogers Br. 11 & n.2. Rogers simply misrepresents the record on this point. The court below did not resolve the motion to strike errata sheets orally at a hearing. Rather, as the transcript attached to Rogers's "Appendix" demonstrates, the court below took the motion under advisement at that hearing. It subsequently issued an order denying the motion, with conditions irrelevant here. SER 00880-81.

In any event, there is an abundance of evidence that Corissa was kept in the room at least an hour without use of the telephone. She was in the separate room shortly after 1:40 a.m. SER 00133 (RTA No. 26); SER 00386 (Tr. 171-73). Auker did not enter that room to speak with her until 2:30 a.m. SER 01051 (¶ 17); SER 00497-98 (¶ 22) & SER 00323-24. Further, Auker testified that she got permission to proceed with the medical treatment (which began at 2:38 a.m.) right after her "incredibly limited" attempt to talk with Corissa in the separate room. SER 00498 (¶ 25) & SER 00324-25; SER 00545-48, 551-52, 555-57.

request. While he has great respect for his wife's judgment, his primary concern would have been Taige's welfare. Had he been convinced that the treatments in question were in Taige's best interest, he would have granted his permission. SER 00995 (¶ 3). Rogers's efforts to suggest otherwise (Rogers Br. 23-24) involve a misinterpretation of convoluted hypotheticals posed at Eric's deposition. In any event, Rogers obviously did not know anything about Eric when he acted.

After calling her husband, Corissa walked toward the room in which Taige was being treated. Rogers, Snyder, and Green were outside the door. Corissa asked whether she could be present while medical procedures were performed on Taige. Both Rogers and Snyder refused. Snyder and Green, at Rogers's request, then "escorted" Corissa to the hospital lobby. ER 324 (¶¶ 34-35, 37), ER 386 (Tr. 20), ER 306 (¶ 43), ER 351 (Tr. 74-75), ER 556-57. None of the officers ever asked medical personnel or anyone else if Corissa could be in the same room with Taige. SER 00134-35 (RTA Nos. 27-32). Had Corissa been allowed the opportunity to be with Taige on the condition that she not interfere with the medical procedures, she would have agreed to that at once no matter how much she disagreed with the decision to remove her custodial rights. SER 00968 (¶ 16).

After hearing from his wife and Hamon, Eric Mueller went to the hospital.

ER 263l (¶ 4). Sometime between 4:30 and 6:00 a.m., long after Taige had been given the antibiotics and Macdonald performed the lumbar puncture, her parents were permitted to enter Taige's hospital room. SER 00239; ER 336 (Tr. 64). Corissa stayed in that room with Taige for most of the time that Taige remained in the hospital, and Eric Mueller stayed as much as he could under the circumstances. ER 263l (¶ 4); SER 00508-09 (¶¶ 13-14).

Between the time that Rogers purported to invoke former I.C. § 16-1612 and the time that a shelter care hearing was held on August 14, 2002, Eric Mueller did not have physical custody of Taige Mueller, and could not choose her doctor or control her medical treatment. If he had tried to take physical custody of Taige, the Department's policy would have been to call the police to prevent him from doing so. SER 00670-72, 00684-85.

5. The Muellers Recover Custody Of Taige

The results of the lumbar puncture, and all other diagnostic laboratory tests performed on Taige Mueller, were negative for meningitis or any other bacterial infection. SER 01127 (¶ 14), 01107 (¶ 30), 00750, 00312-13.

At the shelter care hearing (under then- I.C. § 16-1614), the court had

authority to order temporary legal custody to the state if it concluded (inter alia) that a petition had been filed, that Taige came within the jurisdiction of the court (under I.C. § 16-1603) and that it was contrary to the welfare of the child to remain in the home. A petition was filed in In re Taige Mueller, SP CP 02 00090 M. SER 00207-10. The case was dismissed on the condition that the Muellers continue to bring Taige to their naturopathic physician (Dr. Erickson) for care. SER 00805. The Muellers did not promise to bring their child to a regular (allopathic) physician, and did not promise to follow all advice given to them by any physician. ER 14 (¶ 4), ER 7 (¶ 8). Taige was returned to the Muellers' custody sometime in the late afternoon or early evening of August 14, 2002. SER 00512 (¶ 4), 00508-09 (¶ 14).

D. Rogers's Previous Invocations Of Section 16-1612

Detective Rogers had acted similarly on a number of other occasions, according to documents, mainly police reports, produced by the City of Boise. They demonstrate that Rogers simply did not seek judicial guidance in such situations, regardless of whether he was reasonably able to do so.

1. For example, a child had been transferred to St. Luke's on November 19,

2000. Five days later, on November 24, 2000, after receiving a referral from the Department, Rogers invoked I.C. § 16-1612 and removed parental custody while the child was still at St. Luke's. SER 00808, 00811-12; ER 173 (Tr. 120).

