

No. 00-01749

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2000

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CITY OF DAVIS,

Davis Child Protective Services,  
Eunice Memorial Hospital,  
Officer R.P. Coltrane, Felicia Ferguson,  
Mario Pistone, Ph.D., Lena Rozas,  
Rodes Harlin, M.D., Henry Cherry, M.D.,

Petitioners

v.

Andrew and Amy SPARKS,

Respondents

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

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BRIEF FOR THE PETITIONERS

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## QUESTIONS PRESENTED

1. Does the Fourteenth Amendment Due Process right to family association include a parent's right to accompany and comfort his/her child during invasive medical examinations, even in cases of suspected child abuse?
  
2. Is "custom" a valid ground for municipal liability under 42 U.S.C. § 1983 in light of the Supreme Court decisions subsequent to *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978)?

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BRIEF FOR THE PETITIONERS

## STATEMENT OF THE CASE

Six-year-old Kirsten and four-year-old Tate allegedly suffered both physical and sexual abuse at the hands of their father, Andrew Sparks, while their mother acted as an accomplice. Outward signs of abuse included Tate's bruised face and injured arm and Kirsten's highly agitated behavior.

On September 20, 1998, Davis Child Protective Services (DCPS) received enough information regarding the suspected abuse of Kirsten and Tate Sparks to form an emergency response unit on their behalf consisting of Lena Rosaz, the emergency social response worker, Officer R.P. Coltrane, and District Attorney Gary Ransdall.

On September 22, 1998, Ransdall told Rosaz that the city "had enough to pick up the kids" but did not mention that a petition had been filed to that effect. Rosaz, however, told Coltrane that Ransdall had acquired a court order to remove the children from parental custody. Customarily relying on the telephone representation of a court order, Coltrane removed Kirsten and Tate Sparks from the Sparks' home at 1:00 a.m. on September 22.

On the afternoon of September 23, both children received internal cavity exams designed to identify signs of sexual abuse. The emergency response unit did not notify Amy and



Andrew Sparks of the exams and neither parent was present during the investigative procedure.

Respondents Amy and Andrew Sparks initiated this action against Petitioners in the District Court for the Western District of Davis under 42 U.S.C. § 1983 alleging, inter alia, the violation of the Fourteenth Amendment Due Process Clause. Petitioners moved for directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure upon the grounds that the city could not be held liable under § 1983. Petitioners first argued in the District Court that the liberty interest in family association is not broad enough to allow parental presence during evidentiary exams of potential child abuse victims. Therefore, denying this opportunity would not result in the deprivation of a constitutional right required for action under § 1983.

Respondents Sparks maintained that the right to family association is broad enough to include the right of parents to be present during invasive medical exams, and the City deprived them of this interest protected by the Fourteenth Amendment's Due Process Clause.

Petitioners further argued in support of their motion for directed verdict that even if the court found that the right to family association did include the right to be present at the medical exam of a potentially abused child, the City could not

be held liable; the constitutional deprivation did not result from a municipal policy. Respondent replied that the city is liable under § 1983 due to the police's "custom" of removing allegedly abused children from parental custody before seeing a properly executed court order.

The District Court granted Petitioner's motion for directed verdict, finding that the respondents failed to demonstrate a deprivation of constitutional rights and failed to show that this supposed deprivation resulted from a municipal policy, as opposed to an informal custom.

The United States Court of Appeals for the Sixteenth Circuit reversed the decision of the District Court, finding that petitioners had been deprived of the constitutional right to family association and held the City of Davis liable under § 1983 despite the fact that the deprivation resulted from an unofficial custom.

Petitioners filed a petition for a writ of certiorari, which this Court granted on August 16, 2000.

### SUMMARY OF THE ARGUMENT

The Fourteenth Amendment Due Process right to family association does not include a parent's right to accompany and comfort his/her child during invasive medical examinations in cases of suspected child abuse. The right to family association is not absolute. To uphold a parent's right to family association in this case, the Court must find that there is no compelling State interest to protect the health and well-being of allegedly abused children to outweigh the liberty interest of parents to care for their children. The Court must also find that there are no emergency circumstances that would further limit parents' constitutional rights.

