

IN THE SUPREME COURT OF OHIO

TAMMY SMATHERS, individually and
on behalf of the ESTATE OF
HARMONY BROOKLYN RAYNE
CARSEY,

Plaintiffs-Appellants,

v.

RICK GLASS, Executive Director of
Perry County Children's Services, et al.

Defendants-Appellees.

On Appeal from the Ohio Court of
Appeals, Fifth Appellate District

Case No. 2020-1062

Fifth District Case No.
19 CA 00018

BRIEF OF AMICUS CURIAE CHILD USA IN SUPPORT OF JURISDICTION

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OTHER AUTHORITIES

U.S. DEP’T OF HEALTH & HUMAN SERVICES, CHILDREN’S BUREAU, *Child abuse and neglect fatalities 2017: Statistics and interventions*, (Child Welfare Information Gateway 2019). 9

Fang, et. al., *The Economic Burden of Child Maltreatment in the United States & Implications for Prevention*, 36 CHILD ABUSE & NEGLECT 156-165 (2012)..... 10

CHILD USA, *Fiscal Impact of SOL Reform*, (2018)..... 11

CWLA & the ABA Center on Children & the Law, *Child welfare consent decrees: Analysis of thirty-five court actions from 1995 to 2005* (2005)..... 19

Farber, et. al., *Strengthening the Child Welfare Workforce: Lessons from Litigation*, 4 J. PUBLIC CHILD WELFARE 132-157 (2010) 19

Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14(4) AM. J. PREV. MED. 245-58 (1998)..... 10

Holbrook Mohr & Garance Burk, *AP IMPACT: Abused kids die as authorities fail to protect*, Associated Press, December 18, 2014 17

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OHIO EXEC. ORDER NO. 2019-04D (Nov. 4, 2019)..... 14

Ohio Governors, Children’s Initiative: Children’s Services Transformation, Office of Children Services Transformation, *Initial Findings Report* (February 2020) 14

Rice, et. al., *Engaging Families and Building Relationships: Strategies for Working Across Systems from a Social Exchange Perspective*, 15(2) ADVANCES IN SOCIAL WORK 306-317 (2014) 20

Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARCH PSYCHIATRY CLIN. NEUROSCIE. 174, 175 (Nov. 2005) .. 10

S.R. Dube et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span: Findings from the Adverse Childhood Experiences Study*, 286 JAMA 24, 3089-96 (Dec. 2001)..... 10

Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018) 19

U.S. DEP’T HEALTH & HUMAN SERVICES, *The Adverse Childhood Experiences (ACEs) Study*,
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U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON
CHILDREN, YOUTH, & FAMILIES, CHILDREN’S BUREAU, *Child Maltreatment 2018 (2020)*..... 9

U.S. DEP’T OF HEALTH & HUMAN SERVICES, AMIN. FOR CHILDREN, YOUTH, & FAMILIES, *Risk
and Protective Factors for Child Abuse and Neglect*, Child Welfare Information Gateway
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STATEMENT OF INTEREST OF AMICUS CURIAE

CHILD USA is the leading national nonprofit think tank working to end child abuse and neglect in the United States. CHILD USA pairs the best social science research with the most sophisticated legal analysis to determine the most effective public policies to end child abuse and neglect. CHILD USA produces evidence-based solutions and information needed by courts, policymakers, organizations, the media, and society as a whole to increase child protection and the common good. CHILD USA's interests in this case are directly correlated with its mission to protect children by preventing abuse and neglect. To deter harm to children and to provide justice to those who have been harmed, child protection workers need to be held legally accountable for their wanton and reckless conduct. Civil liability is necessary for three reasons: (1) it is necessary to make harmed children and families whole; (2) it discourages child protection workers from future misconduct, and (3) it fosters agency reform to encourage more proactive protection of our most vulnerable children.

