IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE D.P., A Person Coming Under the Juvenile Court Law	No. S267429
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent,	Court of Appeal No. B301135
v.	Los Angeles No. 19CCJP00973
T. P. Objector and Appellant.	

APPELLANT T.P.'s OPENING BRIEF ON THE MERITS

After the Unpublished Decision by the Court of Appeal,
Second District, Division Five,
Filed February 10, 2020

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OPENING BRIEF ON THE MERITS
FOR APPELLANT FATHER T.P.

QUESTIONS PRESENTED

(1) Is an appeal of a juvenile court's jurisdictional finding moot when a parent asserts that he or she has been or will be stigmatized by the finding?

(2) Is an appeal of a juvenile court's jurisdictional finding moot when a parent asserts that he or she may be barred from challenging a current or future placement on the Child Abuse Central Index as a result of the finding?

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Introduction

At issue in this case is whether Appellant is entitled to the opportunity to clear his name after the court of appeal in an unpublished split decision dismissed his jurisdiction appeal as moot because dependency jurisdiction had terminated. In answering the question, this Court must determine whether an appeal is moot when it leaves the parent with the negative consequences of being labeled an abuser. Additionally, whether an appeal is moot where the jurisdictional finding could result in an erroneous listing in the Child Abuse Central Index (CACI) with no available procedure to seek removal of the listing. The prejudicial collateral consequences along with due process considerations compel this Court to answer both questions in the affirmative.

The critical factor in considering whether a dependency appeal is moot is whether the appellate court can provide any effective relief if it finds reversible error. (*In re Michelle M.* (1992) 8 Cal.App.4th 326, 328-329.) Effective relief can be provided by allowing a parent to challenge the stigmatizing label of child abuse since dismissal of the appeal operates as an affirmance of the underlying judgment or order. (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1489; *Vander Zee v. Reno* (5th Cir.1996) 73 F.3d 1365, 1369 [a statement causes stigma if it is both false and implies that the plaintiff is guilty of serious wrongdoing].)

A parent's right to appeal a "judgment" in a juvenile dependency proceeding is an essential part of the due process

protections afforded to parents to safeguard their interest in companionship, care, custody and management of their children. (*In re B.G.* (1974) 11 Cal.3d 679, 688.) These protections extend beyond jurisdiction where a parent seeks to clear their name. True name clearance can render an otherwise moot matter an ongoing controversy for which effective relief is possible. (*People v. Delong* (2002) 101 Cal.App.4th 482, 487 [Case was not moot for purposes of allowing defendant opportunity to clear her name of the stigma of criminality after completion of court ordered programs and probation conditions].) The stigma of child abuse is no less than that of criminality, and often the two overlap. (*Behrens v. Regier,* (11th Cir. 2005) 422 F.3d 1255, 1260 [no doubt verified child abuse allegations stigmatized plaintiff].)

The due process concerns raised by the stigma of being labeled a child abuser also have a practical negative consequence of inclusion in the Child Abuse Central Index. (Pen. Code, § 11170, subd. (a) ["The Department of Justice shall maintain an index of all reports of child abuse and severe neglect submitted pursuant to Section 11169."].) Moreover, an order dismissing the appeal as moot bars the parent from ever challenging inclusion in the index. (Pen. Code, § 11169, subds. (d) & (e).) Such an outcome violates due process rights to a meaningful hearing. (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 756 ["It is axiomatic that due process guarantees apply to dependency proceedings"].)

An appellate court has discretion to resolve "an issue *of broad public interest* that is *likely* to recur." (*In re N.S.* (2016) 245 Cal.App.4th 53, 59.) Both the stigma of being labeled a child abuser and an erroneous listing in a child abuse index are issues of broad public interest likely to recur. It is undisputed that no parent wants to be labeled a child abuser, and that the public is ill-served by the maintenance of a state child abuse index with erroneous listings. The child as well as the parent have a liberty interest in a stable family home, and both have an interest in the accurate and just resolution of the parent's appeal. (*In re Sade C.* (1996)13 Cal.4th 952, 987–989.) The state also has an interest in promoting the welfare of the child, securing a just appellate resolution, reducing procedural costs and burdens, and concluding the proceedings both fairly and expeditiously. (*Id.* at pp. 989–990.)

Therefore, this court should hold that an appeal is not moot when a parent seeks to clear their name from the adverse stigmatizing consequences of jurisdictional findings and due process requires permitting a parent the ability to challenge inclusion, or the potential inclusion, in a child abuse database.

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Statement of Facts/ Procedural History

A. Background And Request For Protective Custody Warrant

When Respondent, the Los Angeles County Department of Children and Family Services ("DCFS" or "Department"), initiated these proceedings in 2019, mother and father were living with their two children B.P. (born November 2013) and D.P. (born December 2018), and maternal grandparents. (1 CT 1-3, 14.) [1] The family had no prior child welfare history, no criminal history, and no prior issues with mental health, substance use or domestic violence. (1 CT 19.) The parents have been married since 2005, when mother moved to the United States. (1 CT 14.) Mother worked as a Chinese teacher and at a Montessori Kindergarten. (1 CT 130.) Father worked as a driver. (1 CT 132.)

On February 8, 2019, Judge Rudolph Diaz denied Respondent's request for a protective custody warrant to remove the children from their parents' custody. (1 CT 11.) The request was based on an emergency referral received on February 6, 2019 that when D.P., was brought to the hospital by his parents for suspected pneumonia, a chest x-ray was taken that revealed possible viral bronchitis or pneumonia and an old, healing fractured rib. (1 CT 13-14, 44, 49, 51; 2 CT 341.) The parents were unaware of the fracture and had no explanation for its

[1] "CT" refers to the Clerk's Transcript, which will be identified by Volume; "RT" refers to the Reporter's Transcript.

causation. (1 CT 14, 122.) The examining doctors suspected child abuse due to the nature of the injury and lack of explanation and contacted law enforcement. (1 CT 14.) D.P. was then transferred to Children's Hospital Los Angeles for a nonaccidental trauma evaluation and treatment for pneumonia. (2 CT 341.) He remained at Children's Hospital for five days, after which he was released to his parents, healthy and happy. (2 CT 327-328.)

As part of the Department's initial investigation, the social worker interviewed the minor B.P. in Mandarin and English at her elementary school. (1 CT 14.) B.P. reported mother and maternal grandmother have spanked her on the buttocks with a hand and a ruler "a long time ago" when she misbehaved, and she felt safe and happy at home. (1 CT 14.) The social worker also spoke to mother using a Mandarin interpreter. Mother had no idea what happened to D.P. (1 CT 14.) She had noticed his breathing was not good which was why she took him to the hospital. (1 CT 14-15.) She recalled that after she delivered him via c-section there was an incident at the hospital where a nurse assisted in changing his diaper in an "angry way" and that the child cried when this nurse changed his diaper. (1 CT 15.) Mother denied using corporal punishment and never hit her daughter with a ruler. (1 CT 15.)

On February 7, 2019, the social worker was informed by nurse practitioner that the child abuse evaluation Children's Hospital Los Angeles found no other trauma or injuries but could

not exclude nonaccidental trauma because the parents had no explanation for the cause of the rib fracture. (1 CT 17, 64.)