If the Court should find the right to family association to include a parent's right to be present during investigative medical examinations, deprivation of this right under "custom" alone is not valid grounds for municipal liability under 42 U.S.C. § 1983 in light of the Supreme Court decisions subsequent to *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). In order to abate the problem of growing municipal liability for cases outside a city's control, the Court requires evidence of causation and deliberate indifference on behalf of the municipality's job training program, in addition to evidence of customary practice, to hold cities liable for actions of individual police officers.

## ARGUMENT

- I. The Fourteenth Amendment Due Process right to family association does not include a parent's right to accompany and comfort his/her child during invasive medical examinations in cases of suspected child abuse.

The Due Process Clause of the Fourteenth Amendment provides "no State shall...deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The right to family association, the "fundamental right of parents to make decisions concerning the care, custody, and control of their children," is a liberty interest protected by the Due Process Clause. *Troxel v. Granville*, 120 S. Ct. 2054, 2060 (2000). See also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The right to family association includes the right of parents to make important medical decisions on behalf of their children. *Parham v. J.R.*, 442 U.S. 584, '602 (1979). However, parents' rights to care for their children are not absolute. *Id.* at 603. Rights of parents are limited by a State's compelling interest in protecting the health and well-being of children, especially in cases of alleged child abuse. See *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Lambert v. Wicklund*, 520 U.S. 292 (1997); *People v. Ewer*, 36 N.E. 4 (N.Y. 1894). Parents' rights to family association are also limited in emergency situations. *Stanley*, 405 U.S. at 651.

A. Parental rights are limited by the State's compelling interest in protecting the health and well-being of children.

A proper evaluation of the substantive right to family association requires weighing the parent's interest against any reasonable state interest. If the state's interest is compelling, the state's infringement upon the parent's constitutional right is warranted. See *Prince*, 321 U.S. at 166; *Stanley*, 405 U.S. at 651.

Precedent shows that this Court weighs conflicting interests carefully to avoid the broad construction of rights under the Fourteenth Amendment. *Albright v. Oliver*, 510 U.S. 266, 271-272 (1994). This tendency of the Court becomes relatively clear upon the study of over one hundred years of parental rights cases concerning the health and well-being of children. Parent's rights consistently take a second place to the State's interest in protecting children from harm.

In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court cites several cases where the "state as *parens patriae*" constitutionally restricted parental rights. The oldest case mentioned is *People v. Ewer*, 36 N.E. 4 (N.Y 1894). In this case, the court found that parents' custodial rights did not include the right to "publicly exhibit" one's child in the "scanty dress of a ballet dancer" because the nature of this

particular type of performance was harmful to the physical or mental well-being of the child. *Id.* at 6.

The Supreme Court also restricted parental control over children by regulating and prohibiting child labor, *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320 (1913), and requiring child vaccinations, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

More recently, this Court restricted the rights of parents by stating that parental notification is not required for a minor to receive an abortion if gaining notification is not in the minor's best interest. *Lambert v. Wicklund*, 520 U.S. 292 (1997). See also *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The State authorized this judicial bypass provision to protect minors from further physical or emotional strain. *Lambert*, 520 U.S. at 294. The court felt that this interest outweighed any strength to the family unit that provision of absolute parental power to overrule a minor's decision to have an abortion could provide. *Id.* at 296.

Kirsten and Tate Sparks faced the emotional and physical harm of invasive medical examinations. The further emotional trauma that the children might have incurred by enduring medial procedures under the watchful eye of their alleged abusers would have been no less than the trauma endured by a minor forced to notify potentially abusive parents of her decision to have an

abortion. Their physical trauma conceivably would have been no less painful than that of a child subjected to hard labor or a child suffering from a communicable disease. Kirsten and Tate's health and well-being were certainly no less in danger than the State-protected health and well-being of a child dancing in a ballerina costume. Therefore, the State's interest in protecting Kirsten and Tate Sparks from any anticipated harm to their health and well-being should effectively limit Amy and Andrew's right to family association.