I. ARGUMENT

"It is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals"

President Abraham Lincoln, First speech to Congress, 1861

In November 2015, Perry County Children Services (“PCCS”) became aware that 2-year old Harmony Carsey, to whom PCCS had been providing services, had sustained serious injuries as a result of on-going severe abuse and neglect. PCCS employees failed to act to protect Harmony, and Harmony died in January of 2016. Harmony’s grandmother subsequently filed a wrongful death suit on behalf of the child’s estate naming PCCS employees as defendants. PCCS employees moved for summary judgement based on qualified immunity, which the trial court granted despite a genuine issue of material fact as to whether the acts and omissions of PCCS employees amounted to wanton or reckless conduct not protected by qualified immunity. The intermediate appellate court upheld the decision. The Ohio Supreme Court must review this error to ensure that this case does not become a roadmap to absolute immunity for child protection employees’ willful and reckless conduct that harms children. Courts must permit cases where there is evidence of caseworker recklessness to proceed to a finder of fact and hold caseworkers appropriately accountable. Accountability is the best way to deter reckless behavior and prevent future harm.

A. SOCIETY HAS A COMPELLING INTEREST IN RECOGNIZING AND RESPONDING TO CHILD ABUSE AND NEGLECT

Child maltreatment is a public health crisis, the effects of which are lasting and profound for individual victims and as a society. Society pays a steep price for permitting child welfare workers to ignore victimized and at-risk children. The public has a significant interest in seeing that courts hold child welfare agencies and their employees liable when their gross misconduct imperils the lives of the children they are charged with protecting.

1. *The nation's child maltreatment epidemic*

This nation's scourge of child abuse and neglect is growing and outpacing government attempts to eliminate it. For the first time since 2015, rates of child maltreatment are on the rise with estimated numbers of victims reaching a staggering 678,000 victims per year. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH, & FAMILIES, CHILDREN'S BUREAU, *Child Maltreatment 2018* (2020), available at <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment>. The most tragic consequence of child maltreatment is a child fatality. A nationally estimated 1,720 children died from abuse or neglect in 2017, at an average of five children per day or one child every six hours. U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILDREN'S BUREAU, *Child abuse and neglect fatalities 2017: Statistics and interventions*, (Child Welfare Information Gateway 2019). The facts show that child welfare agencies were monitoring more than forty percent of these children. *Id.*

2. *Social and economic costs of childhood trauma*

The effects of childhood trauma can be profound, extensive, and lasting. As explained by the Center for Disease Control ("CDC"), Adverse Childhood Experiences ("ACEs") "have a tremendous impact on future violence victimization and perpetration, and lifelong health and opportunity." U.S. DEP'T HEALTH & HUMAN SERVICES, *The Adverse Childhood Experiences*

(ACEs) Study, Centers for Disease Control & Prevention, available at <https://www.cdc.gov/violenceprevention/childabuseandneglect/cestudy/>; see also Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14(4) AM. J. PREV. MED. 245-58 (1998); S.R. Dube et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span: Findings from the Adverse Childhood Experiences Study*, 286 JAMA 24, 3089-96 (Dec. 2001)(explaining that childhood trauma can lead to negative health outcomes). The ACE Study is one of the largest investigations of the effects of childhood abuse, definitively showing a strong correlation between ACES and negative effects across the lifespan, including, disrupted neurodevelopment; impaired social, emotional, and cognitive development; psychiatric and physical disease; and disability. See, e.g., Feletti et al., at 245-58 (1998); Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARCH PSYCHIATRY CLIN. NEUROSCIE. 174, 175 (Nov. 2005)(“Numerous studies have established that childhood stressors such as abuse or witnessing domestic violence can lead to a variety of negative health outcomes and behaviors, such as substance abuse, suicide attempts, and depressive disorders.”).

The costs to the individual victim are devastating, and the economic cost to society is staggering. In addition to the short and long-term effects to the victim, child maltreatment also puts a significant strain on society as a whole. The negative effects over a survivor’s lifetime generate many costs that impact the nation’s health care, education, criminal justice, and welfare systems. Fang, et. al., *The Economic Burden of Child Maltreatment in the United States & Implications for Prevention*, 36 CHILD ABUSE & NEGLECT 156-165 (2012)(Noting the estimated average lifetime cost per victim of nonfatal child maltreatment includes: \$32,648 in childhood

