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
TWAIN P. Objector and Appellant.	

APPELLANT'S REPLY 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After the Unpublished Decision by the Court of Appeal,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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Introduction

Although Respondent acknowledges jurisdictional findings made by a juvenile court can impose the stigma of being labeled a child abuser, Respondent argues Appellant should be deprived of his right to appellate review because jurisdiction was terminated during the pendency of his appeal raising the issue of mootness. To reach this conclusion Respondent 1) labels father's efforts to clear his name to be the mere assertion of a future unspecified stigma, 2) suggests that a jurisdictional finding of nonaccidental trauma under Welfare and Institutions Code[1], Section 300, subdivision (b), does not constitute a finding of child abuse, and

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

3) the lack of a current listing in the Child Abuse Central Index (CACI) should be dispositive of whether father has a due process right to a merits review of his appeal from the jurisdictional findings. Neither relevant law nor the facts of this case support any of Respondents assertions.

The mootness doctrine does not eliminate a person's constitutionally protected interest in their reputation as a parent. (*Bohn v. County of Dakota* (8th Cir. 1985) 772 F.2d 1433, 1436.) To the contrary, the chief purpose of the mootness doctrine is to assure that an appellant's adverse interest and effective remedy remain alive throughout an appeal. The mootness doctrine recognizes exceptions to the general rule and a case-by-case discretionary approach to its application. Protecting an appellant from practical and legal consequences that reach beyond the termination of dependency jurisdiction is one such exception. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762.)

Respondent's approach prioritizes "no room" for discretionary review and suggests that to merit appellate review a parent must show "realistic and concrete" detriment in addition to the stigma of being labeled a child abuser. Adopting Respondent's approach would place an unrealistic and unnecessary burden on parents who if they prevail in their appeal were already unjustly accused of child abuse. Such an approach would also require a parent to introduce new evidence on appeal as to what reputational consequences they have

suffered due to dependency jurisdiction, a topic generally not included in a child-focused dependency investigation.

The extra burden Respondent wants to impose is also unnecessary as reputational harm from being labeled a child abuser is a fact of common knowledge. Also, the risk of an individual erroneously having a substantiated report placed in a child-abuse database such as the Child Abuse Central Index (CACI) or the Child Welfare Services/Case Management System (CWS/CMS) without any mechanism to challenge their inclusion is too great to deny their constitutional right to procedural due process.

Granting a parent the right to seek appellate review of jurisdictional findings that impact their reputation as a parent, satisfies the requirements of due process, and avoids unjust erroneous listings. Adopting Respondent's position would insulate from review erroneous jurisdictional findings that damage a parent's reputation and leave unjustly accused parents without the prospect of appellate relief to clear their name. Appellate review of a juvenile court's jurisdictional findings that inflict the stigma of being a reported child abuser should be permitted even when jurisdiction has terminated, because concerns of due process and rights to family privacy require this result.

Failure to address each particular point raised in the Respondent's Brief ("RB") is not a waiver of those points but to avoid repetition as they have already been adequately explained

in Appellant's Opening Brief ("AOB") or because those points are not in response to the issues raised by this Court.

Argument

I.
The Mootness Doctrine Does Not Preclude Review Where The Collateral Consequence Of The Juvenile Court's Jurisdictional Findings Includes The Reputational Harm Of Being Labeled A Child Abuser

Respondent acknowledges that a court has discretion to review the merits of a "moot appeal" in certain cases but opines that "the problem with these cases is that they allow a parent to maintain a moot appeal even though the appellant is no longer an aggrieved party, which is what Father is doing here." (RB at p. 29.) In making this claim, Respondent complains about "the problem" of cases such as *In re C.C.* (2009) 172 Cal.App.4th 1489, *In re Nathan E.* (2021) 61 Cal.App.4th 53, and *In re M.W.* (2015) 238 Cal.App.4th 1444, where the court exercised discretionary review but fails to distinguish the basis of those decisions. (RB at p. 29.)

In support of the argument against discretionary review, Respondent cites to *In re K.C.* (2011) 52 Cal.4th 231 at p. 236, as authority for the contention that father is a "no longer aggrieved" party in his appeal to clear his name. (RB at p. 29.) Respondent's reliance on *K.C.* is misplaced and the contention that Father is

no longer an aggrieved party is incorrect. A party is "aggrieved" by the order or judgment from which the appeal is taken, as required for party to have appellate standing, if a party's rights or interests are injuriously affected by the judgment or order. (*Vitatech Internat., Inc. v. Sporn* (2017) 16 Cal.App.5th 796, 803–804, as modified (Oct. 30, 2017); *Simmons v. Ware* (2013) 213 Cal.App.4th 1035, modified on denial of rehearing. In *K.C.*, this Court found that a father whose parental rights were terminated did not have standing to appeal a placement decision for his child. In this case, unlike *K.C.*, Father retains custody of his children and has standing to litigate issues which impact his family and injure his reputation as a parent. Thus, *K.C.*, where the father no longer had standing as a parent does not support Respondent's contentions.

