No. 22-16214

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUSTIN G. REEDY,
Plaintiff-Appellant,

vs.

CALIFORNIA DEPT. OF SOCIAL SERVICES; MARK GHALY, *et al.*,

Defendants-Appellees,

– and –

STATE OF CALIFORNIA; GAVIN NEWSOM.

On Appeal from the United States District Court
For the Eastern District of California
The Honorable Troy Nunley
District Court Case 2:21-cv-00223-TLN-CKD

APPELLANT'S PETITION FOR REHEARING AND/OR REHEARING *EN BANC*

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In Pro Per

Dated: February 7, 2024

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INTRODUCTION AND RULE 40 STATEMENT

The Court should grant Appellee a rehearing for several reasons, foremost because the Panel considered proposed remedies raised for the first time on appeal. Exh. A pg. 3.

The Court should have given Appellee leave to amend because he was in pro se, the SAC was the first complaint served on opposing parties, and there are numerous factual allegations he could have raised.[1] *See* AOB pg. 27; ARB pg. 41-42.

I. Discriminatory in Application and Intent/Title IX

The Panel incorrectly observed that Appellee *has not alleged* that MPP § 82-808.413(d) discriminates against men in its application and intent and that he *failed to allege* that the CCC has an official policy of/is deliberately indifferent to discrimination on the basis of sex.[2] Exh. A pgs. 4-5.

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[1] This is particularly true if the State and County rely on a new legal theory not put forth at trial.

[2] Emphasis is added where print appears in bold / italics throughout the body of the text.

Appellee unequivocally alleged that the *CalWORKs program* discriminates in *its application and intent* on the basis of the challenged regulations. See SAC pg. 23-24; ARB pgs. 18-19 (purpose is to *aid single mothers)*. Appellee established the discriminatory effect and deliberate policy of discrimination by CCC. *See* SAC pg. 20 (decades of grossly disproportionate participation rates); ARB Pgs. 36-38.

II. Due Process

The Panel concluded that Cal. Fam. Codes §§ 3086 and 3087 provide Appellee with "adequate procedural protections." [3] Exh. A pg. 4.

The court negated a substantive due process claim stating Appellee hadn't been deprived of custody. Exh. A pg. 5. He has alleged harm to the protected parent-child relationship.[4] The Fourteenth Amendment §1; Cal. Const. art. I §7. *See* SAC pg. 15 (impairment of dignity, authority,

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[3] The decision affirmed a vested and fundamental property right to welfare benefits exists.

[4] citing *Kelson v. Springfield*, 767 F 2d 651; US Ct App 9th Cir, (1985).

autonomy) [5]; AOB pgs. 36 (threatens to destroy relationship completely); 50–51, 53-55, 62–64; ARB pgs. 1, 29, 31-35.

III. Fam. Code § 3087 – Relevant Background

Appellee petitioned the court for joint equal custody on 4/16/18 before the child was born. On 5/22/19, the parents stipulated to 50/50 custody. The court and family have the "widest discretion to choose a parenting plan that is in the best interest of the child." (Cal. Fam. Code § 3040 (b) cited in *Montenegro v. Diaz*, 26 C4th (2001)). Once a final judicial custody determination is in place, a party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change in circumstances justifying a modification. (*Montenegro v. Diaz* (2001)); (*Burgess, supra*. 13 Cal. 4th at p. 37, 51, Cal. Rptr. 2d 444, 913 P.2d 473). [T]he paramount interest of the court is in furthering the child's need for stability and continuity in custody arrangements, unless some significant change in circumstances indicates a different arrangement would be in her best interest (*Montenegro v. Diaz*,

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[5] Demby, Gene. *The Mothers Who Fought To Radically Reimagine Welfare*, NPR. June 9, 2019.

supra. 26 C4th at 256, 109 CR2d at 580 (2001); *Burchard v. Garay* (1986) 42 C3d 531, 535, 229 CR 800, 802; *Marriage of Brown and Yana* (2006) 37 C4th 947, 956, 38 CR3d 610, 615-616).