Although the mother was alleged to have neglected this child at home, and had also allegedly been tested positive for illegal drugs, she was reported to have had "minimal contact" with the child since he had been admitted to St. Luke's. SER 00812. Rogers had no evidence that she had tried to remove the child from the hospital or had done anything deleterious to his treatment since he had arrived at the hospital. He also had no evidence that the child had been scheduled to leave the hospital in the near future. *Id.*, ER 173-74 (Tr. 120-21).

Rogers did not ask anyone at the Department why the Department had waited two days after learning the mother had tested positive for drugs to refer the case to Rogers. ER 173-74 (Tr. 120-21). Rogers did not determine what percentage of risk the child faced, and he had no evidence suggesting that a court order could not be obtained before the mother could pose any threat to the child's health. ER 101-02 (Tr. 98-99).

2. On July 21, 2000, at St. Luke's, Rogers invoked § 16-1612 and removed the custody of a one-year-old child from her mother, who had brought the child to St. Luke's. SER 00816-17; ER 177 (Tr. 130). Doctors felt that the child was not gaining weight properly when at home in the care of its mother. SER 00816-19.

Again, there was no evidence that the child was scheduled to be discharged from the hospital. Although Rogers has since speculated that the mother might have arrived at the hospital and taken the child while a court order was sought, there was no evidence that she planned to do so. Indeed, there was no evidence that the mother was interfering with the child's treatment at the hospital. SER 00814-20; ER 103 (Tr. 100), ER 177 (Tr. 130). Rogers had not obtained any information from the doctor identifying the chances the child would die or suffer serious injury within the next day if the mother's custody was not removed. ER 102 (Tr. 99), ER 175 (Tr. 125). Rogers had no evidence suggesting that a court order could not be obtained before the mother could pose any threat to the child's health. ER 102-03 (Tr. 99-100).

3. In a third case, Rogers took a child from its home in the presence of its mother at the mother's home; the child was sleeping, and a nurse accompanying

Rogers claimed that it had lost weight. SER 00823; ER 98-99 (Tr. 94-95). Neither Rogers nor the nurse asked the mother for consent to any medical treatment before removing the child. SER 00823-24; ER 171 (Tr. 111). Rogers had no evidence suggesting that a court order could not be obtained before the mother could pose any threat to the child's health, though he would have felt it necessary to have the whereabouts of the mother monitored while he did so. ER 99-100 (Tr. 95-96).

4. Finally, in another case, Rogers apparently did not invoke former § 16-1612, but he did prevent parents from seeing their child or directing her medical care; specifically, Rogers, concerned that a father would leave the hospital with his child against medical advice, cut the father's wrist band that gave him access to the nursery and threatened to charge the father and take his baby into custody. According to the Department social worker, the worry that the child's parents were about to leave the hospital against medical advice was due to a miscommunication between hospital staff and the parents. SER 00835-36, 00845.

E. The Decisions Of The Court Below

In its April 2005 decision resolving defendants' various motions attacking

the pleadings, the court below correctly held that "[t]he Supreme Court has long protected, under substantive due process principles, the integrity of the family unit and the right of parents to raise their children." SER 01072. It further stated that "[p]arents have a fundamental liberty interest in the care, custody, and control of their children, . . . [which] encompasses `the right of parents to make important medical decisions for their children.'" *Id.* (*quoting Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). The court below held that the Muellers' allegations that defendants unreasonably determined imminent harm prior to the removal of the Muellers' parental rights, and their failure to even attempt to obtain judicial authorization under I.C. § 16-1616, had stated a claim that defendants violated those rights. SER 01073. For the same reason, the Court held that the Muellers adequately alleged a seizure of Taige Mueller in violation of her Fourth Amendment rights. SER 01076.

In February 2007, the court addressed the parties' motions for summary judgment. After concluding that "[t]he evidence shows that Corissa and Eric Mueller are loving parents who at all times had the best interests of Taige in mind" and that "[t]here is absolutely no evidence of abuse or neglect, and no allegation that either parent was in any way unfit" (ER-707), the court below addressed the

legal standard. The court concluded that each of the parents and the State had interests in the welfare of a child, but that "[t]he parents' rights and the State's duty are not necessarily equal in strength" (ER 708). Specifically, when fit parents like the Muellers "decline medical treatment for their minor child, the Due Process Clause clothes them with a presumption that they are acting reasonably" (ER 709). The court concluded that "the State cannot carry its burden where the risk of harm is slight" (*id.*); and, further, "[a] difficult choice -- a choice that poses risks either way -- should never trigger intervention by the State." ER 710. Parents do not lose their right to make a medical decision on behalf of their child unless "considering all circumstances in a particular case, no reasonable parent would decline treatment." ER 711.

The court then considered the requirement of a judicial hearing, and ruled that it was subject to a "very limited exception" applicable only when the child was in imminent danger of serious bodily injury. "Without imminent danger, the officer cannot make the decision. A judge must be called." Accordingly, the court held, "the officer's threshold task is to determine whether there is time and means to contact a judge." ER 712.