Next, Respondent argues that the harm of being labeled a child abuser is a "mere assertion of speculative future harm" and insufficient to allow merit review. (RB at pp. 27-28.) In support of this contention, Respondent cites to *In re I.A.* (2011) 201 Cal.App.4th 1484,1494-1495. That case is inapposite. In *I.A.* the appellate court denied the father's request for appellate review as he had not suggested a single specific legal or practical consequence from the juvenile court's finding, either within or outside the dependency proceedings as his claim the appeal would impact visitation was "highly speculative." (*In re I.A.*, *supra,* 201 Cal.App.4th at pp. 1494-1495.) As *I.A.* does not address the issue of reputational harm and the stigma of child

abuse as a practical consequence, it does not support Respondent's arguments on this issue. (RB at pp. 27-28.)

In circling around this Court's question as to whether an appeal is moot when a parent claims to have been stigmatized by a juvenile court's jurisdictional findings, Respondent admits that "DCFS does not contend that a jurisdictional finding can never be detrimental to a parent in the future nor that a jurisdictional finding could never result in a stigma." (RB at p. 29.) Respondent claims that in order for such a stigma to exist "it must be a realistic and concrete detriment that can be articulated and would result in the parent being sufficiently aggrieved to have standing to maintain the appeal." (RB at p. 30.)

Respondent cites no authority for this "realistic and concrete" standard but claims not to apply it would "disembowel the doctrines of mootness" as anyone can claim something may happen in the future. (RB at p. 30.) While anyone can claim something may happen in the future, some things have a foreseeable outcome. As expressed by Justice Rubin, "common sense tells us that no parent wants to be branded a child abuser" and this result is not speculative. (*In re D.P.*, unpub.opn.fld. 2/10/2021 (B301136/Div.5), [Dissenting Opinion of Rubin, J.].) That being branded a child abuser is an acknowledged stigma is a fact of common knowledge. (Evid. Code, § 452 (g) [Judicial notice may be taken of facts and propositions of such common knowledge they cannot reasonably be the subject of dispute].)

Respondent claims that father's desire to clear his name from this acknowledged stigma does not establish he has been injuriously affected by the challenged jurisdictional findings. (RB at p. 27.) Respondent is wrong as the stigma of being a child abuser is not a subject of dispute and there is a constitutionally protected interest in a person's reputation as a parent. (*Bohn v. County of Dakota* (8th Cir. 1985) 772 F.2d 1433, 1436.)

In *Bohn*, parents who were identified by the County of Dakota as child abusers brought a Section 1983 action alleging due process violations in their right to challenge those findings. The Eighth Circuit held that the reputations of parents found by the county to be child abusers were a protectible interest under the Fourteenth Amendment due process clause. (*Ibid*.) The parent's protectible interest stemmed from "the liberty interest in family privacy" which has its source, "not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition." (*Ibid*, citing *Moore v. East Cleveland* (1977) 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531.)

In discussing the protectible right of parents, *Bohn* explained:

> We also note that the Bohns have a protectible interest in their reputations at stake in this case. By identifying the Bohns as child abusers, investigating the quality of their family life and maintaining data on them, the County Department exposed them to public opprobrium and may have damaged their standing in the community.

> When the County Department found Bohn to be a child abuser, it drove a wedge into this family and threatened its very foundation. The stigma Mr. Bohn suffers as a reported child abuser undoubtedly has eroded the family's solidarity internally and impaired the family's ability to function in the community. In light of these clear adverse effects on familial integrity and stability we find that Mr. Bohn's reputation is a protectible interest. (*Bohn v. County of Dakota*, *supra*, 772 F.2d 1433, fn 4.)

Bohn distinguished *Paul V. Davis* (1976) 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405, where the respondent had a record of petty crimes, and in holding that parents had a protectible interest in their reputations when child abuse is involved applied *Wisconsin v. Constantineau* (1971) 400 U.S. 433,437, 91 S.Ct. 507, 27 L.Ed.2d 515 [Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential].)