health care costs, \$10,530 in adult medical costs, \$144,360 in productivity losses, \$7,728 in child welfare costs, \$6,747 in criminal justice costs, \$7,999 in special education costs; the estimated average lifetime cost per death includes: \$14,100 in medical costs, and \$1,258,800 in productivity losses). Estimates based on investigated cases place the economic burden of abuse at \$2 trillion annually. See CHILD USA, *Fiscal Impact of SOL Reform*, (2018) available at <https://www.childusa.org/fiscalimpact>. The number is likely significantly higher when taking into consideration the high incidence of unreported cases of child maltreatment. *Id.* (Noting nearly 1/3 of cases are never reported). As a result, society pays a hefty price for government indifference toward victimized and at-risk children. Holding child welfare agencies and their employees liable for wanton and reckless misconduct is the legal, moral, and fiscal responsible course of action.

B. OHIO’S CHILDREN ARE AT RISK OF SIGNIFICANT HARM OR DEATH AS A RESULT OF JUDICIAL EXPANSION OF IMMUNITY

The vast majority of child welfare workers follow their obligations in good faith and any errors of judgement will generally be afforded appropriate immunity. However, Courts should be “cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in courts.” *Forrester v. White*, 484 U.S. 219, 223 (1988). It is important for child protection workers to operate without excessive constraint, but the courts must also protect the interests of those whom child protection workers serve. In the context of caseworker immunity, the court must also consider the victim child’s interest in access to justice for the harm caused by a caseworker’s indifference to warnings of abuse or neglect. The qualified immunity standard allows courts to effectively balance these competing interests upon review of the full evidentiary record. See *Pearson v. Callahan*, 555 U.S., 223, 231 (2009)(“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they

perform their duties reasonably.”). Alternatively, when courts fail to adequately examine caseworker misconduct that forms the basis of a claim, they pervert the doctrine of immunity to favor the government at the expense of vulnerable children. Permitting caseworkers to act with impunity creates a dangerous disincentive to child protection..

1. *Ohio courts have effectively written ‘recklessness’ out of the law*

Ohio law affords government employees, including child protection workers, *some* degree of protection from liability for actions taken in furtherance of their duties. See R.C. 2744.03(A)(6)(providing that employees of a political subdivision are totally immune from liability but for three exceptions.). These policies are typically justified by an interest in safeguarding government funds and shielding the decision-making of state officials. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)(“[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.”); see also *Saucier v. Katz*, 533 U.S. 194, 195 (2001)(“[T]he goal of qualified immunity is to avoid excessive disruption of government.”). However, neither of these protections is warranted when a child dies as a result of a state employee’s wanton or reckless conduct. See R.C. 2744.03(A)(6)(b)(listing an exception from immunity for an employee whose acts or omissions are done with “malicious purpose, in bad faith, or in a wanton or reckless manner”); see also *Anderson v. Massillon*, 983 N.E.2d 266, 134 Ohio St.3d 380, 388, 2012-Ohio-5711 (Defining wanton conduct as “the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result” and reckless conduct

as “the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances.”); *O’Toole v. Denihan*, 889 N.E.2d 505, 519, 118 Ohio St.3d 374, 389, 2008-Ohio-2574 at ¶90 (“[R]ecklessness is a perverse disregard of a known risk.”). Under Ohio law, issues involving wanton or reckless behavior are questions of fact for a jury. See *Norris v. Ohio Standard Oil Co.*, 433 N.E.2d 615, 616, 70 Ohio St.2d 1, 2 (1982)(Explaining that determinations of recklessness are generally a question of fact for the jury and, as such, that summary judgement should be used very cautiously and sparingly); see also *Brown v. Cuyahoga Falls*, Summit App. No. 24914, 2010 WL 3582806 (“[w]hether conduct is reckless is generally a question to be resolved by a jury.”). Historically, Ohio courts have blocked suits against child protection workers from proceeding to a fact finder, even in cases where genuine issues of material fact are disputed between the parties. See, e.g., *Lindsey v. Summit Cty. Children Servs. Bd.*, , Summit App. No. 24352, 2009 WL 1478711 (Upholding trial court’s finding that no exceptions applied as a matter of law and granting defendants Motion for Summary Judgement in a case where Child Protective Services closed a case following hospital report of suspected abuse); see also *Brent v. Wayne Cty. Dep’t of Human Servs.*, 901 F.3d 656, 685 (6th Cir. 2018)(Affirming the dismissal of claims against a child-protective-services caseworker whose false statements in support of a removal order resulted in minor children being taken from family who were denied visitation, even though the panel “entirely agree[d]” that “a social worker, like a police officer, cannot execute a removal order that would not have been issued but for known falsities that the social worker provided to the court to secure the order.”); *Estate of Glenara Bates v. Hamilton Cty Dep’t of Job & Family Services*, U.S. Dist. Ct. No. 1:15-cv-798 (S.D. Ohio), 2017 WL 106871 (Granting defendants’ motion for summary judgement on the