According to [9th Circuit] earlier decisions, "[t]he changed-circumstances rule…provides…that once it has been established that a particular custodial arrangement is in the best interest of the child, the court need not reexamine that question…it should preserve the established mode of custody…The rule thus fosters the dual goals of judicial economy and protecting stable custody arrangements." (*Burchard, supra*. 42 Cal. 3d at p. 535) cited in *Montenegro v. Diaz*. The Court's decision in *Burgess* further confirmed that the changed circumstances rule applied after any final "judicial custody determination." (*Burgess, supra*, 13 Cal. 4th at p. 37).

IV. Cal. Fam. Code § 3087 Fails as a Remedy

Fam. Code § 3087 fails to provide "adequate procedural protection" because it conflicts with existing law/caselaw. This statute

presents a circumstance under which eligibility *could* change but is not applicable in the instant case.[6]

V. Fam. Code § 3086 – Factual Background

The Court concluded that Appellee could obtain individualized review of the CalWORKs benefits allocation after the child's birth through Cal Fam. Code § 3086. Exh. A pg. 3**.**

Appellee contends that this is an unrealistic requirement for a poor father who lacks requisite ability and resources. Out of desperation, Appellee filed a motion on 4/1/22 and heard on 5/12/22. The matter was continued to 7/11/22 pursuant Cal. Fam. Code § 4251. Appellee paid an attorney for two hearings where K.M. requested continuances without notice. The matter was set for 11/28/22. Commissioner Gary Slossberg gave leave to prepare a brief, which was filed in pro per on 11/11/22.

[6] The Panel incorrectly overlooked Appellee's objections to these proposed remedies which do not address the core issue that the regulation in question discriminates on the basis of sex when the parents are *similarly situated*. See ARB pgs. 10-14. The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated people be treated alike. *City of Cleburne Living Ctr., Inc*. 473 U.S. 432, 439 (1985).

On 11/14/22, Appellee filed a declaration notifying the court that K.M. hadn't submitted the mandatory Income and Expense Declaration (FL-150) updating the court on her college degree, new home, pregnancy, and cohabiting boyfriend. (Cal. Fam. Code §§ 2030-2032, 2100-2113, 3552, 3620-3634, 4050-4076, 4300-4339).

Appellee requested accommodations pursuant Cal. Civ. Code § 54.8 and Title II of the Americans with Disabilities Act. The court failed to respond. Gary Slossberg became a judge. Hana Balfour became Commissioner.

On 11/28/22, **Reesa Miller**, counsel for the **Dept. of Child Support Services** (DCSS) declared, "**The agency's position is that this court has no authority to order anybody to be on or off cash assistance**…**There's an appeals process."** [7] Commissioner Balfour denied the motion citing a "pending change in custody," and concluded that "**the court does not have authority**." Appellee's Objections were denied. The DCSS filed the Orders on 12/12/22. On 12/20/22, Appellee filed a declaration stating that

his rights had been violated by non-compliance with disability laws; the court failed to consider "his individualized needs on a case by case basis" regarding accommodations. *(See, e.g., School Board of Nassau County v. Arline,* 480 U.S. 273, 285 (1987); 28 C.F.R. § 35.130(b); 28 C.F.R. pt. 35, App. B; 28 C.F.R. § 42.503(b)(1); § 45 C.F.R. § 84.4(b)(1)(ii)-(iii); 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act); 42 U.S.C. §§ 12131-12134 (Title II of the ADA); Cal. Civil Code § 51(f)). He attached the brief; a summary of the § 3086 proceedings; and a request for attorney fees.