In this case, as in *Bohn*, the stigma of being labeled a child abuser also impaired Appellant's reputation as a parent. Appellant and Mother were found by the juvenile court to have harmed their son of tender of years. The minor D.P. was hospitalized for a nonaccidental trauma evaluation, social workers and law enforcement investigated their family, interviewed multiple witnesses, and the county sought to detain their children and sustain dependency jurisdiction under section

300, subdivisions (a) and (b). (1 RT 94-95; 1 CT 1-4, 139; 2 CT 327-328, 341, 363.) The humiliation and shame from such a stigmatizing process can impact an individual's psychological core in a negative and often irreversible way. "Shame forces a downward redefinition of oneself and causes the shamed person to feel transformed into something less than [his or] her prior, idealized image. (See *Shame. Culture, and American Criminal Law* (1991) 89 Mich.L.Rev. 1880, 1920-1921.)

The shame from being labeled a child abuser can be as subtle and insidious as other parents, friends or relatives, not wanting their children to have playdates at the abuser's home to a loss of trust or change in attitude by school and health care providers who were contacted because of the investigation. These things may be difficult to measure but are no less real and damaging to a parent. One such consequence that father must live with is his concern about his infant son's radiation exposure after being subjected to 26 X-rays while being evaluated by the Children's Hospital CARES Team. (1 CT 211.)

Justice Rubin noted that this case should not be dismissed as moot because it fell squarely in the third, and arguably second category of *In re Drake M.* (2012) 211 Cal.App.4th 754, where the court refused to dismiss the appeal as nonjusticiable when the jurisdictional finding (1) serves as the basis for dispositional orders that are also challenged on appeal; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) could have other

consequences for [the appellant], beyond jurisdiction." (*Id.* at pp. 762–763.) As Justice Rubin stated, both the second and third category of *Drake M.* that encompass collateral consequences of being labeled a child abuser apply in this case.

In *Hamilton ex rel. Lethem V. Lethem* (2008)119 Hawai'i 1, 11, the Supreme Court of Hawaii recognized the reputational harm of a child abuse accusation as an exception to mootness. The Supreme Court of Hawaii found that a father's appeal of a TRO, that had expired during the pendency of the appeal, and where the mother was awarded full custody, was not moot under the collateral consequences exception to the mootness doctrine because Petitioner still had reputational interest to protect. In the 2012 opinion, which was from the remand after consideration of the merits, the Supreme Court of Hawaii noted that father's daughter had since reached the age of eighteen and the TRO remained expired, but as was the case when the matter was last before the court, the matter was not moot because "there is [still] a reasonable probability that the family court's issuance of the TRO against [Petitioner], which was based on its findings and conclusions that [Petitioner] abused his daughter, will cause harm to [Petitioner's] reputation." (*Hamilton ex rel. Lethem v. Lethem* (2012) 126 Hawai'i 294, 309.)

In *Hamilton ex rel. Lethem*, the mother on behalf of her then fifteen year old daughter obtained a TRO against the father based on his alleged physical and psychological abuse of the

minor. (*Hamilton ex rel. Lethem*, *supra*, 119 Hawai'i at pp. 2-3.) The Hawaii Intermediate Court of Appeals dismissed father's appeal as moot since the TRO was expired and he no longer had custody of his daughter. Father contended the appeal was not moot in part because the family court in granting the TRO found that past acts of child abuse had occurred. (*Id.* at pp. 841-842.) The Supreme Court of Hawaii found the "collateral consequences" exception to the mootness doctrine was applicable as reasonably possible collateral consequences, included a "reputational harm" because of the "legitimate public contempt for abusers" and the "social stigma" of a "protective order granted based on a finding of family violence." (*Id*. at pp. 7-9.) The family court's ruling that father did physically harm the minor undermined his reputation and standing in the community. (*Ibid*.)

The concurring opinion by Justice Acoba in *Hamilton ex rel. Lethem V. Lethem, supra,* 119 Hawaii at pp.12-13, went further to argue that the public interest exception to the mootness doctrine also accurately applied to the facts of the case. Justice Acoba explained that while the underlying facts of father raising his children involved a private matter, a parent's right to the parental discipline defense in TRO proceedings implicated a broader constitutional rights to raise one's children, manifestly a matter of public concern to Hawaii and its families. (*Id*. at p. 852.) In this case, Respondent claims that the stigma of child abuse does not affect the general public. (RB at p, 25.) In applying the reasoning of *Hamilton ex rel. Lethem* to this case,

Respondent is wrong. (RB at p. 25.) As explained by Justice Acoba, parental rights to raise one's children is a constitutional right. It is thereby a matter of public concern to California and its families.

In this case, as in *Hamilton ex rel. Lethem*, there are collateral consequences to Father's reputation and standing as a parent caused by the juvenile court's jurisdictional finding which continue after the termination of dependency jurisdiction. Thus, as held in *Hamilton ex rel. Lethem*, an appeal is not moot when the parent's reputation has been harmed by an accusation of child abuse and the social stigma placed on him by that finding. The reputational harm to a parent from a finding of child abuse is a collateral consequence that merits review as an exception to the mootness doctrine.