B. Filing of Section 300 Petition

On February 13, 2019, Respondent filed a petition that alleged the B.P. and D.P. were subject to juvenile court jurisdiction pursuant to Welfare and Institutions Code[2], section 300, subdivisions (a), (b), and (j), due to then two-month old D.P. being medically examined and found to be suffering from a healing right posterior 7th rib facture for which the mother's explanation was inconsistent with the injury and the father has not provided an explanation, and that such injury would not occur but for deliberate, unreasonable and neglectful acts by the mother and father. (1 CT 1-4.) The petition also alleged physical abuse of B.P. by mother and maternal grandmother by striking the child's buttocks with a ruler and hand on prior occasions; that the neglectful acts as to D.P. and physical abuse of B.P., places the sibling at risk of harm, damage, and abuse. (1 CT 3-7.)

At the initial hearing on February 14, 2019, the juvenile court ordered the children to remain released to the parents and set the matter for a jurisdictional hearing. (1 CT 105.)

C. Evidence in Support of Jurisdiction

As of the April 9, 2019 Jurisdiction/Disposition report, the children remained released to the parents with no further

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[2] All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

evidence of abuse or neglect. The parents were cooperative with DCFS and participating in pre-disposition services. (1 CT 117, 130.) B.P. responded "no" when asked by the social worker if she was ever hurt after being hit by mother and denied any physical abuse by anyone. (1 CT 125.)

Mother and father were enrolled in parenting and individual counseling. (1 CT 130-132; 2 CT 336, 390.) Mother told the social worker that since D.P. was born, they observed something wrong with him as he seemed to be in pain. (1 CRT 127.) She took him to two pediatricians, and they were not able to find what happened to him. (1 CT 128.) Mother then took D.P. to the emergency room for vomiting and breathing problems and was shocked to find out he had a healed fractured rib. (1 CT 128.) D.P. went to a follow up appointment two days after his release from the hospital and everything was fine. He now looks normal and does not seem to be in any pain. (1 CT 129.) Father did not know how D.P. had a rib fracture and had been very surprised to learn of the injury. (1 CT 129, 132-133.)

The social worker informed the parents that the Children's Hospital CARES team indicated that the fractured rib occurred at least 10 days from the day he was admitted to the hospital, and therefore not from when he was born two months ago. Mother the questioned the social worker whether it was possible that the doctor who examined D.P. in January 2019, may have caused the injury because she observed Dr. Lam use two fingers

to hit the baby's chest and mother thought Dr. Lam used a strong force for a baby when doing the physical exam because she heard a hitting sound. (2 CT 363-364.)

Law enforcement had interviewed the family and medical staff and was unable to determine if any of D.P.'s caretakers caused the injury. (1 CT 139.)

The Department recommended family maintenance services over voluntary services, and that the parents participate in individual counseling, parent education, family preservation services and maintain all medical appointments for the children. (1 CT 147-148; 2 CT 364, 469.) This recommendation was based on the conclusion of the CARES team at Children's Hospital Los Angeles that the rib fracture was not from D.P.'s recent illness or from his birth, and that the fracture "only happened" in the care of his parents' home. (1 CT 137.) The CARES team also noted that during his evaluation, D.P. was sleeping in mother's arms, easily arousable and appeared well nourished. (2 CT 283.) A skeletal survey revealed no additional fractures or abnormalities. (2 CT 284.)

As of the Last Minute Information for the Court dated July 12 and August 20, 2019, mother and father continued to attend family preservation, parenting and individual counseling. (2 CT 426, 428-434, 468-469.) Father's therapist reported that father demonstrated good insight and very good ability to parent young children. (2 CT 427.)

D. Expert Medical Evidence

1. Dr. Karen Imagawa's February 11, 2019 Report

Dr. Imagawa, Director of the CARES center at Children's Hospital Los Angeles, found the lateral right 7th rib fracture was 2-3 weeks old from the time the x-ray was taken on February 6, 2019. (2 CT 363, 365-366.) A lateral rib fracture is caused by either significant compression of the chest or blunt force trauma. (2 CT 363, 365.) The rib fracture occurred between January 15 to February 6, 2019, while the child was in the care of his parents. (2 CT 364.) The proposed birth incident at the hospital was not an adequate explanation for the injury based on timing and mechanism. At this time no known witnessed trauma has been reported so non-accidental trauma remains a concern and cannot be excluded. (2 CT 363.)

2. Dr. Karen Imagawa's April 17, 2019 Report

Dr. Imagawa's final report noted that fractures are uncommon injuries in otherwise healthy infants and have a high degree of specificity for non-accidental/inflicted trauma. (2 CT 393, 396-399.) Such injuries are generally due to a significant compression of the chest from front to back on an unsupported back, such as occurs when forcefully grasping and severely squeezing the chest. (2 CT 398-399.) Lateral rib fractures can also result from a direct blow but are usually caused by compression. (2 CT 398.) Often with rib fractures there are no other signs of trauma such as bruising or swelling. A non-offending caregiver would not

necessarily know that the child's irritability was related to the rib and could attribute it to other causes. (2 CT 393.)

3. Dr. Karen Imagawa's summary of D.P.'s medical history

On December 27, 2018, D.P. was seen when 21 days old by primary care provider Dr. Wang due to concerns of vomiting milk after eating. The examination was unremarkable and feeding difficulties were diagnosed. Dr. Wang commented that an "all knowing, domineering maternal grandmother" was involved in the care of the child. (2 CT 396.)

On January 7, 2019, D.P. was seen by primary care provider Dr. Lam, for a check-up and vaccines.

On February 1, 2019, D.P. was taken back to Dr. Lam due to vomiting after feeding, crying and a cough and was diagnosed with an upper respiratory infection. (2 CT 396.)

On February 5, 2019, D.P. was taken to the emergency room for concerns of congestion and fever. (2 CT 396.) The examination noted no external signs of trauma, and a respiratory panel was positive for influenza and pneumonia. (2 CT 397.) A chest x-ray revealed a single healing 7th rib fracture and evidence of possible viral bronchitis. (2 CT 397.) The family reported no known history of trauma. (2 CT 397.)

During his hospitalization, D.P. was treated with Tamiflu and discharged home to his parents. Post discharge, he had a visit at the CARES clinic on February 21, 2019. He appeared well and was a well-nourished, well-developed and interactive infant. (2 CT 397.)

4. Dr. Thomas Grogan's May 22, 2019 Report

Dr. Grogan, a pediatric orthopedic surgeon, evaluated all of the medical records and the chest x-ray. (2 CT 423.) D.P. was seen at age two months for a viral like illness when a chest x-ray disclosed a solitary healing lateral 7th rib fracture with no other fractures or evidence of inflicted abuse. (2 CT 423.) If left untreated, this type of injury goes on to uneventful healing without deformity, dysfunction and certainly without death. This type of injury is typically from a compressive type of force. (2 CT 423.) It could be the result of someone picking up the child incorrectly and applying too much pressure to the chest. Even a small child or sibling could cause the fracture. (2 CT 423.) This type of fracture is not apparent to the caregiver who did not cause the injury. A caregiver would never realize the child had this facture unless an x-ray was performed. (2 CT 423.) Since there was no evidence of other inflicted trauma, this injury could be accidental in nature, but it cannot be ruled out it was done intentionally. (2 CT 424.)

E. Jurisdiction and Disposition Hearing

On August 20 and September 20, 2019, the juvenile court heard testimony from Dr. Karen Imagawa, as an expert witness for DCFS, and Dr. Thomas Grogan, as an expert witness for the parents. (1 RT 59, 81; 2 CT 478-479, 481.) The Department argued to sustain the petition as to B.P. and D.P. as to physical abuse and medical neglect or intentional injury. (1 RT 94.)

Counsel for the minors and parents argued to dismiss the petition. (1 RT 97-103.)