The court further concluded that "the common meaning [of imminent

danger] has both a time and probability component. It means that a danger is likely (the probability component) to occur at any moment or immediately (the time component)." The court further explained: "The probability component requires the officer to determine whether the injury is likely to occur." ER 713. In assessing whether a judicial hearing is required, "the police officer must independently assess all relevant factors, including risk" and "cannot give a physician or other medical expert a `doctor's veto' by relying entirely on the physician's recommendation . . . " (ER 714). The court identified various considerations that a state official must weigh in assessing whether a child is in imminent danger of serious bodily injury. ER 715.

The court below also rejected Rogers's argument that he was precluded from using I.C. § 16-1616. That statute does not prohibit police from using it, the court held, and principals of statutory contruction require that it be interpreted to permit them to use it. ER 718-19.

In assessing whether Rogers had properly believed that Taige Mueller was in imminent danger of serious bodily injury, the court below found that "[i]t was undisputed that Detective Rogers never inquired any further into the risks of treatment" after hearing that they were less than the risks of foregoing treatment.

ER 725. That is, he did not know how much less those risks were. *Id.* ("He had no idea whether the two risks were similar enough that he should ignore Dr. McDonald's advice"). Nonetheless, the court concluded that "whether Detective Rogers had reasonable cause to believe that Taige was in imminent danger is a question of fact for the jury." ER 726. *See also* ER 728 (for same reason, issue of fact on whether substantive due process rights were violated).

The court next turned to the lack of any notice to Eric Mueller, finding that "Eric was ignored twice by Detective Rogers," once when he was considering depriving him of custody of his daughter and once after the police had deprived him of custody of his daughter. Finding that the reasons profferred by Rogers did not justify the failure to provide him with notice, the court concluded that Rogers violated Eric's procedural due process rights.

After concluding that Rogers had not violated Corissa's Fourth Amendment rights by confining her in a room (ER 729-30), the court proceeded to consider whether Rogers was entitled to qualified immunity. The court concluded that Rogers was entitled to qualified immunity with respect to his declaration that Taige Mueller was in "imminent danger" because there was no clearly established law to guide him. ER 732. He also concluded that the confinement of Corissa

was protected by qualified immunity even if it was a mistake. ER 733. However, the court below concluded that Rogers was not entitled to qualified immunity for his deprivation of Eric Mueller's right to notice because the right to such notice was clearly established under *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000). ER 733.

Rogers and the City moved for reconsideration in March 2007. In resolving that motion in the June 2007 Order, the court reiterated that Rogers had violated Eric Muellers' right to notice. It rejected Rogers's arguments that (1) the right to notice only applied to investigatory physical examinations, and (2) notice to Corissa Mueller was adequate to notify Eric. It also specifically held that Eric's entitlement to notice was based upon the requirement in *Wallis* that a state official make a reasonable investigation and the right of parents and children to be together during medical procedures performed on the child. ER 759-61.

Also in March 2007, plaintiffs moved for separate trials under Rule 42 so that a trial could be held on claims that were not subject to any appeal (*e.g.*, those against Macdonald, St. Luke's and the City). That motion remains pending as of this time. ER 803 (Doc. No. 314 dated 6/25/2007) (court cancels conference to set

trial due to pending motion for separate trials).[9]

Summary of Argument

When Rogers deprived Eric and Taige Mueller of Eric's ability to control Taige's medical treatment, he had never met Eric. Nor had he ever spoken with him, although Eric's telephone number was easily available to Rogers. As far as Rogers knew, Eric was a perfectly fine parent who had never done anything to endanger either of his two children. In depriving Eric of his parental rights, Rogers employed an obviously inapplicable statute, having nothing to do with medical emergencies. He failed to follow the mandates of that statute (as he concedes, *see* Rogers Br. 33 n.3), and he misrepresented his actions in a court filing.

Rogers claims he did so because he believed that a doctor wanted to perform some diagnostic and prophylactic treatments on Taige on the *very* small

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[9] As this Court knows, plaintiffs subsequently moved to dismiss the claims against Rogers in order to eliminate any need for this appeal and thus expedite a trial of all remaining claims. ER 804 (Doc. No. 326). It also moved in this Court for a limited remand so that any doubts concerning the district court's jurisdiction to consider that motion would be removed. *See* Ninth Cir. Docket. Rogers opposed all of plaintiffs' efforts to dismiss these claims, and the appellate commissioner denied plaintiffs' motion for a limited remand without prejudice should the district court indicate that a remand would be useful. As of this date, the district court has not acted upon plaintiffs' motion to dismiss the claims against Rogers.

chance that she *might* have some illness, the consequences of which Rogers was only vaguely aware. He argues that he not only had the right to deprive Eric Mueller of his rights, but he had no obligation to contact Eric before or after doing so. But the law is clear that (1) even if a child is in imminent danger of serious bodily injury, the state must minimize the intrusion into the parents' rights and (2) a parent has the right to be with his child during medical treatment, and a child has the right to have his or her parent there for comfort and support. Although this is true of *any* parent, it is particularly so for a non-negligent parent. The right to be together during medical treatment is meaningless if the state can pursue medical treatment for a child and need not even bother to take simple steps to apprise the parent of its intentions.