II.
A Current Placement on the Child Abuse Central Index Is Not Required For Dismissal Of An Appeal for Mootness To Be A Procedural Due Process Violation

Respondent touts that the lack of current placement on the Child Abuse Central Index (CACI) for Father is an "insurmountable obstacle" to his arguments because DCFS has not made a CACI referral. (RB at pp. 37-39.) In making this argument, Respondent acknowledges that under *Humphries v. County of Los Angeles* (9th Cir. 2009) 554 F.2d 1170, a person's

inclusion in the CACI implicates a constitutional liberty interest due to the stigma of such listing. (RB at p. 37.) Respondent's argument ignores that *Humphries* recommended that procedural safeguards guaranteeing the opportunity to be heard on the allegations ought to be *before* someone has reported the name for inclusion on the CACI. (*Id*. at p. 1201) Thus, due process protections do not require a person to have already been placed on the CACI. They also apply to prevent a report from being made in the future, such as when a juvenile court's jurisdictional findings are subject to mandatory reporting to the Department of Justice. (Pen. Code § 11165.9.)

Respondent asserts that no such risk of a future CACI placement exists in this case because 1) the February 2019 referral was closed as inclusive, 2) DCFS has not received a substantiated referral for child abuse, and 3) DCFS policy prohibits reporting a referral based "only on general neglect." (RB at pp. 40-41.) These arguments that the juvenile court's jurisdictional findings are not subject to the mandatory child abuse reporting provisions are inaccurate and demonstrate yet another U-turn taken by DCFS in this case.

The Child Abuse And Neglect Reporting Act (CANRA), requires that "every" case of known or suspected child abuse or severe neglect that is determined to be substantiated "shall" be forwarded to the Department of Justice. (Pen. Code, § 11165.9.) "Child abuse or neglect" includes physical injury or death inflected by other than accidental means upon a child by another

person. (Pen. Code § 11165.6.) The exception to this mandatory reporting requirement being cases that come within Penal Code, Section 11165.12, subdivision (b), which includes "general neglect" as defined by "the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred. (Pen. Code § 11165.12, subd. (b).)

As the jurisdictional findings in this case focused solely on a physical injury, i.e. the minor D.P.'s fractured rib as a case of nonaccidental trauma, those findings as well as the results of the DCFS investigation, fall squarely in the definition of "child abuse or neglect" and exclude "general neglect" as those terms are defined in the Child Abuse And Neglect Reporting Act. (Pen. Code §§ 11165.6, 1165.12.) By definition, "general neglect" excludes cases where a physical injury is involved as in this case.

To that extent that Respondent relies on "DCFS policy" instead of the statutory language of the Child Abuse And Neglect Reporting Act, that reliance is misplaced. The case of *In re H.C.* (2017) 17 Cal.App.5th 1251, instructs that an agency's policy guidelines are "merely an interpretation of the statute" which do not override statutory authority. (*Id*. at pp. 1268-1270.) As noted in *H.C.*, "Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative." (*Ibid.*) When considering the Child Abuse And Neglect Reporting Act's

mandatory reporting provisions and related definitions, statutory authority applies rather than a DCFS policy guideline.

Thus, Respondent's claim that the reporting referral in this case was "based on general neglect where the child sustained a physical injury" and cannot be reported to the Department of justice misstates the law and facts of this case. (RB at p. 42.) The Child Abuse And Neglect Reporting Act does not recognize a category of "general neglect with injury." (Pen. Code §§ 11165.6, 1165.12.) Respondent's hair splitting of terminology is akin to Monty Python's "Argument" skit differentiating between argument and contradictory naysaying. Thus, the substantiated jurisdictional findings in this case regarding physical injury to a child are subject to the mandatory reporting provisions for a case of child abuse or neglect.

Respondent's claim that there was an "inconclusive" referral does not change that fact. Respondent's Brief claiming the "referral received in February 2019" was closed as "inconclusive" cites to the Clerk's Transcript at pages 19 and 20. (RB at p. 40.) That cite references the February 14, 2019 Detention Report, which explained why DCFS believed the minors D.P. and B.P. should be detained from mother and father due to a substantiated allegation as to D.P.'s fractured rib because of the CARES team conclusion that non-accidental/inflicted trauma cannot be excluded. ((1 CT 19-20, 215.) The referral that was considered "inconclusive" was the

physical abuse allegation regarding sibling B.P. which has no bearing on findings of child abuse as to D.P. by the juvenile court.