1. Testimony of Dr. Karen Imagawa

Dr. Imagawa is employed at Children's Hospital and trains other doctors in child abuse cases. (1 RT 58.) She looked at the medical records for the minor D.P. who presented with a healing lateral 7th right rib fracture. (1 RT 60-61.) This type of injury is from compression or blunt force trauma. (1 RT 61.) A rib fracture in a two-month old would not occur from normal daily handling an otherwise healthy child. (1 RT 61, 65.) The only explanation by the parents she was aware of was the diaper changing incident when the child was born. (1 RT 63.) The pediatric radiologist felt that the fracture occurred within a two to three week time frame which ruled out that the injury could be from the date of birth. (1 RT 64.)

Holding the child a little tighter would not cause the fracture. It would have to be really significant compression. (1 RT 67.) It would be more force than squishing an empty soda can. (1 RT 67.) Given that there was no accidental mechanism that has been provided, the injury appears to have been intentional. (1 RT 69.) Often with squeezing the child you will see a posterior rib fracture, depending on how the patient is being held and the pressure put on certain areas. With lateral rib fractures it can also be from blunt force trauma. (1 RT 71.) A person handling the baby would not notice that the baby is crying because of a rib fracture. (1 RT 69.) A parent could not know the child has a rib

fracture. (1 RT 74.) The person that broke the rib would probably know that it was broken. (1 RT 74.)

When the child came back for follow up, the nurse practitioner felt the family was interacting well with the baby and had appropriate questions. (1 RT 75.)

2. Testimony of Dr. Thomas Grogan

Dr. Grogan has been on the faculty in UCLA for the last 15 years. (1 RT 80-81.) He reviewed the medical records and Dr. Imagawa's report dated April 17, 2019. (1 RT 82.) The specific injury was a healing rib fracture of the right slightly posterior lateral 7th rib. (1 RT 83.) The fracture probably occurred two to three weeks before the x-ray was taken, so the child was slightly smaller at that age. The fracture was caused by blunt-type trauma. It would take 40 and 50 newtons of force, about the same amount of force or energy required to crush a soda can. (1 RT 84.) There was no evidence of any other injury. (1 RT 84.) The solitary healing rib fracture injury was identified in the chest x-ray taken for pneumonia. (1 RT 84.)

In his opinion, the cause of the injury was lateral compression, someone picking the child up and compressing the two sides together. (1 RT 85.) The injury could have occurred unintentionally by someone picking up the baby and grasping too tight because perhaps the baby was slipping. (1 RT 86-87, 91.) Anybody lifting the child up inappropriately could apply the hoop stress. (1 RT 92.) Someone who was not around at the time of the injury would not notice any evidence of any injury. There is no

bruising. (1 RT 86.) This injury would heal on its own. It was healed when it was first observed. It would be pure, uneventful healing. (1 RT 86.)

A child suffering from pneumonia could potentially suffer such an injury from coughing but in this case, the pneumonia was new, and the fracture was at least two weeks old. (1 RT 89.) The injury was probably a lateral compression. (1 RT 90.) Typically in inflicted intentional trauma you see multiple posterior rib fractures. (1 RT 93.)

3. Court Orders

The juvenile court dismissed the petition as to the minor B.P. with prejudice for insufficient evidence. (1 RT 113-117; 2 CT 482.) As to the minor D.P., the juvenile court sustained a single count B-1 (failure to protect) as amended with the finding that there was at most a "possible neglectful act" and striking the words "deliberate" and "unreasonable" from the petition. (1 RT 121.) The juvenile court dismissed all other counts, finding insufficient evidence to jurisdiction under support subdivision (a) and (j). (1 RT 113, 120; 2 CT 483.)

As to the disposition, after the juvenile court declined to follow the suggestion of the parents and minor's counsel to terminate jurisdiction because mother and father had already completed the court ordered case-plan, the parties submitted to informal services under section 360, subdivision (b). (1 RT 123-124.) The juvenile court ordered the minor D.P. to remain released to his parents under the supervision of the Department

pursuant to section 360 for a six-month period of supervision. (1 RT 124; 2 CT 484.)

F. The Appeal

On September 30, 2019, father timely filed a notice of appeal from the declaration of dependency. (2 CT 485-486.) On October 18, 2019, mother timely filed a notice of appeal. (2 CT 487.)

On January 28 and 31, 2020 Appellants father and mother each submitted Opening Briefs arguing the petition should be dismissed for insufficient evidence. (Appellant Father's Opening Brief, dated January 28, 2020, Appellant Mother's Opening Brief, dated January 31, 2020.)

On April 9, 2020, Respondent submitted a letter in lieu of a Respondent's Brief expressing, "DCFS does not oppose reversal of the jurisdictional finding because of the parents' cooperation and their successful completion of the section 360, subdivision (b) disposition." (Respondent's Letter In Lieu Of Brief, dated April 9, 2020.)

On August 5, 2020, oral argument was waived, and the cause submitted.

On October 30, 2020, the Court of Appeal noted that the juvenile court's jurisdiction had since terminated as the Department did not file a petition pursuant to section 360, subdivision (c) or otherwise bring the case back before the juvenile court. Accordingly, the Court of Appeal vacated the prior cause submitted order and invited the parties to submit

supplemental letter briefs on whether the appeal should be dismissed because the juvenile court dependency proceedings were terminated during the pendency of the appeal. The parties then submitted letter briefs. Appellants opposed dismissal and Respondent argued in favor of dismissal.

In a split opinion dated February 10, 2021, the majority dismissed the appeal as moot, and the dissent by Justice Rubin found the matter was not moot and that insufficient evidence supported the jurisdictional findings. (*In re D.P.*, unpub.opn.fld. 2/10/2021 (B301136/Div.5).)

On March 3, 2021, Appellant father timely filed a petition for review. On May 26, 2021, this Court granted review.

Argument

I.
Appellant's Appeal From The Juvenile Court's Jurisdictional Finding Based On The Minor's Unexplained Physical Injury Is Not Moot Because Appellant Will Be Stigmatized By The Finding

A. Introduction

A case is moot only if interim events have completely and irrevocably eradicated the effects of an allegedly improper ruling. (*In re Pintlar Corp.* (9th Cir. 1997) 124 F.3d 1310, 1312; *Los Angeles County v. Davis* (1979) 440 U.S. 625, 631 [99 S.Ct. 1379, 1383, 59 L.Ed.2d 642].) An order terminating juvenile court jurisdiction generally renders an appeal from an earlier

order moot, but dismissal is not automatic. (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1055.) The reviewing court will determine on a case-by-case basis whether an appeal is moot and, if so, whether the reviewing court should nevertheless review the merits of a claim of error. (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1498; *In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.)

The party seeking discretionary merits review must identify specific legal or practical negative consequences arising from a dependency court's jurisdictional findings that might justify such review. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1493.) Courts also have discretion to resolve appeals that are technically moot if they present important questions affecting the public interest that are capable of repetition yet evade review. (*In re A.M.* (2013) 217 Cal.App.4th 1067, 1078-1079.) The pivotal question in determining if a case is moot is whether the court can grant the plaintiff any effectual relief. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574.) Issues of justiciability, such as mootness, are generally reviewed de novo. (*Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 319–320.)

B. Termination Of Dependency Proceedings Does Not Preclude Review Of The Merits Of The Appeal

The fact that dependency proceedings terminated before the appeal was adjudicated, should not preclude a parent from being allowed to fully litigate being labeled a child abuser. The

recent juvenile dependency cases of *In re Rashad D.* (2021) 63 Cal.App.5th 156 and *In re Nathan E.* (2021) 61 Cal.App.5th 114, addressing the issue of mootness are instructive.