On 12/27/22, the **DCSS requested Reconsideration.** A hearing was set for 1/23/23. Judge Bowers presided. Reesa Miller **rescinded.**

Judge Bowers denied the motion stating Appellee could "refile at a future date"…warning him not to file "motions that would be **frivolous or meritless**." She stated that **"[K.M.] has been designated the benefit recipient**… **and has been receiving the benefits accordingly**"… "this is

in the **best interest** of the minor.[8]" She concluded that "the system…is **not discriminatory on the basis of gender…it's based on the child's needs, not the parents' needs**." She "encouraged" Appellee to seek out…benefits through the state "**that do not involve the minor**."

Invidious discrimination is apparent as: (1) Commissioner Balfour denied the motion based on a "pending change in custody," relying on facts that had not been proven [see *Colony Ins. Co. v. Crusader Ins.* 188 Cal.App. 4th 743, 750-751, 115 Cal. Rptr. 3d 611 (2010)]; (2) Judge Bowers ignored K.M.'s statutory requirement to file form FL-150 [*supra* pg. 3]; (3) She warned Appellee not file "frivolous or meritless" motions; (4) She encouraged him to seek benefits unrelated to the minor despite equal responsibility; (5) She concluded that K.M.s eligibility "ensure[s] the child's needs are being met," ignoring his time share; and (6) She proclaimed that "the system…is not discriminatory on the basis of

[8] "[T]he law of domestic relations…treats as distinct the two standards, one harm to the child and the other best interests of the child…I…shall assume that there are real and consequential differences between the two standards." [*quoting* Justice Kennedy, op. 2, *Troxel v. Granville* (2000)].

gender," a finding outside the court's jurisdiction, dependent on facts outside the record or that had not been proven (*Id*.).

Appellee requested a Statement of Decision pursuant Cal. Code of Civ. Proc. § 632. Judge Bowers wouldn't prepare one but said he could. He submitted it pursuant Cal. Rules of Court, rule 3.1590.

The family law facilitator couldn't assist with appeals. Appellee had a statutory right to appeal but wasn't timely informed. He filed a writ petition that was denied without further recourse.

Institutionalized discrimination was documented by Law Professor Daniel Hatcher in 2013.[9]

> "Poor fathers…struggle with poverty – often with near hopelessness – within multiple systems in which they are either entangled or overlooked…, such as child-support and welfare programs, family courts…and education…systems…"

VI. Legislative History of § 3086

There is long-established custody bias in legislation and judicial policy as described by Law Professor, Nancy Lemon:

[9] Daniel L. Hatcher, Forgotten Fathers, 93 B.U. L. Rev. 897 (2013).

"Since 1973, the Civil Code sections comprising the Family Law Act were purposely devoid of language stating a preference for a parent's sex in determining custody of minor children. Yet, Civil Code § 4600(a) typically resulted in custody being awarded to the mother based on the maternal presumption and Tender Years Doctrine. Custody was often awarded to the parent who requested it, which resulted in mothers getting sole custody approximately 90% of the time.

Prior to 1979 and the adoption of Cal. Senate Bill 477 and Cal. AB 1480 which amended Ca. Civil Code §§ 4600 and 4600.5, there was no provision in the law for the court to grant joint custody even when that was the desire of both parents. The intent of the state legislature was to provide a mechanism to allow parents to share custody of minor children by agreement.

The amended § 4600 provided that "Custody should be awarded in the following order of preference, according to the best interests of the child: (a) To both parents jointly pursuant §

4600.5 or to either parent…," which continued to result in mother's getting sole custody. The statutory framework focused on promoting frequent and continuing contact with both parents, but there was no significant change in the number of fathers seeking custody after the amendments were enacted."[10]

Legislative Intent:

Neither the enactment of Civ. Code § 4600.5, nor the 1979 amendment to Civ. Code § 4600, abrogated the requirement of a change in circumstances to justify a change in child custody. Those statutory changes facilitate joint custody and implement a **public policy** in favor of assuring frequent and continuing contact with both parents and the **sharing of the rights and responsibilities of child rearing**, and do not purport to alter the **public goals** of **ending litigation** and **minimizing changes in the child's established mode of living** or to define the "best interests of the child," the guiding consideration for determining

[10] Nancy K. Lemon, Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5, 11 Golden Gate U.L. Rev. (1981).

custody. Civ. Code § 4600.5 implicitly adopts the change in circumstances requirement by requiring that the court state its reasons for modifying or terminating joint custody if the motion for joint custody is opposed. *Speelman v. Superior Court* (Cal. App. 1st Dist. Nov. 22, 1983), 152 Cal. App. 3d 124, 199 Cal. Rptr. 784, 1983 Cal. App. LEXIS 2575.