**B. The State has an especially strong compelling interest  
in protecting children from abuse.**

As mentioned above, a state has constitutional control over parental discretion whenever a child's physical or mental health is endangered. *Parham v. J.R.*, 442 U.S. 584, 603. This Court consistently defines the State's police power to specifically include the protection of children from abuse, reported, potential or actual. *Baltimore City Dept. of Soc. Servs. v. Bouknight*, 493 U.S. 549 (1990); *Maryland v. Craig*, 497 U.S. 836 (1990). "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982).

In *Bouknight*, this Court held that a mother accused of child abuse must hand over the abused child to the State despite this requirement's violation of her Fifth Amendment protection

against self-incrimination. Once again the Court allowed interference with constitutionally protected rights when the "care and safety [of a child] became the particular object of the State's regulatory interests". *Bouknight*, 493 U.S. at 559.

In *Craig*, this Court faced the question of whether or not six-year-old, alleged victim of child abuse, Brooke Etze should face her accused abuser, kindergarten teacher Sandra Ann Craig, in open court. *Craig*, 497 U.S. at 840. The State contended that its compelling interest in protecting "children who are allegedly victims of child abuse from future trauma" justified the statutory procedure of child victims not confronting alleged child abusers in open court, despite the criminal defendant's right under the Confrontation Clause of the Sixth Amendment. *Id.* at 852. This Court held in favor of the State concluding that a state's interest in the physical and psychological well-being of child abuse victims outweighed the defendant's right to face his accusers in court. *Id.* at 860.

Though the case at issue may be based on less conclusive evidence of child abuse than precedent and is concerned with the liberty interest in family association under the Fourteenth Amendment rather than rights protected by the Fifth or Sixth Amendment, the state's compelling interest in protecting children from abusive and traumatic situations appears in every case and is controlling.



Like six-year-old Brooke Etze, the State has reason to believe that Kirsten and Tate Sparks are victims of child abuse. Like Brooke's kindergarten teacher, the State identified Andrew and Amy Sparks as potential abusers of children within their care and followed the routine procedures necessary to prove whether or not the children were abused and by whom. Recounting abuse through testimony before one's alleged abuser would be no more traumatic than testifying about events to physicians by presenting one's body before his/her alleged abuser. Subjecting two young children to the further trauma of invasive medical examinations under the observation of their potential abusers is exactly the type of trauma that state's seek to prevent.

Whether a conflicting interest be present under the Fifth, Sixth or Fourteenth Amendment, it is the State's compelling interest to protect children from abuse that supersedes that interest. Facts of alleged abuse are all that is necessary for the State to intervene in an effort to ensure the protection of a child. The compelling state interest to protect children from abuse should alone override the parental right to be present at the medical examinations of potentially abused children. However, the rights of parents are further limited under emergency circumstances.

**C. The right of family association is limited under emergency circumstances.**

Emergency circumstances allow the State to interfere with the parental right of family association. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Although Stanley is the only Supreme Court case that discusses the emergency exception, it is well-established on the appellate level. See *Campbell v. Burt*, 141 F.3d 927 (9th Cir. 1998); *Hurlman v. Rice*, 927 F.2d 74 (2d Cir. 1991); *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977). Though most family association cases limit their factual description of the emergency situation to the actual primary removal of the children from parental custody, all cases involved some evidence that the parent may be unfit. *Stanley*, 405 U.S. at 648; *Campbell*, 141 F.3d at 928 (Children's home had no running water, toilet or cooking facilities). The Supreme Court also defines an emergency situation to include a situation where "the destruction of evidence" would occur if an evaluative exam was not performed immediately. *Schmerber v. California*, 384 U.S. 757, 770 (1966).