The *S*econd District, Division Seven in *In re Rashad D. supra,* 63 Cal.App.5th 156 dismissed mother's appeal as moot because dependency jurisdiction was terminated with a family law order while the appeal was pending. The appeal was from the sustained petition in the mother's second dependency based on her illicit drug use. (*Id*. at pp. 158-159.) After mother received services, jurisdiction was terminated with a family law custody order that awarded sole physical custody of the child to mother and joint legal custody to mother and father. The mother did not appeal from the exit orders. (*Ibid.*) The Second District, Division Seven rejected mother's arguments against dismissal for mootness because the sufficiency of the evidence issue regarding her ongoing drug use was fact-specific and did not raise issue of broad public interest; mother's argument that the jurisdictional finding could impact DCFS to file a new petition was speculative; and mother forfeited her appeal as to custody and visitation issues because she did not appeal from the exit orders. (*Id.* at p. 159.)

In this case, unlike *In re Rashad D. supra,* 63 Cal.App.5th 156, forfeiture is inapplicable as there was no termination of jurisdiction order. Also, unlike *Rashad D.*, in this case the jurisdictional challenge was not highly fact-specific. The facts were undisputed. Both medical experts agreed the child

sustained a single rib fracture caused by compression which left alone would go on to uneventful healing. (2 CT 423-424.) The issue raised on appeal was whether the juvenile court's finding of a "perhaps negligent act" satisfied the burden of proof for a jurisdictional finding under section 300, subdivision (b). (§ 355, subd. (a); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) As aptly expressed by Justice Rubin, the juvenile court's finding of "a possible neglectful act" is "not the stuff of substantial evidence." (*In re D.P.*, unpub.opn.fld. 2/10/2021 (B301136/Div.5), [Dissenting Opinion of Rubin, J.].) The uniform standard of proof presents an issue of broad public interest.

Further, in this case unlike *Rashad D.*, the parents have no prior child welfare history, and dismissal of the petition would clear their name. The mother in *Rashad D.* was already labeled a drug abuser from the 2017 petition and the 2020 appeal could not undo that finding or clear her name. Last, in *Rashad D.* dismissing mother's appeal did not leave her without a remedy as pursuant to section 302, subdivision (d), she could seek modification of the exit order. (*Rashad D., supra*, 63 Cal.App.5th at p. 165.) Dismissal of father's appeal leaves him without a remedy to remove the child abuser label. The factors relied upon by the Second District, Division Seven are not applicable in this case. *Rashad D.* also agreed that dismissal for mootness following termination of jurisdiction is not automatic, as an erroneous jurisdiction finding can have unfavorable consequences extending

beyond termination of dependency jurisdiction. (*Id.* at p. 164; see *In re Hirenia C.* (1993) 18 Cal.App.4th 504, 517–518 [same].)

In *In re Nathan E.* (2021) 61 Cal.App.5th 114, 121, the Second District, Division One, declined to dismiss the mother's appeal as moot where only mother and not father appealed the jurisdiction and disposition orders due to concern the rulings could impact future dependency proceedings for these children, or the children mother may have in the future. Thus, in *Nathan E.*, the possibility of a future harm due to potentially erroneous jurisdictional findings, even if that harm was speculative was sufficient to justify review.

In this case, as in *Hirenia C.* and *Nathan E.*, the ruling on appeal will continue have an impact beyond jurisdiction due to the stigma of being labeled a child abuser.

C. The Infliction Of An Acknowledged Stigma Justifies Discretionary Review Though The Order Which Inflicts The Stigma Is Technically Moot

The stigma exception to mootness has been applied in cases concerning mental illness, sexual offenses, criminal conduct, and juvenile delinquency. For the same reasons these recognized stigmas merit discretionary review, child abuse should also be included in the stigma list.

In cases concerning mental illness, courts have routinely held that while an order imposing an involuntary commitment ordinarily becomes subject to dismissal as moot when the order

ceases by its terms to restrain the subject's liberty, the "stigma" inflicted by such an order may require consideration on the merits even though the order has become technically moot. (See *People v. Hurtado* (2002) 28 Cal.4th 1179, 1186 [case "became moot when defendant's 1996 commitment expired"; court nonetheless addressed recurring issues raised on merits; *In re Michael D.* (1977) 70 Cal.App.3d 522, 524, fn1.)

In *Michael D.,* a 17-year-old ward of the court sought review of a juvenile court order appointing a guardian for the purpose of committing the minor to a state hospital. While the matter was pending, the minor was discharged from the hospital and placed in a foster home. *Michael D.* declined to consider the matter moot "because of the stigma involved in placement in a mental institution." (*Michael D., supra*, 70 Cal.App.3d at p, 524, fn1; see also *People v. Succop* (1967) 67 Cal.2d 785, 790 [defendant entitled to the opportunity to clear his name of the adjudication that he is a probable mentally disordered sex offender]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 229 [stigma that attaches to an individual found to be mentally ill includes not only physical restraint when individual is confined to a mental hospital but there is also the injury in reputation and interest in not being improperly or unfairly stigmatized].) Thus, the stigma of being mentally ill or being a mentally ill sex offender, even without the threat of confinement, is a sufficient injury to reputation to warrant consideration on the merits.

A juvenile delinquency adjudication has also been found to carry a stigma that merits discretionary review. (*In re Kevin S.* (2003) 113 Cal.App.4th 97, 109-110 [Both the potential loss of liberty and the stigma attached to a delinquency finding compel the application of some of the due process protections available to criminal defendants in the juvenile context.) The Supreme Court has reasoned that minors adjudicated delinquents are stigmatized, as they acquire a record that can follow them through life, and they may be restrained of liberty for years. (*Application of Gault* (1967) 387 U.S. 1, 49 [87 S.Ct. 1428, 1455, 18 L.Ed.2d 527].) Juvenile delinquency proceedings are similar to juvenile dependency proceedings in that they are generally confidential. (§ 781.) Nonetheless even though there is a similar aspect of confidentially, the stigma of being adjudicated a juvenile delinquent is still recognized.

The stigma of sexual abuse has also been used to justify merits review. In *In re M.W.* (2015) 238 Cal.App.4th 1444, the Second District, Division Four, declined to dismiss the mother's appeal for justiciability, as the finding that mother failed to protect the children from a substantial risk of sexual abuse was deemed "pernicious" and to carry a particular stigma. (*Id*. at p. 1452)

The stigma of being labeled a gang member has likewise been found of such significance as to warrant consideration of an otherwise moot appeal. (*People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1253.) In *Englebrecht*, the plaintiff challenged

the stigma of a gang injunction which labeled him as a member of a criminal gang. Although, he had been released by the trial court from the effect of the injunction making the case moot, the Fourth District, Division One declined to dismiss the case finding that the legal issues were of broad public interest and likely to recur. (*Id.* at p. 1242.) The Fourth District, Division One explained that "while some social stigma might arise from the finding that Englebrecht is a gang member, it is not the same order of stigma arising from a criminal verdict or a finding that one is a mentally disordered sexual offender or a narcotics addict, or an LPS Act conservatee. The rights involved in this case, while important, are not as significant as the interest in physical liberty or parental rights." (*Id.* at p. 1253.)

It is noteworthy that *Englebecht* emphasized the significance of parental rights, as being of the most significant in the order of stigma. It is undisputed that parental rights concerning the care, custody, and control of their children free of intervention by the government is a fundamental liberty right under the due process clause of the Fourteenth Amendment. (*Troxel v. Granville* (2000) 530 U.S. 57, 65–66 [77, 120 S.Ct. 2054, 147 L.Ed.2d 49]; *Stanley v. Illinois* (1972) 405 U.S. 645, 651 [92 S.Ct. 1208, 31 L.Ed.2d 551]; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306 [parents' right to raise their children ranked among the most basic of civil rights]; *In re M.S.* (2019) 41 Cal.App.5th 568, 590.)