As a consequence of Rogers's conduct, a nurse administered steroids and antibiotics to Taige Mueller through an IV. A lumbar puncture -- a procedure whereby a needle was stuck into her spinal cord and fluid removed -- was performed on her. Eric had no say in the decision to treat Taige in that fashion and was not there to comfort her when the procedures were performed on her. Rogers violated Eric's clear rights, and the court below correctly so found.

Finally, much of Rogers's argument is that there is no "notice right" when a

child is in "imminent danger" of serious bodily injury. *E.g.*, Rogers's Br. 18-19. While this legal standard is wrong, it would not matter if it were otherwise. When the factual disputes are resolved against Rogers, it is quite clear that Rogers had no reasonable basis for believing that Taige Mueller was in "imminent danger" of serious bodily injury, and Rogers should not have been granted qualified immunity for any of his acts.

Argument

Rogers's motion for summary judgment relied upon the defense of qualified immunity. Accordingly, because it is an affirmative defense, he bore the burden on summary judgment of showing that his evidence would entitle him to a jury verdict if uncontested. *E.g.*, *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992). Even where movants have met their initial burden, the standard on a summary judgment motion requires that all factual disputes, and all inferences from undisputed facts, be resolved in favor of the non-moving party. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 604-05 (9th Cir. 2005). A party that fails to object to evidence in the lower court cannot complain of its admissibility on appeal. *E.g.*, *Federal Deposit Ins. Corp. v. New Hampshire Ins. Co.*, 953 F.2d 478, 485 (9th Cir. 1992).

A denial of summary judgment is reviewed *de novo*. *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1033 (9th Cir. 2007). As described earlier, *see* Statement of Jurisdiction, *supra*, this Court limits its review to the question whether, assuming all conflicts in the evidence are resolved in the non-moving party's favor, the movant would be entitled to qualified immunity as a matter of law. *Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004). "The qualified immunity inquiry involves two sequential questions. First: `[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?' . . . Second: `if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step, is to ask whether the right was clearly established . . . in light of the specific context of the case.' *Id.* at 934-35.

II. THE COURT BELOW PROPERLY DENIED ROGERS'S MOTION FOR SUMMARY JUDGMENT

The rights of familial association are both hoary and fundamental, so much so that they have met the exacting standard that the Supreme Court has set for heightened scrutiny of such interests. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case -- the interests of parents in the

care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (to be recognized by the Court for heightened scrutiny, an asserted "fundamental liberty interest" must be "`deeply rooted in this Nation's history and tradition,'" and "`implicit in the concept of ordered liberty,'" so that " `neither liberty nor justice would exist if [it] were sacrificed.'"). Accordingly, "there is a presumption that fit parents act in the best interest of their children." *Troxel*, 530 U.S. at 68.

In *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000), this Court made it clear that the "right [of parents and their children to live together without governmental interference] is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law, except in an emergency." *See also, e.g.*, *Mabe v. San Bernardino County, Dep't of Public Social Services*, 237 F.3d 1101, 1107 (9th Cir. 2001) ("The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies."). Because the presence of an "emergency" is an exception to the general rule that a notice and hearing are required -- just as the presence of exigent

circumstances presents an exception to the Fourth Amendment warrant requirement for searches -- the burden is on the government to demonstrate that such circumstances existed. *E.g.*, *United States v. Reid*, 226 F.3d 1020, 1028 (9th Cir. 2000) ("`[t]he government bears the burden of showing the existence of exigent circumstances by particularized evidence.'. . . This is a heavy burden and can be satisfied `only by demonstrating specific and articulable facts to justify the finding of exigent circumstances.'" quoting *United States v. Tarazon*, 989 F.2d 1045, 1049 (9th Cir. 1993) and *LaLonde v. County of Riverside*, 204 F.3d 947, 954 (9th Cir. 2000)); *O'Donnell v. Brown*, 335 F. Supp. 2d 787, 804 (W.D. Mich. 2004) ("It is the government's burden to overcome the presumption that a warrantless entry [to check on children left home alone] was unreasonable within the meaning of the Fourth Amendment by establishing the exception"); *id.* at 821 (failure of government to show exigent circumstances also demonstrated that there was no compelling interest sufficient to overcome the liberty interest in familial association).

In *Wallis*, this Court set forth the two-part test for determining whether the state has properly met this burden: the state may seize a child from the custody of his parents without prior judicial authorization "only if the information [state

officials] possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." *Wallis*, 202 F.3d at 1138. The standards for assessing the propriety of a seizure of a child under the Fourth Amendment are the same. *Id.* at 1137 n.8.

This Court continued:

> Moreover, the police cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued, particularly where it is not clear that a crime has been -- or will be -- committed . . . Whether a reasonable avenue of investigation exists, however, depends in part upon the time element and the nature of the allegations.