As to Respondent's argument that DCFS did not make a substantiated allegation of child abuse in this case, the actions taken by the Department speak for themselves. (RB at p. 44.) On February 13, 2019, DCFS filed a petition which requested detention of the minors D.P. and B.P. from their parents under section 300, subdivisions (a) and (b), alleging serious physical harm as the result of deliberate, unreasonable and neglectful acts by the child's mother and father, and physical abuse. (1 CT 1-4, 11.) The section 300 petition added that DCFS intended to proceed by the rebuttable presumption under section 355.1, subdivision (a). (1 CT 7.) Section 355.1, subdivision (a) applies when competent professional evidence shows the child suffered an injury of the type that would not ordinarily be sustained absent the unreasonable or neglectful acts or omissions of a parent, guardian, or other person who has the care of the child. (§ 355.1, subd. (a).) Such an injury described by section 355.1 falls with the definition of child abuse or neglect. (Pen. Code §§ 11165.6, 1165.12.)

Respondent then argued at the September 20, 2019 jurisdictional hearing for the juvenile court to sustain jurisdiction under section 300, subdivisions (a) and (b) because "either someone did use blunt force and is lying about it, or because the parents say the child was in their care or the grandmother's care

at all times, the lack of explanation indicates medical neglect." (1 RT 55, 95. 97.) Throughout these proceedings, up until Respondent's Answer Brief On The Merits, DCFS has maintained the position that this was a case of serious physical harm to child of tender years caused by his parents due to nonaccidental trauma. (1 CT 1-4, 7, 55, 95, 97.) That is to say, DCFS pursued this as a case about child abuse.

The jurisdictional findings made by the juvenile court do not change that fact. Respondent's Answer To The Petition For Review, strenuously argued, "[I]t is judicial action, and not judicial reasoning or argument, which is the subject of review…" (Respondent's Answer, at pp. 12-13.) To the effect, Respondent urged this Court to focus on the language of section 300, subdivision (b). A jurisdictional finding under section 300, subdivision (b), requires the parent either to fail to adequately supervise or protect the child, or to willfully or negligently fail to protect the child from the conduct of the child's custodian. (*In re Roberto C.* (2012) 209 Cal.App.4th 1241, 1255.) The jurisdictional findings in this case affirmed the DCFS position that non-accidental/inflicted trauma could not be excluded as the cause of the child's unexplained rib fracture. (1 RT 96, 113-114; 2 CT 363-364, 365-366, 398.) Thus, the juvenile court's jurisdictional finding substantiated an allegation of "child abuse or neglect" as defined in Penal Code, section 1165.6. Respondent's arguments otherwise must be rejected. (RB at p. 44.)

To the extent that Respondent argues that DCFS is not bound by the juvenile court's jurisdictional findings due to "DCFS's policy" when fulfilling the requirements of the Child Abuse And Neglect Reporting Act, those arguments are both unavailing and disconcerting. (RB at p. 43.) The standard for the juvenile court to sustain a jurisdictional finding under section 300 must be made by a preponderance of the evidence. (§ 355, subd. (a).) The standard for DCFS to report an individual to the DOJ for a "substantiated" report is "more likely than not" that child abuse or neglect occurred. (Penal Code, § 1165.12, subd. (b).) There is no meaningful difference between those two standards. (See *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879 [stating "more likely than not" standard means evidence "would constitute a preponderance of the evidence"].)

Thus, if, as Respondent argues, the juvenile court's sustaining an allegation of child abuse does not require the Department to report the underlying incident to the DOJ, it would mean that the juvenile court found it more likely than not that abuse occurred, but that the Department's investigator disagreed. That DCFS would have filed a petition under section 300, subdivisions (a) and (b), and argued on appeal that the jurisdictional findings should be affirmed, is then very troubling. In that regard, it is ironic that Respondent is accusing Appellant of trifling with the Court. (RB at p. 43.)

In attempting to claim that Appellant was not labeled a child abuser because no finding of child abuse was made,

Respondent failed to answer the issue raised by this Court as to whether an appeal of a juvenile court's jurisdictional findings is moot where a parent may be barred from challenging a present or future CACI report. (RB at p. 48.) Respondent instead opines this issue has "no merit" and should not be entertained by this Court." (RB at p. 38.) Respondent's failure to address the issue raised by this Court can then be viewed as a concession. *(See Ramirez v. Ghilotti Bros. Inc. (2013)* 941 F.Supp.2d. 1197, fn 7 [failure to respond to argument on merits viewed as grounds for concession of the argument].)

III.