In considering the due process afforded to parental rights, there is no doubt that being labeled a child abuser is a stigma. (*Humphries v. Cnty. of Los Angeles* (9th Cir 2009) 554 F.3d 1170, 1186-1188 [to be accused of child abuse may be our generations' contribution to defamation per se, a kind of moral leprosy]. "Indeed, there is perhaps no name more deserving of our opprobrium than to be called a child abuser—or, as Hawai'i euphemistically refers to them: a perpetrator or maltreater." (*Bird v. Department of Human Services* (9th Cir. 2019) 935 F.3d 738, 749–750, cert. denied sub nom. *Bird v. Hawaii* (2020) 140 S.Ct. 899 [205 L.Ed.2d 468].

As expressed in this case by Justice Rubin in his dissent, "common sense tells us that no parent wants to be branded a child abuser, which is exactly what happened in this case" and that the consequence of dismissing the appeal is "neither speculative nor unreasonable." (*In re D.P.*, unpub.opn.fld. 2/10/2021 (B301136/Div.5), [Dissenting Opinion of Rubin, J.].) It is also common sense that the stigma of being labeled a child abuser is no less significant than other stigmas which have merited discretionary review.(1 RT 114, 119, 121; 1 CT 5.) To permit discretionary review for other stigmas that are no more pernicious, is the equivalent of a hit-by-pitch rule in baseball where the player gets to walk to first base if the pitcher's ball hits the player's body on the right arm but not the left. A player should of course be able to walk to first base, after being hit anywhere with the ball, just as being hit with a significant

stigma, whether it is criminal or child abuse, merits the right of the accused to clear their name.

Further, there are practical adverse consequences implicating parental rights and the parent-child relationship when a parent is adjudicated to have committed acts of child abuse. "At least it ought to be recognized that the effects of being labeled an abuser may be more damaging to the individual caretaker and his or her child than is the actual instance of abuse."[3]

Another practical consequence is that father has no other realistic forum in which to challenge the propriety of those findings. (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1431–1432 [appeal is not moot because jurisdictional findings could affect parent if future dependency proceedings were initiated or contemplated with regard to father's other children, if any]; *In re D.C.* (2011) 195 Cal.App.4th 1010, 1015 [same].)

Lack of an alternative forum to challenge a child abuse finding merits discretionary review. (*Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917.) In *Saraswati,* the Fourth District, Division declined to find father's appeal moot as to removal of an "inconclusive" child abuse determination in a child abuse reporting database, even though there was new regulation

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[3] Richard Gelles, Ph.D., *The Social Construction of Child Abuse,* 45 *Amer.J.Orthopsychiat.* 3, (1975) "The personality disorders commonly held to be the cause of child abuse may well be the result of being labeled an abuser."

that indicated his name would be removed because there was no guarantee when the father's name would be removed, leaving him without a guarantee or remedy if his appeal were dismissed. (*Id*. at pp. 924-926.)

In this case, as in *Saraswati*, father is entitled to clear his name where there are no other available avenues to challenge the substantiated findings. (*Ibid*.) The appropriate remedy is for an appellant to have the opportunity to fully litigate their claim. (*Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 168–172 [71 S.Ct. 624, 646–649, 95 L.Ed. 817] ["This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society].)

A trial court judgment rendered moot on appeal and dismissed has not been fully litigated as there has not been an appellate review on the merits. Nevertheless, in this context, a less-than-fully-litigated judgment may have a preclusive effect on appellant's right not to be labeled a child abuser based on an erroneous adjudication. (See *Chamberlin v. City of Palo Alto* (1986) 186 Cal.App.3d 181, 187; *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1017–1018.) Under these circumstances, the affirmance implied by a dismissal of the appeal is unjustified. Appellant's claim that he will be stigmatized by the jurisdictional findings justifies a merits review of his appeal.

II.

An Appeal Of A Juvenile Court's Jurisdictional Finding Is Not Moot When A Parent Asserts That He Or She May Be Barred From Challenging A Current Or Future Placement On the Child Abuse Central Index As a Result

A. Statutory Scheme

California's Child Abuse and Neglect Reporting Act ("CANRA"), was enacted by the California State Legislature in 1980, "to protect children from abuse and neglect." (Penal Code §§ 11164 *et seq*.) Penal Code section 11165.6, in turn, defines in relevant part, "child abuse or neglect" to include "physical injury or death inflicted by other than accidental means upon a child by another person ... [and] neglect as defined in Section 11165.2. (Pen. Code, § 11165.6.) Penal Code Section 1165.2 defines "neglect" to includes both acts and omissions on the part of the responsible person. (Pen. Code, § 11165.2.)

Any reasonable suspicion of child abuse or neglect must be reported by mandatory reporters to a responsible authority, such as local law enforcement or the county child welfare department and may be reported by any other person. (Pen. Code, §§ 11165.7, 11165.9, 11166.) The Department is then required to report known or suspected cases of "child abuse or neglect, as defined in [Penal Code] section 11165.6," to the Department of Justice (DOJ) for inclusion in the Child Abuse Central Index (CACI) when an investigator determines it is "more likely than not" child abuse has occurred. (Pen. Code, § 11165.12, subd. (b).)

The standard for a juvenile court to sustain an allegation in a section 300 petition is preponderance of the evidence. (§ 355, subd. (a).) The standard for the Department to report an individual to the DOJ for child abuse or neglect is "more likely than not." (Pen. Code, § 11165.12, subd. (b).) The two standards are essentially the same. Requiring proof that something is "more likely than not" is a preponderance of the evidence standard. (*Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1093, 50 Cal.App.5th 1077, 1093], *review denied* (Sept. 30, 2020) citing *People v. Superior Court* (2013) 215 Cal.App.4th 1279, 1305, fn. 28.)

A substantiated report of child abuse is subject to mandatory reporting to CA DOJ for inclusion in the Child Abuse Central Index. (Pen. Code, § 11169(a).) The Child Abuse Central Index consists of an index of all reports of child abuse and severe neglect submitted to the [Department of Justice] pursuant to the CANRA under Penal Code section 11169." (*Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917, 921, fn. 1.) The information in CACI is referenced during licensing of childcare facilities and employment background checks of peace officers, childcare providers, and adoption agency workers. (Pen. Code, § 11170(b).) The CACI database also provides access to the entire record of an agency's investigation. (*Ibid*.)

The Department is required to notify an individual that he or she has been reported to the DOJ. (Pen. Code, § 11169, subd. (c).) A person can file a self-inquiry to ask if their name is in the

CACI by sending a notarized and signed letter to the Department of Justice, Bureau of Criminal Information and Analysis. (Pen. Code, § 1170.) A procedure to request removal from a listing on the CACI is provided in Penal Code, Section 11169, subdivision (d). The ability to request a hearing under Penal Code, Section 11169, subdivision (d), shall be denied when a court of competent jurisdiction has determined the suspected child abuse occurred. (Pen. Code, § 11169, subd. (e).)

B. Application of the Child Abuse Central Index Reporting Requirements Has Consequences For Appellant Beyond Jurisdiction

In this case, the jurisdictional findings based on the child suffering a physical injury, constituted a substantiated claim of child abuse subject to mandatory reporting requirements for inclusion in the CACI. (Pen. Code, §§ 11165.7, 11165.9, 11166, 11169, subd.(a).) Although the juvenile court found the injury occurred by a "perhaps neglectful" act, the exemption from CACI reporting for cases of "general neglect" specifically excludes from that exemption cases where physically injury to the child has occurred. (Pen. Code, §§ 11165.2, subd. (b), 11169, subd. (a).)