Id. This Court also held that the rights of both custodial parents must be respected:

> We note that the claims of each family member must be assessed separately. Here, nothing in the record before us suggests that [plaintiff] was anything other than a fit and loving mother. As the Third Circuit recently held, a state has no interest whatever in protecting children from parents unless it has some reasonable evidence that the parent is unfit *and* the child is in imminent danger . . . The government may not, consistent with the Constitution, interpose itself between a fit parent and her

> children simply because of the conduct -- real or imagined -- of the other parent.

Id. at 1142 n.14 (emphasis added). *See also id.* at 1140-41 ("the police had no information whatsoever that implicated the children's mother in any past or future abuse. . . A genuine issue of material fact exists therefore as to whether the removal of the children from their mother's custody, . . . was sufficiently `strictly circumscribed by the exigency that justified' the City's intrusion into the children's lives.").

Finally, this Court identified two other rights of families relevant here. First, "[t]he right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Id.* at 1141. Second, "parents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention . . . . Likewise, children have a corresponding right to the love, comfort, and reassurance of their parents while they are undergoing medical procedures, including examinations -- particularly those . . . that are invasive or upsetting." *Id.* at 1142.

A. Rogers Violated Eric Mueller's Constitutional Rights

When Rogers gave control of Taige Mueller to the Department, he deprived both Taige and Eric (at least) of their rights of family association. Even if we assume (contrary to both fact and law) that Rogers reasonably believed that Taige Mueller was in imminent danger of serious bodily injury, the second part of the constitutional test required that Rogers intrude into the Muellers' rights only to the extent *necessary* to eliminate that alleged danger.

It was not necessary for Rogers to place the Department in charge of Taige Mueller's medical care instead of Eric Mueller, and it was not necessary for him to preclude Eric from having any reasonable opportunity to be with Taige during the procedures that were performed on her. In any event, Rogers had no way of knowing whether it was necessary because he never bothered to give Eric Mueller notice, either before or after he decided to separate Taige and Corissa.

The *Wallis* Court also held that absent an "urgent medical problem . . . requiring immediate attention, the state is required to notify parents . . . before children are subjected to investigatory physical examinations." *Id.* at 1141. This holding was based on the fundamental rights of parents to make medical decisions for their children and for families to be together during medical procedures. *Id.* at 1135 ("[T]he parents [were not] notified in advance that the examinations would

be conducted. They were not given any opportunity to object to the intrusive examinations, to suggest conditions under which they might take place, or to be present when they occurred."). It was also based on Fourth Amendment interests in bodily integrity that parents are entitled to assert on behalf of their children. *Id.* at 1141. From the holding in *Wallis*, the court below concluded that Rogers was under a duty to provide notice of impending medical procedures to Eric Mueller, both before and after the seizure of Taige Mueller. ER 716.

1. Pre-Deprivation Notice

Rogers argues that the court below erred in finding that he violated Eric's rights to pre-deprivation notice because (1) *Wallis* was limited to investigatory exams that were not medically necessary, and no notice is thus required in instances where there was an "urgent medical problem" (Rogers Br. 17-20), (2) procedural due process only requires post-deprivation notice (Rogers Br. 20-21), and (3) logistical concerns rendered such notice impractical (Rogers Br. 23-24).

The fact that the medical procedure in *Wallis* was an investigatory procedure was irrelevant to the analysis there. The right to make medical

decisions for one's child and to be present when the child is undergoing a medical procedure are general rights that parents have; there is no reason these rights should be dependent upon the type of procedure being administered, and Rogers offers none.

Rogers's claim that an "urgent medical problem" somehow eliminates the need for notice (Rogers Br. 20) turns *Wallis* on its head. The second part of the *Wallis* test requires that the intrusion by the state into a family's rights be the minimum reasonably necessary to eliminate a danger of a serious bodily injury. For the reasons described above, notice to the parents is needed in order to effect that goal of limiting the intrusion. Rogers essentially argues that the two-part test does not apply in cases of a medical emergency; that is, he suggests that if the "imminent danger of serious bodily injury" is caused by a medical problem, the second part of the test drops out entirely. Nothing in *Wallis* or any other case suggests that that is true. To the contrary. *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007) (citing the basic test from *Wallis* in a case of alleged medical neglect).

The "urgent medical problem" language from *Wallis* was not intended to modify the basic test, but rather simply to acknowledge that an urgent medical

problem *might* preclude notice under some circumstances. Plainly, those circumstances were not present here, especially given the long period of time between Taige's first arrival at St. Luke's (at a little after 10:00 p.m. on August 12) and the time when treatment was actually approved (at a little before 3:00 a.m. on August 13). Rogers had Eric Mueller's phone number and could have called him at any time.[10]

Rogers's argument that "[t]here is no right to procedural due process when the state has not yet determined whether to act" (Rogers Br. 21) is wrong. Rogers had a duty to inform Eric Mueller that he was contemplating seizing his daughter both because he had a duty to assess the rights of each parent separately and because he had a duty to pursue reasonable avenues of investigation. ER 760 (*citing Wallis*, 202 F. 3d at 1138, 1142 n.14). He could not assess Eric Mueller's rights separately if he never spoke to him, or at least attempted to do so, and, as the court below found, one reasonable avenue of investigation "would have been to call the father for information as well as notice." *Id.* Nor is it reasonable (as

[10] To see the error of Rogers's argument here, one need only consider the situation where a babysitter or other caregiver has brought the child into the hospital, and then gives the authorities the parents' telephone number. The notion that the state could then take custody of the child and not even notify the parents of that fact, so that they could either have a say in the procedures to be performed or be with their child during those procedures, is absurd.