In 1992, the Civil Code sections of the Family Law Act were converted into the California Family Code. **Cal. Fam. Code § 3086** (Operative January 1, 1994) **continues former Civ. Code § 4600.5(h) without change.** [11]

VII. Fam. Code § 3086 Fails as a Remedy

A *requirement* that Appellee seek relief through judicial process establishes two distinctly different processes for obtaining eligibility for benefits, and therefore treats similarly situated men and women differently, violating Appellee's right to equal protection of the laws. Fourteenth Amendment §1 and California Const. Art. 1, §7. All persons similar situated should be treated alike. *Klinger v. Dept. of Corr.*, 31 F.3d

[11] Deering's California Codes, LexisNexis

727, 731 (8th Cir. 1994). *City of Cleburne Living Ctr., Inc*. 473 U.S. 432, 439 (1985). See ARB-13.

The relief proposed is illusory.

The application process for CalWORKs through the county:

Is free; is confidential; is available online; uploads documents from a computer; is available in person where a county employee can assist; imposes no penalty for reapplication; permits assignment of an authorized representative; is completed within thirty (30) days with retroactive benefits; furnishes help from County Ombudsperson's office; and provides a state hearing on appeal where the authorized representative can act on behalf of the applicant.

The proposed process pursuant Fam. Code § 3086:

Required an attorney; required money; required extensive help from family; is public record[12]; required at least 8 trips to El Dorado County Superior Court over 10 months; excluded retroactive eligibility;

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[12] The Fourth and Fifth Amendments were described in *Boyd v. United States,* as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." cited in *Griswold v. Connecticut*, 381 US 479 (1965).

required appellate review; had a chilling effect on refiling (considered frivolous/meritless); increased litigation (to defend motion to find Appellee a vexatious litigant).

Appellee isn't trained in the practice of law or legal procedure. He is held to the same standard as an attorney in pro per. *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.

The State defendants have the power pursuant Welf. and Inst. Code §§10600-10619[13] to review the case *de novo* and to revise discriminatory regulations. *See* also ARB-34. Argument for additional burden on the State administrative process is rebuttable by the additional burden on the judiciary.

VIII. Cal. Fam. Code § 4053 Inoperable Without § 3086

Commissioner Slossberg stated that "The **goal of the State is to get parents out of poverty when they have children**…**it doesn't seem to fit with public policy that two parents have 50 percent time share and only one parent is receiving the support from the state…both parents**

[13] Welf. & Inst. Code Article 2. Powers and Duties [10600 - 10619] (Article 2 added by Stats. 1965, Ch. 1784.).

should have that support if neither has the ability to support the child without [it]... If there were a child support order in place, I would find **good cause under the circumstances** to likely deviate to try to rectify the situation…**it's beyond my scope to go beyond that**."

Appellee cannot obtain a child support order because K.M's right to child support is assigned to the State. If the Commissioner had granted § 3086 relief, the State could recoup resources from K.M. for the child's support.[14] The parents were no longer similarly situated due to K.M.'s bachelor's degree. Instead, she continues to receive benefits while obtaining a master's degree. *See* SAC pgs. 2, 10-12, 19 (unequal treatment re child support).