A Juvenile Court's Jurisdictional Finding Substantiating A Child Abuse Report That Subjects A Parent To Inclusion In A Child Abuse Database Without Any Recourse For The Parent To Have That Report Deemed Unfounded Constitutes A Legal And Practical Consequence Entitled To Procedural Due Process Protection

In addressing whether Father has identified a specific legal or practical consequence from the challenged jurisdictional finding, Respondent claims Father has not explained what "acknowledged stigma" is at issue in this case. (RB at pp. 45-46.) Respondent agrees a juvenile court's jurisdiction finding could result in a stigma that would be "a tangible and concrete harm to a parent's rights or interest" but does not state when that could happen but only that it did not happen in this case. (RB at p. 48.)

Respondent is wrong as the substantiated finding of child abuse is a practical and concrete harm to Father that raises due process protection.

In making the argument that there are no due process concerns in this case, Respondent spends significant time describing *Endy v. City of Los Angles* (9th Cir. 2020) 975 F.3d 757, a case about an "unfounded referral" which is readily distinguished from the facts at hand. (RB at p. 50-57.) In doing so, Respondent fails to mention at all the relevant decision of *Castillo v. County of Los Angeles* (C.D. Cal. 2013) 959 F.Supp.2d 1255, which addressed an "inconclusive" or "substantiated" referral. *Endy* noted *Castillo's* holding that inclusion of "inconclusive" allegations in the CWS/CMS was stigmatizing but that the record in Endy's case was limited to "unfounded" allegations. (*Endy v. County of Los Angeles*, *supra,* 975 F.3d at p. 765, fn3.) Respondent's reliance on *Endy* as applied to the facts in this case is misplaced.

In *Endy v. City of Los Angeles* (9th Cir. 2020) 975 F.3d 757, the plaintiff was found not to have suffered a stigma for purposes of a procedural due process claim as a result of "unfounded" child abuse allegations against him listed in the California's Child Welfare Services/ Case Management System ("CWS/CMS") internal database. The juvenile court dismissed two petitions that alleged Endy had physically and sexually abused his minor daughters. The second petition was dismissed "with prejudice" which caused DCFS to update its database to

indicate the allegations were "unfounded." (*Id.* at pp. 763-763.) Endy then sought to have the "unfounded" reports against him removed from DCFS's internal database. (*Id.* at p. 763.) The Ninth Circuit agreed "No doubt ... being falsely named as a child abuser on an official government index is defamatory." (*Id.* at p. 764-765.) *Endy* distinguished the "stigmatizing listings" in *Humphries* because the child abuse allegations against Endy were "unfounded" which meant that the allegations were false. (*Ibid.*) The potential negative impacts of inclusion in the CWS/CMS database such as employment, school visitation, or ability to adopt or foster a child were not shown by the inclusion of an "unfounded" referral. (*Ibid.*)

Respondent then claims the "takeaway" from *Endy* is that "appellant must do more than assert an unspecified and speculative stigma to avoid dismissal for mootness." (RB at p. 55.) Respondent's assertion that this is the correct "takeaway" from *Endy* is mistaken. (See also *Khai v. County of Los Angeles* (9th Cir. 2020) 823 Fed.Appx. 534 [Agreeing with *Endy* that "unfounded" allegations in CWS/CMS database did not cause reputational harm].) The holdings in *Endy* and *Khai* addressed an "unfounded" listing (i.e. an allegation determined to be false) in the CWS/CMS database. Endy did not suffer the stigma of being labeled a child abuser because the juvenile court found the allegations against him to be false. This does not reach or control the issue in this case of whether a "substantiated" listing establishes a protectible liberty interest.

A relevant "takeaway" from *Endy* is that after DCFS entered a "substantiated report" into CWS/CMS, the Department then filed a petition in the juvenile court. (*Endy v. City of Los Angle*s, *supra,* 975 F.3d at p. 762.) Thus, a "substantiated" report preceded the petition. As applied to this case, it can then be assumed there was a "substantiated" report entered into the CWS/CMS for Appellant since a petition was filed with the juvenile court. (1 CT 121.) That "substantiated" listing is left unchanged by dismissal of the appeal for mootness.

A second "takeaway" from *Endy* is that a reversal by the juvenile court caused DCFS to change the CWS/CMS "substantiated" report to an "unfounded" report. As applied to this case, a reversal of the jurisdictional findings would also change Appellant's "substantiated" CWS/CMS report to an "unfounded" one as all of the sustained allegations were challenged on appeal by mother and father. (See *In re Madison S.* (2017) 15 Cal.App.5th 308, 330 [finding claim nonjusticiable because "allegation would almost certainly be available in any future dependency or family court proceeding, regardless of any determination on our part as to whether it formed an independent basis for juvenile court jurisdiction"].) Respondent's argument that reversal of the jurisdictional findings would not eliminate any stigma from the substantiated child abuse report must also then be disregarded. (RB at p. 58.)