In *Schmerber*, the Supreme Court held that it was constitutional to perform an evaluative exam for the blood-alcohol content of an individual despite an officer's lack of warrant because without the emergency test the evidence would be destroyed. *Id.* This Court concluded that securing evidence of the blood-alcohol content was especially appropriate because the percentage of alcohol in the blood begins to diminish shortly

after drinking stops. *Id.* Therefore, there was no time to uphold the rights of the individual by following the proper procedure. *Id.*

The initial separation of Kirsten and Tate Sparks from their parents and their continued separation during the medical examinations was an emergency situation. Like the other emergency cases, there was some evidence of unfit parenting, such as Tate's bruises and injured arm, that created an immediate need for State interference. Rozas was an "emergency social worker". She and Coltrane acted as part of an emergency response unit. Like *Schmerber*, there was also the emergency need for testing in the Sparks' case. Kirsten and Tate's evaluative exams, like the tests for blood-alcohol content, needed to be performed as soon as possible.

A recent article entitled *Forensic Evidence Findings in Prepubertal Victims of Sexual Assault* published by the American Academy of Pediatrics states that swabbing the allegedly abused child's body for evidence is unnecessary after twenty-four hours for prepubertal children, children less than ten years old. Cindy W. Christian et al., *Forensic Evidence Findings in Prepubertal Victims of Sexual Assault*, *Pediatrics*, July 2000 at 100.

Kirsten and Tate Sparks both fall under the ten-year maximum age of prepubertal children. Coltrane removed them from

their parents' custody at 1:00 a.m. on September 23, 1998.

Kirsten and Tate arrived at the hospital sometime that afternoon. Given the busy schedule of the two specialists that examined the children, it would likely have been impossible to notify the parents, bring them both to the hospital, gather the doctors, and perform the detailed internal body cavity exams ordered by Police Officer Coltrane by 1:00 a.m. on September 24<sup>th</sup>.

Not only did the City of Davis have a compelling interest to protect the health and well-being of Kirsten and Tate in potentially abusive situations, it also had the authority to prolong the emergency separation from their parents to perform the necessary evaluative exam before the destruction of state evidence naturally occurred. The compelling interest of the City of Davis to protect Kirsten and Tate Sparks clearly limits Amy and Andrew Sparks' right to be present during the investigative exams of their children.

**II. "Custom" alone is not a valid ground for municipal liability under 42 U.S.C. § 1983.**

42 U.S.C. § 1983 provides that "Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected any citizen of the United States...to the deprivation of any rights...secured by the Constitution..., shall be liable to the party injured in an action

at law...". In order to claim municipal liability under § 1983, the injured party must first show the deprivation of constitutional rights caused by a municipal policy or custom. Therefore, without showing a deprivation of the right to family association under the Due Process Clause, Amy and Andrew Sparks have no cause of action under § 1983. Even if the Court should find that the Sparks' were deprived of the right to family association by the City of Davis, however, they still would not be entitled to redress without meeting the proof requirements for municipal liability claims under § 1983.

In *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), the Supreme Court considered whether or not a municipality could be held liable for constitutional deprivations visited pursuant to official government policy. This Court decided that an official policy that caused the deprivation of constitutional rights was, standing alone, grounds for municipal liability under 42 U.S.C. § 1983. *Id.* at 691. However, the Court did not decide whether or not an unofficial custom alone would also be grounds for municipal liability under § 1983. The Court also neglected to define the types of acts and how consistently they must be performed to be considered customary under § 1983. The Court stated, instead, that there would be another day to determine the full contours of municipal liability. *Id.* at 695.

Since this statement, the Supreme Court established three distinct groups of cases deciding § 1983 municipal liability claims, official written policy, *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), unofficial decisions made by those with the authority to make official policy (also defined in dicta in *Monell* at 691, n.56 quoting *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940), and "failure to train" cases, *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1988); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Lengthy study of precedent shows that there is no fourth miscellaneous category, so a case must belong to one of these categories for the injured party to hold the municipality liable under § 1983.