While Appellant, to date, has not received notice under Penal Code Section 11169, subdivision (c), of his inclusion in the CACI, there is nothing to prevent, or ensure the prevention, of such reporting from taking place in the future. It must be assumed that the Department will comply with its duties under

CANRA. In the face of a silent record, the established applicable principle is that the official duty has been regularly performed. (Evid.Code, § 664.) As this Court has asked whether Appellant's assertation he would be barred from challenging a current *or* future placement on the CACI due to the dismissal of his appeal, the lack of a current listing is not a determinative factor in whether his appeal should be considered moot.

Reviewing courts have exercised their discretion to consider an appeal from the jurisdiction findings despite the subsequent termination of jurisdiction when the findings "could be prejudicial to the appellant or could impact the current or any future dependency proceedings" or "the finding[s] could have consequences for the appellant beyond jurisdiction." (*In re J.C.* (2014) 233 Cal.App.4th 1, 4; accord *In re C.C.* (2009) 172 Cal.App.4th 1481, 1488–1489 [An issue is not moot if the purported error infects the outcome of subsequent proceedings].) Inclusion in the CACI database can damage an individual's reputation in the eyes of various agencies. (*Miller v. California* (2004*)* 355 F.3d 1172, 1178.; *Castillo v. County of Los Angeles* (2013) 959 F.Supp.2d 1255, 1259–63.)

Dismissal of Appellant's appeal affirms the child abuse allegation as substantiated and bars Appellant from being able to ever seek a CACI listing removal hearing. (Pen. Code, §§ 11169, subds. (d), (e); *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1005 [An involuntary dismissal of an appeal operates as an affirmance of the judgment below]; see *City of Santa Paula v.*

Narula (2003) 114 Cal.App.4th 485, 492 [same].) Application of mootness where the jurisdictional findings are subject to the mandatory reporting requirements violates Appellant's due process rights by taking away his right to a meaningful hearing.

C. Appellant's Liberty Interest Is Implicated By The Dismissal Of His Appeal Because Risk of Placement On the Child Abuse Central Index satisfies the Stigma Plus Test

An individual's liberty interest may be implicated "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." (*Wisconsin v. Constantineau,* (1971) 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515.) Procedural due-process protections apply to reputational harm only when individuals suffer stigma from governmental action *plus* the alteration or extinguishment of rights or status recognized by state law. (*Paul v. Davis* (1976) 424 U.S. 693, 711 [96 S.Ct. 1155, 47 L.Ed.2d 405]; *Humphries V. County of Los Angeles,* (9th Cir. 2008) 554 F.3d 1170, reversed on other grounds by *Los Angeles Cty., Cal. v. Humphries* (2010) 562 U.S. 29.)

In *Humphries*, *supra*, 554 F.3d at p. 1175, the plaintiffs sought to remove their names from the CACI after a criminal court declared them factually innocent of all charges and the dependency petition was dismissed with all counts being found untrue. The Ninth Circuit determined that there was a deprivation of a protected liberty interest using the "stigma-plus" test set forth in *Paul V. Davis*. (*Id.* at 1185–92.) The stigma of

being listed in the CACI as substantiated child abusers, *plus* the statutory consequences of being listed in the CACI constituted a liberty interest, the deprivation of which may not occur without due process of law. (*Ibid*.)

This "stigma-plus" test requires a showing the respondents defamed appellant (the "stigma") and deprived him of a property or liberty interest (the "plus"). (*Hart v. Parks* (9th Cir. 2006) 450 F.3d 1059, 1070.) Inclusion in the CACI without being afforded "some kind of hearing" to contest inclusion was enough to satisfy the stigma-plus test. (*Humphries, supra,* 554 F.3d at p. 1201.) As explained in *Humphries*, it is undisputed that inclusion in the CACI is a stigma. (*Humphries, supra,* 554 F.3d at p. 1186.) After *Humphries*, *Castillo v. County of Los Angeles* (2013) 959 F.Supp.2d 1255, held that inclusion in the internal data base (CWS/CMS) retained by DCFS was also sufficient to constitute a stigma. *Castillo* noted that while the CWA/CMS is similar to the CACI, it also goes beyond CACI's purpose merely serving as an index of names of suspected child abusers by providing access to the entire record of an agency's investigation. (*Id.* at pp.1259–1264.)

As explained in *Castillo* and *Humphries*, being labeled a child abuser subject to inclusion in child abuse database is "unquestionably stigmatizing." (*Miller v. California* (9th Cir. 2004) 355 F.3d 1172, 1178 [Being falsely named as a suspected child abuser on an official government index is defamatory]; see also *Valmonte V. Bane,* (2d Cir. 1994) 18 F.3d 992, 1000 [beyond

dispute that inclusion on a child abuse registry damages reputation by "branding" an individual as a child abuser].)

As to the second prong of the *stigma plus* test, being listed in the CACI satisfies the *plus* part because inclusion places a tangible burden on a right or status previously recognized by state law. (*Humphries, supra,* 553 F.3d at p. 1188.) *Humphries* explained that inclusion in the CACI also deprived a person of a protected liberty interest because it impacted applying for custody of a relatives child, becoming guardians or adoptive parents, obtaining a license for childcare, becoming licensed or employed in a position dealing with children, obtaining employment as a peace-officer, renewal of teaching credentials, eligibility to volunteer with children, and involvement in adoption and child placement. (*Ibid*.)

Other courts have reached the same conclusion as *Humphries*. "State-created child abuse registries form an organic network of accusations from which consequences flow: those listed may be denied the privilege of teaching or working with children, adopting, fostering, volunteering in a child's school or at community activities, and coaching youth sports or other activities." (*See Wright v. O'Day* (6th Cir. 2013) 706 F.3d 769, 771 [Tennessee law prohibits people listed on the state's child abuse registry from working in child-care agencies, child-care programs, and adult-daycare centers]; *Behrens v. Regier* (11th Cir. 2005) 422 F.3d 1255, 1257 [plaintiff was unable to adopt another child after inaccurate listing on Florida's child abuse registry]; *Dupuy*

v. Samuels (7th Cir. 2005) 397 F.3d 493, 497–98 [Illinois law requires licensed facilities in childcare to check the state's child abuse registry].)

Thus, there are the real consequences for those who find themselves on the CACI. In this case, Mother works as a teacher and at a Kindergarten. (1 CT 130.) A CACI listing could preclude such employment. It could also prevent Appellant from volunteering at his children's schools or at community organized sporting events where background checks are required. Thus, since inclusion, or the potential for inclusion, in the CACI satisfies the *stigma plus* test, Appellant's individual liberty interests are implicated. The next step is a balance of factors to decide what process is due. (*In re Vanessa M.* (2006) 138 Cal.App.4th 1121, 1129; *In re Malinda S.* (1990) 51 Cal.3d 368, 383.)

D. Due Process Requires Discretionary Review Using the Mathew's Due Process Balancing Test

Under the federal Constitution, "procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 332 [96 S.Ct. 893, 47 L.Ed.2d 18]; see also *Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1048, 1059.) The essence of due process is the requirement that a person in jeopardy of serious

loss receive notice of the case against him and opportunity to be heard. (*Mathews v. Eldridge, supra,* 424 U.S. 319, 348.)

"Due process is flexible and calls for such procedural protections as the particular situation demands." (*Mathews, supra*, 424 U.S. at 334.) To determine what procedural protections are required, *Mathews* articulated a three part test to balance: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional procedural safeguards; and (3) the governmental interest, including the fiscal and administrative burdens of that the additional or substitute procedural requirement would entail. (*Ibid*.)