Thus, a practical consequence of a merits review of the jurisdictional findings would be to allow the appellant the

opportunity to alter the DCFS database records, and to remove the stigma of having a substantiated report in the CWS/CMS index. The appellate process is also the only way for Father to alter this listing. The lack of a mechanism to challenge this inclusion is a violation of an individual's constitutionally protected interest. (*Castillo v. County of Los Angeles*, *supra,* 959 F.Supp.2d 1255 [an "inconclusive" report of child abuse in the CWS/CMS database satisfied the "stigma" criterion of "stigma-plus" due process test].)

In *Castillo v. County of Los Angeles*, *supra,* 959 F.Supp.2d at p. 1257, the plaintiff Castillo was accused of abusing his girlfriend's child. Following an investigation, DCFS determined the allegation to be "inconclusive." An "inconclusive" report means that the investigator determined the report "not to be unfounded," but nevertheless found the evidence insufficient to determine whether child abuse or neglect has occurred. (Cal. Penal Code, § 11165.12.) Castillo subsequently received notice that he had been reported to the CACI and CWS/CMS databases with an "inconclusive" report for child abuse. (*Id.* at pp. 1257-1258.) Since he was not accused of harming his own child there was no dependency proceeding.

While the law was later changed so that only "substantiated" findings were reported to the CACI, and Castillo's report was removed, his report remained in the CWS/CMS database. (*Castillo v. County of Los Angeles*, *supra,* 959 F.Supp.2d at p. 1257.) *Castillo* noted the CWS/CMS database

is generally not subject to public disclosure but is accessible on a limited basis by several in—and out-of-state agencies with multiple exceptions. (*Id*. at pp. 1258, 1261) Castillo was told there is no way to appeal his inclusion in CWS/CMS. (*Ibid*.) Although inclusion in the CACI may implicate greater legal consequences, Castillo's rights and benefits were implicated by his inclusion in the CWS/CMS database for an "inconclusive" report and the procedural safeguards on Castillo's liberty interests were not sufficient to protect his rights. (*Id* at p. 1264.)

In applying the reasoning of *Castillo*, to this case, the first consideration was that the county interfered with Castillo's liberty or property interests by listing him in the CWS/CMS. because "being labeled a child abuser" by being placed on the CACI and CWS/CMS databases was "unquestionably stigmatizing" given the common aims of both databases. (*Castillo v. County of Los Angeles, supra,* 959 F.Supp.2d at pp. 1260-1261.) Thus, in addition to the risk of placement on the CACI, inclusion in the CWS/CMS database for even an "inconclusive" report of child abuse satisfies a "stigma" that implicates an individual's procedural due process rights.

In this case, the jurisdictional findings denote there is a substantiated listing for Father in the CWS/CMS database as part of his DCFS prior child welfare history. *Castillo* noted that the CWS/CMS database is similar to CACI in that it is "available to a broad range of third parties for a variety of purposes" including pre-employment background investigations, childcare

licensing or employment adoption or child placement. (*Ibid*.) The CWS/CMS database was also noted to go beyond the purpose of CACI to provide an index of names of suspected child abusers by providing access to the entire record of the agency's investigation. (*Ibid*.)

In the "plus" or second inquiry of the procedure due process analysis, Castillo's inclusion in the CWS/CMS database placed a tangible burden on a right or status previously recognized by state law because the database is available without a court order to a variety of state agencies. (*Castillo v. County of Los Angeles, supra,* 959 F.Supp.2d at p. 1262.) Castillo expressed concern about being able to adopt or obtain guardianship of his half-brother and his ability to continue volunteering with children because of his inclusion in CWS/CMS. (*Ibid*.) Those facts suggested the CWS/CMS listing, even one that was "inconclusive" had the potential to stigmatize.

Similar concerns exist in this case. Mother expressed concern about continuing her employment as a teacher. (Mother's Letter Brief (dated November 19, 2020) at p. 2; 1 CT 140.) Father has also worked as a School Bus Driver and at a Disabled Center. (1 CT 141.) Both mother and father have an interest in their eligibility to continue similar employment, volunteer at their children's schools, and participate in community, and organized sporting activities for their children in the future. These type of employment and volunteer activities commonly involve a child abuse background check. Being labeled a child abuser in a state

database places a tangible burden on Appellant's reputation as a parent and impacts his rights and abilities to engage in activities and employment involving children.