IX. Eligibility Circular Argument

"To be eligible for CalWORKs, families must meet income and asset tests, and children must be deprived of parental support and care due to the incapacity, death, or absence of a parent, or **unemployment of**

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[14] The court never considered the totality of circumstances or the merits under § 4053.

the principal wage earner."[15] K.M. **quit** her 12/hr. job during pregnancy to obtain benefits. The family court's conclusion that K.M. should continue to receive them relies on the challenged regulations.[16]

The trial court erred by making a similar circular argument. *See* AOB pg. 55.

X. New Arguments on Appeal

A reviewing court may consider an issue raised for the first time on appeal if the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court. *United States v. Carleson*, 900 F.2d 1346; 1990 U.S. App. LEXIS 4706); See *Rubalcaba*, 811 F.2d at 493; *Bolker*, 760 F.2d at 1042; *Patrin*, 575 F.2d at 712.

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[15] CalWORKs Annual Summary. August 2023. https://www.cdss.ca.gov/inforesources/calworks/reports

[16] "[T]the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by **circuitous and indirect** methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" *Byars v. United States*, 273 U.S. 28 (1927) quoting *Boyd v. United States,* 116U. S. 616, 116 U. S. 635; *Gouled v. United States, supra,* p. 255 U. S. 304, *supra.*

DCSS is a department within the Health and Human Services Agency; Secretary Ghaly is a named defendant. State's attorney and two Commissioners had *no knowledge of the § 3086 statute* until Appellee's motion was heard. State defendants raised the issue on appeal, prejudicing his case.[17] *See* ARB pgs.3-5.[18] Appellee would have presented different evidence at trial.

The fact that the State defendants argue that an indigent parent who qualifies for public assistance should have the ability and resources to litigate § 3086 "shocks the conscience."

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[17] ARB pg. 5. "Tellingly, even the County Defendants do not embrace this newly-minted defense. *See* Dkt. No. 27.

[18] The panel incorrectly overlooked Appellee's objections to these proposed remedies which do not address the core issue that the regulation in question discriminates on the basis of sex when the parents are similarly situated. See ARB pgs. 10-14. The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated people be treated alike. *City of Cleburne Living Ctr., Inc*. 473 U.S. 432, 439 (1985).

The non-existence of prior Civ. Code § 4600(h) or Fam. Code § 3086 cases unequivocally proves the statute's futility. [19]

The relief is illusory.

XI. Conclusion

For the foregoing reasons, the Court should grant rehearing.

EXTRAORDINARY CIRCUMSTANCES AND RULE 35(b)(1) STATEMENT

Two questions of exceptional importance are:

(1) Is continuing CalWORKs benefits to K.M. while she obtains advanced degrees whilst depriving Appellee of the same benefits when both parents were similarly situated and eligible prohibited by law?

(2) Does the challenged California regulation[20] serve a legitimate governmental purpose?

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[19] The Panel appears to have overlooked the fact that because of his indigence and disabilities, Appellee could not possibly have access to judicial relief through his own resources. See ARB-1.

[20] MPP 82-808.413(d)

I. Adverse Impacts: Personal and Generalized

A survey published in Forbes found that **single mothers who share parenting time equally** are **325%** more likely to **earn $100,000** compared to single moms who have their children 100% of the time.[21]

Providing *only* K.M. with CalWORKs galvanized this economic advantage by furthering *only her* earning potential, even while she was able to provide adequate private resources for support.

"[P]overty rates among non-custodial fathers may be as high as 25 percent, and 20 percent of non-custodial fathers reportedly earn less than $6,000 annually."[22] Appellee was medically discharged from work, had no earnings and was denied benefits because K.M. was already receiving them.

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[21] Forman, Tami. *Study Finds That Equal Custody Arrangements Narrows The Gender Pay Gap.* Feb. 9, 2021. Forbes Magazine. https://www.forbes.com/sites/tamiforman/2021/02/09/study-finds-that-equal-custody-arrangements-narrows-the-gender-pay-gap/

[22] Sara McLanahan, Irwin Garfinkel, and Ronald B. Mincy, *Fragile Families, Welfare Reform, and Marriage*, The Brookings Institution, Washington D.C., Policy Brief No. 10, November 2001.