pleadings based on allegations that caseworkers failed to properly investigate child abuse reports against a known abuser and the child ultimately died as a result of the ongoing abuse).

In effect, Ohio courts have written the recklessness exception out of the immunity law. In so refusing to intervene, the courts will deter aggrieved parties from bringing their stories to light. As wronged families are unempowered, those who have wronged them will go unpunished.

2. *A pattern of significant harm and death emerges from Ohio's failure to hold caseworkers accountable for their misconduct*

In November 2019, Ohio Governor Mike DeWine ordered a review by the Ohio Department of Job and Family Services into the practices of child welfare agencies.

OHIO EXEC. ORDER NO. 2019-04D (Nov. 4, 2019) available at <https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/2019-04d>. The review found, among other things, that child welfare agencies across Ohio fell woefully short of their obligations to investigate reports of child maltreatment and assess children's safety. See Ohio Governors, Children's Initiative: Children's Services Transformation, Office of Children Services Transformation, *Initial Findings Report* (February 2020) available at https://drj.fccourts.org/uploads/Forms/transformation_report_020520.pdf. The review came after hundreds of children in Ohio had already died and countless others irreparably harmed at the hands of adults whose histories were well known to agencies designated to protect children. See Katie Wedell, *Targeting at-risk kids may be key to reducing child deaths*, Dayton Daily News, October 27, 2017 available at <https://www.daytondailynews.com/news/crime-law/targeting-risk-kids-may-key-reducing-child-deaths/4ywEm2s35DGBM37yGwpXPL/> (referencing a Dayton Daily News exclusive investigation that found that more than half of the 474 Ohio children who died from suspected

abuse or neglect between 2009 and 2016 had been on the radar of a local child protection agency prior to their deaths.). Unfortunately, this shocking trend shows no signs of slowing.

While child protection workers cannot be expected to forecast every harm or fatality that befalls a child under their watch, Ohio courts have broadened qualified immunity protections beyond the scope of the statutory language. While R.C. 2744.03(A)(6)(b) does not offer immunity for a government employee's recklessness, Ohio courts have repeatedly dismissed suits against child protection workers, despite disputes between parties regarding facts that, if true, evidence harmful recklessness. In so doing, Ohio courts make it inordinately difficult to protect at-risk children and penalize those workers who disregard known risks to the children they serve. The Dayton Daily News investigation of Ohio's broken child welfare system identified at least 19 cases where a child had been removed from an unsafe living environment, to then be returned—"sometimes just days before their deaths." *Id.* These cases are just a few of the many that reflect the tragedy that has befallen Ohio's children in the absence of caseworker accountability:

- **2019:** 10-year-old Takoda Collins, was fatally injured after what police called "extreme abuse" by his father. Records show that school officials reported suspected abuse on 17 separate occasions. Police also made several reports and referrals to child protective services for abuse concerns between 2016 and 2019.
- **2018:** CPS caseworkers placed 4- and 5-year old siblings with their grandfather, despite his lengthy criminal record of violence against his minor son, and several sexual assault charges. Another teenage boy lived with the grandfather, who CPS had placed there after they deemed him unsafe to remain in a home where he sexually assaulted a 5-year-old. Shortly after the siblings' placement, they disclosed to their mother that the grandfather was sexually assaulting the youngest sibling. The mother reported same to the CPS caseworker, who failed to follow agency direction to schedule a forensic examination and failed to remove the children from the home. The children remained with the grandfather until Mother regained custody, at which point the CPS caseworker

recommended continued visitation with grandfather. The caseworker remains employed in her same role with the county.