After *Castillo v. County of Los Angeles, supra,* 959 F.Supp.2d at p. 1263 decided that inclusion in the CWS/CMS database satisfied the "stigma-plus" procedural due-process analysis, the court applied three-part test in *Matthews V. Eldridge* (1976) 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18, in deciding that the government did not have adequate procedural safeguards. (*Castillo v. County of Los Angeles, supra,* 959 F.Supp.2d at p. 1263.) In the first prong, Castillo's private interest was considered analogous to his argument in support of his liberty interest, which was pursuing adoption, seeking custody of children, and securing licenses for working with children without having to be subject to an additional investigation, delays and possible denial or a benefit under California law. (*Ibid.*)

In this case, Appellant shares the same protected interests as expressed in *Castillo*. As mentioned above, those interests include employment and volunteer opportunities to work with children as he raises a family. Father has the same protected interest as any other California citizen to not be subjected to undue delays, appeals, and denials when undergoing routine background checks. Appellant also has the right not to be afraid of failing a routine background check due to a listing in a state child abusers database that he was precluded from challenging.

The second prong of the three prong test, the government's interest, was a justifiable interest to prevent child abuse but *Castillo* followed the reasoning in *Humphries* that this interest was "severely diminished if that database is either incorrect or inaccurate." (*Castillo v. County of Los Angeles, supra,* 959 F.Supp.2d at p. 1263.) In this case, where Respondent's argument that there was no child abuse report implies the jurisdictional findings were inconsistent with the DCFS's investigation, the state's interest in maintaining an inaccurate report as to Appellant is further diminished. Respondent's Brief expounds that father does not have a protectable interest but fails to articulate, what interest the government has in finding Appellant's appeal to be moot. Other than the self-imposed concern to protect the mootness doctrine from "disembowelment" it is unclear what "government" interest is being protected. (RB at p. 30.)

In the third "balancing" prong of the *Matthews* test, *Castillo* found the state's interest had no harm from permitting a system to clear those false accused of child abuse. (*Castillo v. County of Los Angeles, supra,* 959 F.Supp.2d at p. 1264.) Due process required a mechanism to challenge inclusion in a child abuse database. (*Ibid.*) In this case, as Respondent has not established a government interest other than unspecified mootness enforcement concerns, Appellant's protected procedural due process interests outweigh the government's interest. Thus,

in applying the "balancing" prong, the concerns of Appellant must prevail.

The appropriate mechanism to protect Appellant's procedural due process rights to challenge his inclusion in a child abuse database such the CACI or the CWS/CMS, is to find his appeal is not moot and permit him to fully litigate his appeal of the juvenile court's jurisdictional findings. Such a mechanism allows a parent to challenge and potentially change a "substantiated" report to an "unfounded" report. This would remove the label of child abuser from DCFS records and prevent a report being made to the Department of Justice. Due process requires this result.

Conclusion

In his dissent, Justice Rubin aptly stated that a dismissal of this case on mootness grounds "takes us far afield from the foremost purpose of the dependency system- the protection of children and the preservation of the family." (*In re D.P.*, unpub.opn.fld. 2/10/2021 (B301136/Div.5).) The label of child abuser has driven a wedge in this family by forcing the parents to suffer this stigma. A dismissal on mootness grounds has left them without any recourse to clear their names solely because dependency jurisdiction terminated as a result of their commendable compliance with the Department.

The resulting consequence poses serious challenges and obstacles to any similarly situated parent raising and providing for their children. The Department is mandated to report every substantiated claim of child abuse or neglect to the Department of Justice for inclusion on the Child Abuse Central Index. The substantiated report is also included in the California State Child Welfare Services/ Case Management System. Both databases have the purpose of providing the state with a list of suspected child abusers that is made available to government agencies for background checks and licenses, employment and volunteer activities related to children and childcare. Leaving a parent without a mechanism to challenge these listings, is a procedural due process violation. That these unchallengeable listings may remain indefinitely creates a high risk of erroneous inclusions which undermines any justifiable government interest in maintaining such a database.

This result is a direct assault on the integrity of a family unit, which has the protection of the Due Process Clause of the Fourteen Amendment. Respondent recognizes that the judgement of a juvenile court can impose a stigma on a parent but argues that a parent must present "concrete" evidence of the stigma and its impact. That is not required as the stigma of child abuse and its impact are well acknowledged.

Accordingly, father argues that both issues raised by this Court should be answered in the affirmative. A parent should be permitted to pursue an appeal from a juvenile court's

jurisdictional findings to clear their name and to challenge any present or future listings in a child abuse database.

Date: October 4, 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 37 pages and 7,865 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: October 4, 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 REPLY 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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T.P.*
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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 October 4, 2021 at Los Angeles California Megan Turkat Schirn
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