1. Privacy Interest

In considering, the private interest at stake, both the federal right to familial privacy and the state constitutional right to informational privacy are implicated when a parent is listed on the CACI as a possible abuser of his or her child. (*Burt v. County of Orange* (2004) 120 Cal.App.4th 273, 285; *Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917, 928; *Bohn v. County of Dakota* (8th Cir.1985) 772 F.2d 1433, 1435 ["privacy and autonomy of familial relationships involved in a case like this are unarguably among the protectible interests which due process protects"].) The California Constitution recognizes the right to informational privacy "includes interests in precluding the dissemination or misuse of sensitive and confidential information." (Cal. Const., art. I, § 1.)

In *Burt v. County of Orange*, *supra*, 120 Cal.App.4th 273, the Fourth District, Division Three, found a parent whose name was referred for listing on the CACI had a sufficient interest in "familial and informational privacy" to trigger procedural due process protections. (*Ibid*.) In *Burt*, the mother accidentally exposed her child to her prescription migraine medication. After an investigation, law enforcement declined to file charges and child welfare services determined that the child did not suffer, and was not at risk to suffer, any serious physical harm. (*Id.* at pp. 277-278.) Nonetheless, the mother's name was referred to the CACI. The trial court found there was no statutory provision that afforded her a right of review. (*Id*. at pp. 278–279.) The court of appeal reversed, finding the mother had a sufficient privacy interest in avoiding an inaccurate CACI listing to require a due process hearing upon timely request. (*Id*. at pp. 283-285.) The holding in *Burt*, was followed by *Humphries, supra,* 554 F.3d at pp. 1192-1193, which agreed the parents had a private interest at stake which was "essentially coextensive with their argument in support of their liberty interest" in not having their names included in a child abuse database, if "they have not committed the acts underlying the reports that led to their inclusion."

Saraswati v. County of San Diego (2011) 202 Cal.App.4th 917, 928, in accordance with *Burt* and *Humphries*, found the right to familial and informational privacy is impacted when a parent is publicly identified as a possible abuser of his or her

child and that this right is of "sufficient significance to preclude its extinction or abridgement by a body lacking judicial power." Thus, in accordance with *Burt*, *Humphries*, and *Saraswati*, Appellant has a recognized right to privacy in not being included, or placed at risk of inclusion, in the CACI, based on findings he has been precluded from challenging as erroneous.

2. Countervailing Governmental Interest

It is undisputed that California has a vital interest in preventing child abuse, and the creation or maintenance of a centralized database is a responsible means for California to secure its interest. (See *Santosky v. Kramer,* 455 U.S. 745, 766, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *People v. Stockton Pregnancy Control Med. Clinic* (1988) 203 Cal.App.3d 225, 249, (1988) [goal of detecting and preventing child abuse are a "compelling" government interest].) If this database contains false or inaccurate information, California's interest in maintaining such a database is severely diminished. Simply put, Respondent does not have an interest in maintaining a system of records that contains incorrect or even false information. (*Humphries, supra*, 554 F.3d at p.1194)

It is also hard to find that Respondent has a vital interest in having the jurisdictional findings in this case affirmed. Respondent's Letter Brief Submitted In Lieu of Respondent's Brief dated April 8, 2020 ("RLB"), stated that, "However, because of the parents' cooperation and their successful completion of the

section 360, subdivision (b) disposition, DCFS does not oppose reversal of the jurisdictional finding." (RLB at p. 4.) Declining to submit a Respondent's Brief, demonstrated Respondent had a lack of interest in seeing the juvenile court's decision affirmed. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134-135 [When the basis for the trial court's judgment becomes nonexistent due to postjudgment acts or events, an appellate court should "dispose of the case, not merely of the appellate proceeding which brought it here"].)

Respondent would also be hard pressed to show a vital interest in precluding Appellant from fully litigating the child abuse findings made against him. The burden of litigating child abuse allegations is the sort that Respondent is expected to shoulder. That burden was even lighter in this case where prior to arguing the case was moot, Respondent had no objections to reversal of the jurisdictional findings.

3. *Adequacy of the Procedures*: *Risk of erroneous deprivations and value of additional safeguards*

Perhaps most important *Mathews* factor is the risk of error in a dependency proceeding and the need for additional safeguards to protect individuals from an erroneous substantiated child abuse finding. As applied to this case, the issue is if a dismissal for mootness is permitted, what is the chance that Respondent will make a mistake. That mistake

would be a CACI listing based on findings that appellate review on the merits would have reversed.

In this case, the risk is high, and the chance of mistake is quite likely, where the dissenting opinion concluded "the juvenile court's jurisdictional findings were based on insufficient evidence, requiring reversal." (*In re D.P.*, unpub.opn.fld. 2/10/2021 (B301136/ Div.5), [Dissenting Opinion of Rubin, J.].) Also, the fact that Respondent declined to submit a Respondent's brief lends further support that if the majority had considered the merits of Appellant's appeal, the jurisdictional findings would have been reversed. Thus, leading to a high risk of error that Appellant could be subjected to an erroneous listing in the CACI. (Penal Code §11169, subd. (e).)

The result in this case demonstrates that the procedural safeguards to protect an individual from an erroneous listing are inadequate without opportunity to fully litigate a child abuse allegation. It is undisputed that a person named as a suspected child abuser must be given a reasonable opportunity to rebut the charge. (*Burt v. County of Orange* (2004) 120 Cal.App.4th 273, 285.) Cases dealing with the maintenance of child abuse registries, have repeatedly found a due process violation in the absence of adequate procedural safeguards to permit an effective challenge of a substantiated child abuse report (*Humphries, supra* 554 F.3d at pp. 1200–1201; *Valmonte, supra*, 18 F.3d at 995–97; *Bird v. Department of Human Services* (9th Cir. 2019)

935 F.3d 738, 749–750, cert. denied sub nom. *Bird v. Hawaii* (2020) 140 S.Ct. 899 [205 L.Ed.2d 468.)

When state procedures fail to offer a chance to rebut an erroneous listing on a child abuse registry, due process has not been provided. (*Bird v. Department of Human Services* (9th Cir. 2019) 935 F.3d 738, 749–750, cert. denied sub nom. *Bird v. Hawaii* (2020) 140 S.Ct. 899 [205 L.Ed.2d 468]. In *Bird*, the Hawaii Department of Health and Human Services (DHS) placed plaintiff Bird and her husband on the state's Central Child Abuse Registry (CCAR) following the death of their infant daughter. Though plaintiff's husband later confessed to killing the baby and was convicted of murder, the state did not remove plaintiff's name from the child abuse registry. The plaintiff's due process claim was untimely as it was outside the two year statute of limitations but the concurring opinion by Justice Bybee made clear that it was a procedural due process violation to be included in the registry as an "identified perpetrator or maltreater" without recourse to have the erroneous listing removed. (*Ibid*.)

Justice Bybee explained there was a "glaring gap" in the Hawaiian regulatory scheme. (*Bird, supra,* 935 F.3d at p. 742.) Under the scheme, if DHS has petitioned the family court for custody of the listed individual's child(ren) and then returns custody of the child(ren) and settles the proceeding before it reaches the adjudicatory phase, the individuals who are wrongfully listed in the CCAR have no recourse for expunging their names, as the listed individual is not permitted to seek

administrative review. (*Id.* at p, 742-74.) In pointing out this flaw, Justice Bybee compared the case to *Humphries* noting this was "not a case of first impression" and the court "had seen this bad movie before." (*Id.* at pp. 749-750.)