Rogers urges) to limit *Wallis*'s separate-assessment requirement to situations where both parents are in the physical presence of the investigating officer. Throughout Rogers's investigation, Eric Mueller was only a phone call away.

Rogers asserts that "[t]his Court has recognized, both before and after its holding in *Wallis*, that there are situations where it is permissible to remove children from the custody of both parents where only one parent is suspected of abuse/neglect" (Rogers Br. 23), citing only *Baker v. Racansky*, 887 F.2d 183 (9th Cir. 1989). *Baker* held no such thing. It held only that the social workers there were entitled to qualified immunity because there was no binding precedent at that time clearly establishing when a child could be taken into temporary protective custody. *See, e.g.*, *Calabretta v. Floyd*, 189 F.3d 808, 814 (9th Cir. 1999) (distinguishing *Baker* on exactly that ground, and noting the development of the law in the Ninth Circuit since that time).

Finally, Rogers's attempts to justify his conduct because of the logistical concerns "in removing Taige from her mother's arms" (Rogers Br. 23) also fail. Rogers had the same logistical concerns in the actual event, and he managed to overcome them (with Macdonald's help) quite easily. Moreover, if Rogers deemed Corissa's presence at the hospital an obstacle to procuring effective consent from

Eric, he could have simply arrested her for violating I.C. § 18-1501 and removed her from the hospital.

Rogers misleadingly asserts that "Condon, the hospital's social worker, explained that even if Eric had provided consent, . . . the hospital would have to follow Corissa's wishes, because she was the present parent, and had physical custody of Taige." Rogers Br. 8-9. Given the context (in the Statement of Facts), one might believe that Condon had explained this to Rogers on August 13, 2002. In fact, as the record shows, Condon was explaining why *he* did not call Eric Mueller. Thus, he "explained" this view several years after the fact to a room full of lawyers -- all of whom presumably knew better. I.C. § 39-4503(d) (consent may be given for someone incapable of giving it by "*a* parent of such person") (emphasis added); I.C. § 39-4303(a) (repealed 2005) ("any competent parent"); *Neff v. St. Paul Fire & Marine Ins. Co.*, 304 Ark. 18, 21, 799 S.W.2d 795, 797 (1990) ("[i]n health matters generally, *either* parent's consent is sufficient") (emphasis in original). There is no evidence that Rogers investigated whether the hospital would have performed the procedures or not. Moroever, he did not know whether Eric Mueller would have persuaded his wife to consent; he never even asked Corissa that question. ER 114-15 (RTA 41), ER 6 (¶ 4).

2. Post-Deprivation Notice

Even if Rogers had no obligation to notify Eric Mueller prior to seizing his daughter, he certainly had one afterwards, when it was quite clear that some kind of procedure would be performed on Taige. *Wallis*, 202 F.3d at 1141 (state is required to notify parents before physical exam). Nonetheless, Rogers claims that (1) procedural due process requires only notice of the impending hearing and not impending medical procedures (Rogers Br. 27-29), (2) he had nothing to tell Eric because the Department was in charge of making medical decisions (Rogers Br. 31), (3) his notice to Corissa was adequate to notify Eric (Rogers Br. 33), and (4) the Department gave notice to Eric (Rogers Br. 32-33). These reasons provide no justification for Rogers's failure to provide post-deprivation notice.

Rogers's first argument is that "the right to be present [at a medical procedure] does not equate to a legal right which required Rogers to personally give Eric notice" (Rogers Br. 29). He then offers several ways in which the facts in *Wallis* (where the right to be present was recognized) differ. These are distinctions without a difference. The only facts that matter are that Rogers believed that the State would consent to medical procedures and that he had ample time to call Eric and tell him that. As Rogers concedes, the discussion in *Wallis*

regarding the familial right of association during medical procedures "elaborate[d] on the *liberty interest* giving rise to prior notice." Rogers Br. 30 (emphasis added). He offers no reason Eric's and Taige's interest in Eric being present at his daughter's bedside should have been taken from them without any due process at all when it could have been preserved with a simple telephone call. In the end, Rogers concedes that "this Court has apparently concluded [presumably in *Wallis*] that Eric was entitled to immediate, personal, post-deprivation notice from Rogers." Rogers Br. 32.