In 2021, 40% of children born in the U.S. were to unwed mothers.[23] The percentage of children living with their *mother only* has doubled since 1968.[24] Over 24 million kids in the U.S. don't live with their biological father.[25]

Sociologists have shown a "negative association between living apart from a biological father."[26] Fatherless children face increased risks of suicide, incarceration, mental health problems, teen pregnancy, low

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[23] CDC. National Center for Health Statistics. https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm

[24] Hemez, Paul, and Chanell Washington. *Percentage and Number of Children Living With Two Parents Has Dropped Since 1968*. United States Census Bureau. https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html April 12, 2021

[25] Sanchez, Claudio. *Poverty, Dropouts, Pregnancy, Suicide: What The Numbers Say About Fatherless Kid*. NPR. June 18, 2017. https://www.npr.org/sections/ed/2017/06/18/533062607/poverty-dropouts-pregnancy-suicide-what-the-numbers-say-about-fatherless-kids

[26] McLanahan S, Tach L, Schneider D. *The Causal Effects of Father Absence*. Annu Rev Sociol. Jul 2013; 39:399-427. doi: 10.1146/annurev-soc-071312-145704. PMID: 24489431; PMCID: PMC3904543. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3904543/#FN1

academic achievement, poor family relations, and intergenerational economic disadvantage.[7,27]

When men are struggling economically, the family becomes poorer and boys are impacted the most, damaging *their* prospects for the future.[28] "There is simply no way to reduce economic inequality without improving the fortunes of less advantaged boys and men."[29]

The Governor's 2022-23 budget proposed $7.3B in total funding for CalWORKs, a net increase of $108M. The 2023-24 budget estimates $2B TANF and $2.9B of MOE[30] funds for Cash Aid. The 2024 budget proposes an almost $1.2B increase in the amount of General Fund going

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[27] Richard V. Reeves. *Of Boys and Men: Why the Modern Male is Struggling, Why It Matters, and What To Do About It*. Brookings Institution Press. 2022.

[28] Reeves, Richard. See pgs. 60-63, *Deaths of Despair*.

[29] *Id*. at pg. 61.

[30] MOE: Maintenance of Effort; *See* Sec. 409(a)(7) Social Security Act; https://www.acf.hhs.gov/sites/default/files/documents/ofa/categories_and_definitions_for_tanf_and_moe_funds.pdf

towards CalWORKs. There is an annual cost of $125M to fund a 2.9 percent increase to cash grants starting in October 2023.[31,32]

II. Cal. Fam. Code § 4053 v. § 3086

The United Nations Articles 3 and 27 provide, in relevant part:

"[I]n all actions concerning children the **best interests of the child** shall be a primary consideration; every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development; the parent(s)… have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development; States Parties should take all appropriate measures…to secure the recovery of maintenance for the child from the parent(s) or other responsible persons..."[33]

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[31] Anderson, Ryan. California Legislative Analyst's Office Budget and Policy Post Feb. 22, 2023.

[32] M = million; B = billion.

[33] United Nations Convention on the Rights of the Child, November 20, 1989 (See also: Hague Conference on Private International Law)

States must adopt child support guidelines (See: 42 U.S.C. § 651; 45 C.F.R. ch. III). California's legislature enacted an extremely complex system. (*In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1040)).