The "glaring gap" identified in *Bird* is similar to Appellant's situation. The settlement of the child abuse proceedings before the case was fully adjudicated, has the same effect of precluding an administrative review hearing. Permitting dismissal of the appeal without a merits adjudication contains the same flaw found in *Humphries* and *Bird*, namely, to create a high likelihood that innocent names would be placed in the registry without adequate procedures to seek removal of the listing. That risk of erroneous inclusion is especially high in cases like this one, where the issues that caused the dependency resolved while the appeal was pending. A quick resolution is more likely in cases where the evidence against the parents is weaker.

Thus, dismissal of an appeal where dependency jurisdiction has been terminated and the findings could result in an erroneous CACI listing, fails to satisfy the requirement in *Humphries* to "provide some kind of hearing by which [an accused individual] can challenge his inclusion." *(Humphries, supra,* 554 F.3d at p. 1201) The result is insufficient procedural safeguards to protect Appellant's due process rights.

4. *A Balance of the Mathews Factors*

In balancing the interest of the state and that of an individual wrongly accused of child abuse, the *Mathews* due

process test requires that the Court consider the risk of error in light of the government's and appellant's interests. (*See Hamdi v. Rumsfeld* (2004) 542 U.S. 507, 529 [124 S.Ct. 2633, 159 L.Ed.2d 578].) In this case, as in *Humphries*, the state's interest was "not harmed by a system which seeks to clear those falsely accused of child abuse from the state's databases." (*Humphries, supra*, 554 F.2d at p. 1200.) The risk that an individual can be erroneously placed and then indefinitely remain on a child abuse registry is too great when balanced against any interest of the state to dismiss an appeal as moot. Due Process rights to be heard outweigh any countervailing need to limit litigation or conserve judicial resources. (*Pease v. Pease* (1988) 201 Cal.App.3d 29, 34.)

The fact that Appellant's interest may concern a future listing rather than a current listing does not change this result. *Humphries* pointed out that the lack of any meaningful, guaranteed procedural safeguards *before* the initial placement on the CACI combined with the lack of any effective process for removal from the CACI violates the *Humphries*' due process rights. (*Humphries*, *supra*, 554 F.2d at p. 1201.) Thus, Appellant need not wait until or unless there has already been a CACI listing for due process protections to apply. (See *People v. Litmon* (2008) 162 Cal.App.4th 383, 399–400 [the demands of procedural process in the context of involuntary SVP commitments must be a trial in advance of potential commitment term]; *Boddie v. Connecticut* (1971) 401 U.S. 371, 378 [91 S.Ct. 780, 786, 28 L.Ed.2d 113 [Opportunity for that hearing must be

provided before the deprivation at issue takes effect]; see also *Valmonte v. Bane* (1994) 18 F.3d 992 [plaintiff "does not need to await the consumption of threatened injury to obtain preventative relief"].)

In *Valmonte v. Bane, supra,*18 F.3d 992, the U.S. Court of Appeals, Second Circuit, considered the due process claim of a person placed on New York state's central register of suspected child abusers after child protective proceedings were initiated but later dismissed. The plaintiff claimed that the maintenance of New York's Central Register implicates a protectible liberty interest because a state family court finding of abuse or neglect against the subject in the report creates "an irrebuttable presumption" that the allegations are supported. (*Id*. at pp. 994, 996.) The Second Circuit agreed that the state's procedures to challenge a designation on the register were constitutionally inadequate, and also that the plaintiff's claim was ripe as it is not necessary to wait until there is an actual injury to file this suit. (*Id*. at pp. 999-1000.)

In balancing the state's interest against the plaintiff's private interest, *Valmonte v. Bane, supra,* 18 F.3d at pp. 1004-1005, held that the enormous risk of erroneous inclusion of individuals being placed on the list who do not belong there tipped the scales in plaintiff's favor. In this case, as in *Valmonte*, the risk of an erroneous listing on the CACI tips the balance in favor of protecting Appellant. The procedures found inadequate in *Valmonte*, share the same flaw as in this case, where dismissal

of the appeal creates an irrebuttable presumption that the child abuse allegations are substantiated.

Although there is no constitutional right to an appeal, where a right to appeal is given, the appeal proceedings must comport with due process. *(Griffin v. Illinois 1956)* 51 U.S. 12, 18 [76 S.Ct. 585, 100 L.Ed. 891].) Due process requires the opportunity to challenge a listing in a child abuse database, along with the opportunity to prevent a future listing. Permitting discretionary review of an appeal in order to prevent an unchallengeable erroneous CACI listing serves both the interest of Appellant and the state. An inaccurate child abuse database, makes the CACI less effective as a tool to protect children from child abuse and poses a great cost to those individuals wrongly accused. California has a vital interest to protect abused children and to protect its citizens from being wrongly labeled as child abusers.[4]

The potential that California agencies would rely on the substantiated child abuse findings against Appellant without affording him an adequate opportunity to contest those findings, is inherently unjust. The remedy is minimal, simply

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[4] *They're Making a List, But Are They Checking It Twice? How Erroneous Placement on Child Offender Databases Offends Procedural Due Process* (2011) 44 U.C. Davis L. Rev. 1641, author Shaudee Navid suggests that procedures to avoid erroneous listings is a more efficient use of state resources while recognizing an individual's protected liberties.

consideration of the merits of an appeal that could result in a CACI listing. Thus, in balance, the scales tip in favor of the right of Appellant to be meaningfully heard.

Conclusion

For all the foregoing reasons, an appeal of a juvenile court's jurisdictional finding is not moot when that finding stigmatizes that parent as a child abuser as this pernicious label interferes with a parents' ability to care for their child. The appeal is also not moot where dismissal of the appeal precludes the ability to contest a potential CACI listing. Due process requires that Appellant have the opportunity to clear his name from jurisdictional findings that have serious consequences for him beyond jurisdiction.

If this court determines the majority opinion in the Court of Appeal erred by dismissing Appellant's appeal as moot, this Court should reverse that order and transfer the case to the Court of Appeal to consider the merits of the appeal pursuant to the California Rules of Court, rule 8.500 (b)(4).

Date: July 22, 2021

Respectfully submitted,

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Certificate of Compliance

Counsel of record hereby certifies, the enclosed brief complies with the form requirements set by the California Rules of Court, rule 8.204(b), and has been produced using 13-point Century Schoolbook. The text of this brief includes 58 pages and 11,109 words, excluding the cover, tables, signature block and this certificate, according to the word count feature of the computer program used to prepare this brief.

Date: July 22, 2021

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In Re: *D.P.*
Supreme Court No. S67429
Court of Appeal No. B301135
Juv. Case No. 19CCJP00973

Declaration of Service

I, the undersigned, declare that I am over 18 years of age, residing or employed in the County of Los Angeles, and am not a party to the instant action. My business address is listed above, and my e-service address is *schirn@sbcglobal.net*. On July 22, 2021, I served the attached APPELLANT FATHER'S OPENING BRIEF ON THE MERITS by placing true copies in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of the following persons at the following addresses:

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Los Angeles Juvenile Court
201 Centre Plaza Dr., Suite 7
Monterey Park, CA 91754

Court Of Appeal
Second Dist., Div. 5
300 S. Spring St. North Tower
Los Angeles, CA 90013

T.P.
Address on record

On July 22, 2021, I also transmitted a PDF version of this document via email, to each of the following using the email address indicated:

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Executed on July 22, 2021 at Los Angeles California

Megan Turkat Schirn

Megan Turkat Schirn

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Case Name: **IN RE D.P.**
Case Number: **S267429**
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/s/megan turkat schirn
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