- **2015:** 2-year old Nicholas Wolfe was beaten to death by his mother, Channae Fleisher. He was the third child of Fleisher's to die. One child reportedly died of SIDS and another child was killed by the father. Nicholas had been removed from Fleisher's care for two years and returned to her custody about two months before his death.
- 2015:** 2-year-old Glenara Bates died as a result of battered child syndrome, acute and chronic head injuries, and starvation. Child protective services (“CPS”) was aware of the abuse and neglect and had removed Glenara and her six siblings as a result. CPS recommended Glenara’s return to her mother’s home when she was 8 months old. Upon return, CPS continued to receive abuse reports from hospital staff and others. CPS took no steps to remove Glenara from the home and CPS failed to see Glenara for 3 months following these reports. CPS finally saw Glenara 3 weeks before her death, reporting that she appeared “happy and healthy.” Contrarily, the child’s autopsy revealed over 100 injuries to her body that weighed just 13 pounds at the time of her death. The coroner reported that Glenara’s injuries were not strictly recent, and that she had been brutalized “her entire pathetic, pathetically short life.” See *State of Ohio v. Bates*, 149 N.E.2d 475, 159 Ohio St.3d 156, 2020-Ohio-634. Shortly thereafter the public learned that Glenara’s caseworker had previously been suspended for impeding a child abuse investigation by lying to officials and agency personnel. The head of Family Services publicly admitted that the caseworker had failed to follow proper procedures.
- **2010:** 16-year-old Adonis Mays died after his father put him in a chokehold during an argument. Records indicate he was deprived of oxygen for a long time and aspirated food into his lungs. Child protective service workers investigated eight prior abuse and neglect reports involving the child and he had previously been discharged from county custody.
- **2010:** 4-year-old Lawrence King, III, was beaten to death by his stepfather. On the day of his death he was noted to have bruising over most of his body. Child protective services had investigated three prior accusations of abuse and neglect involving the child with one being substantiated. The child had just been reunited with his mother three weeks prior to his death after being in the custody of his paternal grandmother.
- **2010:** 2-year-old Bianca Jackson died after her 4-year-old brother accidentally set fire to a building where the two had been playing. The building housed illegal fireworks and had been stripped of insulation. Records indicate there were six prior reports of abuse or neglect

involving Bianca and three were substantiated. The child was previously discharged from children services custody.

- **2006:** 11-month-old Nicholas Goodrich died after his mother's boyfriend picked Nicholas up by the throat and threw him across the room. In the four weeks preceding his death, CPS workers across two counties ignored at least 12 calls regarding on going abuse, including one where a caller told the CPS worker, "Because there's nothing that has been done, that poor child will end up dead."

C. THERE IS A SIGNIFICANT PUBLIC INTEREST IN DEMANDING ACCOUNTABILITY FOR CHILD PROTECTION EMPLOYEES' MISCONDUCT

As cases like the aforementioned gain public attention nationwide, civic demand for child protective services reform has intensified. Courts must permit suits with evidence of caseworker recklessness to proceed to a finder of fact, and hold caseworkers appropriately accountable to deter reckless behavior and prevent future harm, enhance system wide policies and procedures, and increase trust between the public and the government officials charged with their protection.

1. Accountability through qualified immunity exceptions minimizes further harm

Abused and neglected children are often socially isolated and lack community supports. See generally, U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN, YOUTH, & FAMILIES, *Risk and Protective Factors for Child Abuse and Neglect*, Child Welfare Information Gateway (Feb. 2004). Often, an abused child's only hope is the intervention of a child protective agency. These children rely on agencies and their caseworkers to respond quickly to abuse reports, identify signs of harm, and intervene with services and, where necessary, court intervention. As the sole saviors of many abused and neglected children, this system must be held to a high standard. Accountability for those who discharge these duties with recklessness is essential to the growth and improvement of the child welfare system overall. As Kentucky Franklin Circuit Court Judge Philip Shepherd aptly states, "there can be no

effective prevention when there is no public examination of the underlying facts.” Holbrook Mohr & Garance Burk, *AP IMPACT: Abused kids die as authorities fail to protect*, Associated Press, December 18, 2014 available at <https://apnews.com/1014e8fcc2b5432685111e567c403262/ap-impact-abused-kids-die-authorities-fail-protect>. Child protection workers must be aware that their actions will be scrutinized before the courts will rule that they have qualified immunity.