Cal. Fam. Code § 4053 includes a mandate for the court to adhere to the following principles: (a) A parent's first and principal obligation is to support the parent's minor children **according to the parent's circumstances and station in life**. (b) Both parents are mutually responsible for the support of their children. (c) The guideline takes into account each parent's **actual income** and level of responsibility for the children. (d) **Each parent should pay for the support of the children according to the parent's ability**. (e) The guideline seeks to place the interests of children as the state's top priority. (f) Children should share in the standard of living of both parents. Child support may therefore appropriately improve the standard of living of the **custodial household** to improve the lives of the children. (g) Child support orders in cases in which both parents have high levels of responsibility for the children should reflect the **increased costs of raising the children in two homes**

and should minimize significant disparities in the children's living standards in the two homes. (h) The financial needs of the children should be met through **private financial resources** as much as possible. (i) It is presumed that a parent having primary physical responsibility for the children contributes a **significant portion of available resources for the support of the children.** (j) The guideline seeks to encourage fair and efficient settlements of conflicts between parents and seeks to minimize the need for litigation. (k) The guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula. (l) Child support orders shall ensure that children actually receive **fair, timely, and sufficient support** reflecting the **state's high standard of living and high costs of raising children compared to other states.**

Women are outperforming men in education and the job market.[34] Under § 3086, K.M.'s ability, opportunity, and earning capacity were

[34] Reeves, Richard. pgs. 61, 66, 72.

disregarded.   'First to apply' couldn't determine whether her unemployment was optional. Her welfare-to-work employment and advanced degrees establish her earning capacity and opportunity. Regardless of welfare-to-work training,[35] there is no mandate for CalWORKs recipients to become self-supporting or to support the child(ren).

"There is a consensus that neither the discretionary best interests of the child standard nor sole custody or primary residence orders are serving the needs of children and families..."[36]

III. Conclusion

For all the aforementioned reasons, the Court should grant rehearing *en banc.*

Date: 2/7/2024   s/Justin G. Reedy

[35] Although eligibility requirements and grant levels are uniform throughout the State, counties are given considerable latitude to design welfare-to-work programs. Each county must have a CalWORKs plan describing specific program outcomes and how those outcomes are to be achieved.

[36] International Council on Shared Parenting; International Conference Press Release and Conference Conclusions May 12, 2023; https://athens-2023.org/updated-conference-program-2-3/

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 22-16214

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,196.

(Petitions and responses must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Justin G. Reedy **Date** Feb 7, 2024

(use "s/[typed name]" *to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I certify that, on February 7, 2024, I caused the foregoing Appellant's Petition for Rehearing *En Banc* to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of February 2024, at Sacramento, California.

s/ Justin G. Reedy, in pro per

EXHIBIT A

EXHIBIT A

NOT FOR PUBLICATION

FILED

DEC 11 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUSTIN G. REEDY, Plaintiff-Appellant, v. CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; MARK GHALY, Secretary of the California Health and Human Services, in his official and individual capacity; KIM JOHNSON, Director of the California Department of Social Services, in her official and individual capacity; ELOY ORTIZ OAKLEY, Chancellor of the California Community Colleges; ANN EDWARDS, Previous Director of the Sacramento County Department of Human Assistance, in her official and individual capacity; ETHAN DYE, Acting Director of the Sacramento County Department of Human Assistance, in his official and individual capacity, Defendants-Appellees, and STATE OF CALIFORNIA; GAVIN NEWSOM,	No. 22-16214 D.C. No. 2:21-cv-00223-TLN-CKD MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendants.

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted December 4, 2023**
San Francisco, California

Before: BRESS and JOHNSTONE, Circuit Judges, and EZRA,*** District Judge.

Justin Reedy, now proceeding pro se, appeals the district court's dismissal of his federal and state claims against the California Department of Social Services (CDSS) and state and county officials responsible for administering the California Work Opportunity and Responsibility to Kids Act (CalWORKs) benefits program. We review de novo the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) and can affirm on any basis supported by the record. *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093, 1096 (9th Cir. 2023). We assume the parties' familiarity with the facts. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Reedy's challenges to the denial of CalWORKs benefits generally proceed

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** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

from his view that the combination of the "parent who first applied" rule, MPP § 82-808.413(d), and a separate provision allowing "a pregnant person" to apply before their child's birth, Cal. Welf. & Inst. Code § 11450(b), locks in a sex-based preference for mothers that fathers cannot dispute or overcome.[1] Reedy argues that this creates a procedural due process problem and led to him being denied CalWORKs benefits on the basis of his sex.