**A. The case at issue fits best under the "failure to train" line of cases.**

Failure to train cases attempt to answer the question of whether or not inadequate police training may serve as the basis for § 1983 liability. *Harris*, 489 U.S. at 388-392. The cases involve a police officer, acting against an official policy, whose behavior, due to lack of appropriate job training, allegedly causes a deprivation of constitutional rights. In *Harris*, for example, a police officer did not provide medical assistance to the arrested individual in violation of city policy that requires officers to take those needing medical care

to a hospital for treatment. *Id.* at 386. In the case at issue, Coltrane acted against City of Davis law § 1247-667 that requires removal of minors only be pursuant to a court order; he certainly was not acting according to any official municipal policy or unofficial policy created by someone in the position of authority to do so. Respondents allege that Coltrane's actions caused the deprivation of the right to accompany their children during investigative exams. Therefore, the facts of the Spark's case clearly fit best into the category of "failure to train" cases.

B. A grant of municipal liability under § 1983 in a "failure to train" case requires claimant to produce information additional to showing that the police officer acted according to "custom".

The failure to train cases hold that custom alone is not valid grounds for municipal liability under § 1983. *Harris*, 489 U.S. at 387-391. Instead, the injured party must show (1) that the inadequate police training was due to deliberate indifference of the city toward the constitutional rights of the injured party, *Id.* at 387; (2) that the training program, as a whole, is inadequate, *Id.* at 390; and (3) that a better training program would have ensured the avoidance of party's injury. *Id.* at 391.

The Court created these additional criteria to strictly limit the possibility of municipal liability attaching to

processes occurring outside of official policy provisions. In *Tuttle*, the Court stated that virtually every time a city employee violates a person's constitutional rights, a § 1983 plaintiff will be able to find something (emphasis added) the city could have done to prevent the deprivation. *Tuttle*, 471 U.S. at 823. This would encourage federal courts to "second-guess municipal employee-training programs" causing problems with federalism. 489 U.S. at 492. It is in the best interest of this Court to continue restricting the range of municipal liability under § 1983 by applying the three-part test to the case at issue.

"Municipal liability under § 1983 attaches where- and only where- a deliberate choice to follow a course of action is made [by the municipality] from among various alternatives". *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484. Respondents produce no evidence of a deliberate choice by City of Davis to not provide adequate training to its officers. In fact, the City had detailed procedures in place to help the officer uphold the court order policy. The communication network established between the District Attorney, social worker, and police officer by placing them in one emergency response unit was a direct effort of the City of Davis to keep the process running smoothly and avoid the deprivation of constitutional rights. There was



no deliberate choice by the City of Davis to not train officers in the proper custody removal process.

"That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program". *Tuttle*, 471 U.S. at 821. Officer Coltrane knew about the official policy that required a court order to remove children from custody. He specifically asked a senior officer if it would be proper to take the children upon telephone representation of the order. The officer told him that it was fine to rely on the word of Davis Child Protective Services. "It was not an inadequate training program but misinformation that caused Coltrane to act against official municipal policy.

"Respondent must prove that any deficiency in training actually caused the police officer's indifference to her medical needs." *Harris*, 489 U.S. at 391. The Court asks the question: "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *Id.* If Respondents had been able to show a program deficiency and fulfilled the other two criteria of this test, they would certainly fail on this account. The injury caused by Coltrane's actions was not due to lack of training but several other factors, including the miscommunication between the

District Attorney and the social worker, the misinformation provided by his senior officers, and Coltrane's reliance on a false representation. Even if there had been a training program that forced Coltrane and every officer to memorize the official policy requiring court orders to remove children from parental custody, there is no guarantee that this training would prevent the entire chain of events that lead to the removal of children absent a court order. There is even less of a guarantee that the training would prevent the continued separation of the children during the medical procedures. The Sparks' case does not produce enough evidence to satisfy the "failure to train" case criteria to qualify for municipal redress under § 1983.

### CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Court to reverse the ruling of the Sixteenth Circuit Court of Appeals and declare that the Fourteenth Amendment Due Process right to family association does not include the parent's right to be present during invasive medical exams of potentially abused children and that custom absent additional evidence of causation is not valid grounds for municipal liability under 42 U.S.C. § 1983.

Respectfully submitted,

Counsel for Petitioners # 276