Rogers next argues that he was not obligated to give notice to Eric Mueller because custody had been transferred to the Department and he "did not have any information to convey to Eric Mueller regarding what treatment would be performed or when it would occur." Rogers Br. 31. Of course, this argument is inconsistent with Rogers's assertion that he had no time to call Eric prior to his so-called "imminent danger" declaration because "he knew he was running out of time for Dr. Macdonald to begin treatment." Rogers Br. 37. Rogers was well aware that a spinal tap was about to be performed on Taige, and antibiotics administered to her; to ensure that such procedures would be performed in the near future was (on his own account) the very reason he had just seized Taige, after

receiving assurances from Auker that the Department was prepared to consent to these procedures if he transferred custody of Taige to it. SER 00131 (RTA No. 16), SER 00145. And if Rogers was not confident that the Department would consent to the procedures that Macdonald wanted to perform, then he had no reason to seize Taige in the first place (since he could only do that which was reasonably necessary to avert the alleged danger of a serious bodily injury).

Rogers's last two arguments, regarding proper notice being provided by Corissa or the Department, are just a variation on his first argument that notice need only be given of the impending hearing, and not the impending medical procedures. (He does not argue that the notice provided by anyone else would have been adequate to allow him to attend to his daughter, since they came far too late for that.) For the reasons given above, he is wrong.

B. Rogers Is Not Entitled To Qualified Immunity

If the law was clearly established such that a reasonable official in Rogers's position would have understood that his conduct was unlawful, then he is not entitled to qualified immunity. There need not be a precedent with exactly the same facts. *See, e.g.*, *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1297 (9th

Cir. 2007) (officers were not entitled to qualified immunity where they removed children from their parents' custody and control without a court order in a case of alleged medical neglect; "it is not necessary that a case be on `all fours' with the facts of the instant case").

Rogers' argument that he is entitled to qualified immunity even if his failure to give Eric notice violated the constitution revolves primarily around his contention that the court below concluded that Rogers was otherwise entitled to qualified immunity in separating Taige and Corissa. Rogers Br. 36 ("The procedural due process and substantive due process rights at issue in this case spring from a single decision"). But there was more than one decision. Not only did Rogers separate Corissa and Taige, he *also* failed to allow Corissa to be with her child and did not provide Eric with the notice needed to separately assess Eric's rights and permit him to attend to his daughter during medical procedures. Not only did Rogers need to determine whether Taige was in "imminent danger of serious bodily injury," he *also* had to determine whether his actions (including ignoring Eric Mueller's rights) were reasonably necessary to avert that alleged danger. The "decision not to call Eric" did not "necessarily flow[] from the declaration of imminent danger." *Id.* The *separate* rights were established in

Wallis. While, of course, the facts in *Wallis* were not precisely the same as the facts here, that case nonetheless set forth legal standards that any reasonable official would have understood required Rogers to acknowledge Eric Mueller's separate interests and rights.

Of course, to the extent that Rogers's violations of the law were *broader* than recognized by the lower court -- if, for example, as the Muellers believe, he simply violated Eric's rights to substantive due process by ignoring him entirely -- that would not entitle him to qualified immunity on the question of whether he violated Eric Mueller's procedural due process rights to notice. Rogers should not benefit if the court below interpreted Eric's rights too narrowly.

III. IF THE ISSUE BEFORE THIS COURT IS "INEXTRICABLY INTERTWINED" WITH ROGERS'S DECISION TO REMOVE TAIGE FROM HER PARENTS' CONTROL, THEN THIS COURT HAS JURISDICTION OVER THE ORDER GRANTING ROGERS QUALIFIED IMMUNITY AND SHOULD REVERSE THAT ORDER

If Rogers were correct that the part of the February 2007 Order granting him qualified immunity for removing Taige Mueller from her mother's control is "inextricably intertwined" with the issue properly here on appeal, then this Court would have jurisdiction over that part of the order as well. It should then reverse

that part of the order.

The court below concluded that there were issues of fact over whether Rogers violated the Muellers' rights in invoking I.C. § 16-1612. It nonetheless granted Rogers qualified immunity because it believed that the law was unclear about the factors that needed to be weighed in determining whether a child is in "imminent danger of serious bodily injury," such that Rogers was reasonable in separating Taige and her mother even if Macdonald told him only that there were a 3-5% chance of a serious bacterial infection.

With the facts interpreted in the Muellers' favor, Macdonald told Rogers either that (a) Taige had a very small chance of a serious outcome, far below 1%, or (b) a child in Taige's condition "could" die, and provided no assessment at all about the likelihood of that possibility. *See* discussion *supra* at 18-19. In either case, no reasonable official could have believed that such a remote chance of a serious outcome could be "imminent danger of a serious bodily injury."

The word "imminent" means "likely to happen without delay; impending; threatening" (Webster's New World Dict., 3d college ed., 1991) or "likely to occur at any moment, impending" (The Random House College Dict., revised ed., 1975).