But contrary to Reedy's allegations, a father can obtain individualized review of the CalWORKs benefits allocation after the child's birth by asking a state court to "specify one parent as the primary caretaker of the child . . . for the purposes of determining eligibility for public assistance." Cal. Fam. Code § 3086; *see also id.* § 3087 (permitting modification of the order upon the petition of one parent if it is in "the best interest of the child").[2] When parents sharing joint custody of an eligible

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[1] CDSS promulgates rules and regulations governing CalWORKs eligibility. Cal. Welf. & Inst. Code § 10553(e). These rules and regulations are published in the Manual of Policies and Procedures (MPP). *See* Cal. Welf. & Inst. Code § 10554. Reedy has not clearly alleged that K.M., the mother of his child, even applied for benefits while pregnant. But we will assume that she did, as the parties' briefing appears to do.

[2] While defendants did not address §§ 3086 or 3087 in their motions to dismiss, we exercise our discretion to consider these provisions because the availability of these state processes is "purely [an issue] of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). Here, the challenged regulation incorporates § 3086. MPP § 82-808.413(a). Reedy is not prejudiced because he had the opportunity to address §§ 3086 and 3087 in his reply brief, which was prepared by counsel.

child both apply for CalWORKs benefits, MPP § 82-808.413(a) sets benefits eligibility in accordance with the court order. In addition, even without a court order under § 3086, fathers can avoid the "parent who applied first" rule by showing they exercise greater care and control over the child. *See generally* MPP § 82-808.2. Indeed, Reedy himself unsuccessfully appealed his denial of benefits to an administrative law judge who considered whether he had shown that he "exercises the majority care and control" for his child.

In view of the availability of these state processes, Reedy has not plausibly alleged a "denial of adequate procedural protections." *Kildare v. Saenz*, 325 F.3d 1078, 1085 (9th Cir. 2003) (citing *Hufford v. McEnaney*, 249 F.3d 1142, 1150 (9th Cir. 2001)). To the extent Reedy argues that he has not or would not prevail in these processes, "[i]t is process that the procedural due process right protects, not the outcome." *Ching v. Mayorkas*, 725 F.3d 1149, 1156 (9th Cir. 2013). Nor was Reedy denied benefits on the basis of his sex, in violation of the Equal Protection Clause, when he had ways to challenge the initial award of benefits. Reedy has also not alleged that MPP § 82-808.413(d) discriminates against men in its application and intent. *See Toomey v. Clark*, 876 F.2d 1433, 1437 (9th Cir. 1989) (explaining that absent a sex-based classification, a plaintiff must show the challenged law "had a discriminatory effect" and that defendants "acted with discriminatory intent or purpose").

The district court properly dismissed Reedy's remaining claims. Reedy's substantive due process claim fails because he has not alleged any deprivation of his right to parent his child, *see Lehr v. Robertson*, 463 U.S. 248, 261 (1983), and the denial of CalWORKs benefits did not contravene that right. *See Harris v. McRae*, 448 U.S. 297, 317–18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

Reedy's claim that the denial of CalWORKs benefits violated Title IX because it denied him ancillary education benefits provided by California Community Colleges (CCC) likewise fails. In light of the available state processes for seeking a change to the allocation of benefits, Reedy was not denied benefits "on the basis of sex." 20 U.S.C. § 1681(a). Nor has Reedy alleged that CCC, the federal funding recipient, had an official policy of discriminating on the basis of sex or was deliberately indifferent to any such discrimination in the CalWORKs program. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1104 (9th Cir. 2020).

Finally, the district court did not err in denying leave to amend because amendment would be futile. *See Novak v. United States*, 795 F.3d 1012, 1020 (9th

Cir. 2015). Reedy's counseled briefing does not identify any facts that he could invoke that would cure the defects in the complaint.

AFFIRMED.