. While it is important for child welfare employees to operate without constant fear of repercussion for reasonable errors, it is essential that they be accountable to the public for their reckless misconduct. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)(quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (“Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects “all but the plainly incompetent or those who knowingly violate the law.”). Civil liability is fundamental to deterring future recklessness. See, e.g., *Urseth v. City of Dayton*, 680 F. Supp. 1150, 1160 (S.D. Ohio 1987)(Urging the police department to alter its practices in this wrongful death suit, stating that “[t]o do otherwise will be to risk another James Urseth case, another tragedy which will, while proclaiming loud and clear that the community has learned nothing from the death of James Urseth, serve as proof positive that he died needlessly and in vain.”); see also *In re Care & Prot. of Sharlene*, 445 Mass. 756, 773 (2006)(Involving a child who was abused by her adoptive mother and stepfather and ultimately died after being taken off life support at the behest of her stepfather. The court noted, “[this is] a case about a young girl who has suffered tremendously from acts of violence and cruelty and who now will be permitted to pass away with dignity. [The child’s] memory will remind us, time and again, that we, as a society, need to do more to aid children who are neglected and abused, and thereby denied the care and

nurturing they so desperately want and need. If [this child's] case helps other children to escape their misery, her short life will not have been in vain.”).

Research supports the position that civil liability serves as a profound deterrent for undesirable behavior and motivator for systemic change. By creating greater awareness of systemic problems, putting pressure on stakeholders, and using the court to promote change, civil litigation has served as a catalyst for significant child welfare reform. Farber, et al., *Strengthening the Child Welfare Workforce: Lessons from Litigation*, 4 J. PUBLIC CHILD WELFARE 132-157 (2010). Some notable reforms include increased funding, improved staff training and supervisory ratios, lower caseloads, new quality assurance measures, and enhanced data collection. *Id.* (citing a study from CWLA & the ABA Center on Children & the Law, *Child welfare consent decrees: Analysis of thirty-five court actions from 1995 to 2005* (2005)).

To best protect at-risk children from abuse and neglect, there must be some reasonable expectation and degree of assurance that child protection agencies and their employees will recognize when they fall short of public expectations and are held meaningfully accountable.

2. *Accountability fosters confidence in public services*

Official misconduct, including that of state child protection agencies and their employees, is an issue of the highest public concern and civil liability is often the only mechanism for redress. Beyond protecting the rights of the aggrieved party, civil liability is needed “to hold public officials accountable when they exercise power irresponsibly.” *Pearson*, 555 U.S. at 231.

Such a lack of accountability risks further eroding citizen's trust and basic understanding of the rule of law. See, e.g., Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356

(2018)(“When a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness.”).

Alternatively, appropriate accountability helps people overcome negative perceptions about child welfare workers and makes families more willing to comply with services that they genuinely need. See Rice, et. al., *Engaging Families and Building Relationships: Strategies for Working Across Systems from a Social Exchange Perspective*, 15(2) *ADVANCES IN SOCIAL WORK* 306-317 (2014)(Citing a study that revealed most clients’ perceptions of the “system” were negative and clients’ did not feel they would “get the help [they] really need.” Therefore, more than ever, effective collaboration between the child welfare caseworker, family, and other service providers is an essential practice method to foster engagement and development of a helping relationship.). Failing to hold them accountable when they ought be erodes relationships between workers and the families they serve.

In order to best protect children, courts must strike a balance between child protection and shielding child protection workers from excessive lawsuits. Allowing children and their champions to litigate allegations of misconduct by protection workers keeps those workers focused on the life and death implications of their choices.

CONCLUSION

For the foregoing reasons, Amicus files this brief in support of jurisdiction and urge this Court to grant review, reverse the trial court’s award of summary judgment to each Appellee, and remand this case to a fact finder who can determine whether Appellees recklessly harmed Harmony Carsey.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amicus Curiae CHILD USA was sent via electronic mail to counsel of record this 8th day of September, 2020:

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