That is its use in common language and in the law. If a weather forecast calls for a 5% chance of rain in the next hour, no one would say that there is an "imminent danger" of rain. *See also, e.g.*, *Roska ex. rel. Roska v. Peterson*, 328 F.3d 1230, 1245 (10th Cir. 2003) ("notice and a hearing are required before a child is removed `"except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event"' . . . `Valid governmental interests' include `emergency circumstances which pose an immediate threat to the safety of a child' . . . [T]he `mere possibility' of danger is not enough to justify a removal without appropriate process" (citations omitted)); *O'Donnell v. Brown*, 335 F. Supp. 2d 787, 805 (W.D. Mich 2004) (fact that small children were left home alone with twelve-year old in charge did not constitute "exigent circumstances" permitting policemen's entry into home; "[t]hese facts perhaps raise reasons for concern, but they do not reach to the level of exigent circumstances to support a warrantless entry" that resulted in the removal of the children); *id.* at 821-22 (for the same reason, policemen interfered with familial relationship and violated Due Process). *See also, e.g.*, *Millslagle v. State*, 81 S.W.3d 895, 898 (Tex. Ct. App. 2002) (ingestion of metamphetamine and leaving three year old child in truck alone was insufficient to constitute endangering a child; "a person must place the child in *imminent* danger of death, bodily injury, or

impairment. `Imminent' means `ready to take place, near at hand, impending hanging threateningly over one's head, menacingly near . . . It is not sufficient that the accused placed the child in a situation that is potentially dangerous" (emphasis in original)); *Broussard v. State*, 827 S.W.2d 619, 622 (Tex. Ct. App. 1992) (person could not be committed unless danger to others was "likely or a clear imminent risk. Bare psychiatric expert opinion of a `potential danger' to others is insufficient to support a commitment"); *In re Moore*, 14 Pa. D & C.3d 655, 1980 WL 936 (Ct. Common Pleas 1979) (court appoints guardian ad litem for schizophrenic who had an ulceration of the leg because "a further delay in appropriate medical treatment is *likely* to result in a life threatening situation. The onset of gangrene is imminent, with a resultant loss of the leg or death." (emphasis added)); *Zukor v. Commonwealth of Virginia Dep't of Social Services*, 52 Va. Cir. 2001, 2000 WL 1210507 (Cir. Ct. 2000) (had child protective services agency "determined that [child] was being subjected to imminent harm (irremediable injury would be likely to result if she were left in the custody of her parents), the Department could have taken action to obtain a preliminary protective order . . . or removed the child . . . ."). *Cf. Crowley Marine Services, Inc. v. Maritrans, Inc.*, 447 F.3d 719, 724 (9th Cir. 2006) (under the collision avoidance rules for sea navigation, "`it is not necessary for a collision to be imminent or even probable

before the obligation imposed by them accrues . . . There is a danger or risk of collision whenever it is not clearly safe to go on'") (*quoting Ocean Marine Ltd. v. United States Lines Co.*, 300 F.2d 496, 499 (2d Cir. 1962)).

The court below correctly concluded that the concept of "imminent danger of serious bodily injury" has a "probability component" requiring that the serious injury be likely to occur. But it erred in believing that this interpretation of a common English word was either new or groundbreaking. *E.g.*, *Alabama Disabilities Advocacy Program v. Nachman*, 969 F. Supp. 682, 697 (M.D. Ala. 1997) ("The Court finds it helpful to divide the concept of `imminence' into two components, probability and timeliness. An injury will be `imminent' if it is both highly probable and temporally near.").

While the degree of probability needed for an event to be "imminent" might differ somewhat in different legal contexts, the cases all agree that an event that has only a small chance of occurring is *never* "imminent." In *Rogers v. County of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007), this Court rejected qualified immunity for officers who removed children from their parents' custody without a court order, where the parents were about to take their children (three and five years old) to work and lock them in a room. Although the court recognized that

the children could be injured there -- indeed, the three year had a large scratch on her face from a fall off a chair at the parents' workplace (*id.* at 1292) -- the Court nonetheless held that "the chances of accidental injury or of a fire breaking out at the Rogerses' workplace during the few hours that it would take [the police officer] to obtain a warrant were very low. So remote a risk does not establish reasonable cause to believe that the children were in immediate danger." *Id.* at 1295.

So, too, the chances of anything happening to Taige were "very low." Under those circumstances, it was the Muellers' right to determine whether the diagnostic test and prophylactic treatment recommended by Macdonald were appropriate for their daughter. Rogers violated their clearly-established rights in precluding them from making that decision. *A fortiori*, he violated Eric Mueller's clearly-established right to notice before the state performed invasive medical procedures on his infant daughter.

Conclusion

For the foregoing reasons, this Court should affirm the judgment of the Court below.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced (Times New Roman 14-point), and contains 13,518 words exclusive of tables, this certificate, the cover, and the proof of service.

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Statement Of Related Cases

To the knowledge of plaintiffs-appellees, there are no related cases pending in this Court.

Certificate Of Service And Filing

I hereby certify that I served two copies of the foregoing Plaintiffs-Appellees' Brief by commercial carrier for service within three calendar days on December 6, 2007 addressed as follows:

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Pursuant to Rules 25(a)(2)(B)(ii) and 26(d) of the Federal Rules of Appellate Procedure, I also certify that, on December 4, 2007 I will dispatch an original and fifteen copies of this brief to the Clerk of the Court by a commercial carrier for delivery within three calendar days.

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