No. 24-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JUSTIN G. REEDY,

Petitioner,

VS.

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, et. al.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the
Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 31, 2024

QUESTIONS PRESENTED

The questions presented are:

1. Whether the principles of due process prohibit the Ninth Circuit Court's consideration of a new argument raised by the State Defendants' on appeal that prejudiced petitioner's case.

2. Whether the State of California's challenged regulation deprives unwed fathers of the equal protection of the laws as required by the fourteenth amendment by creating disparate procedural processes to obtain public benefits when both parents share equal custody.

3. Whether a regulation that automatically denies eligible unwed fathers CalWORKs public benefits through county application, when the mother has applied first, violates substantive due process by denying eligible applicants access to public benefits to which they have a protected property interest without adequate due process provided by an expedient, appropriate, administrative deprivation hearing pursuant the test in *Mathews v. Eldridge*.

LIST OF PARTIES

A list of all parties of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner is Justin G. Reedy

Respondents are Dr. Mark Ghaly, Secretary, Health and Human Services Agency, in his official and individual capacity; Kim Johnson, Director of the California Department of Social Services, in her official and individual capacity; 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; and Eloy Ortiz Oakley, Chancellor and CEO of the Board of Governors of California Community Colleges. Governor Gavin Newsom was terminated as a named defendant on 10/13/2021.

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Petitioner Justin G. Reedy respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The order granting petitioner's motion to submit on the briefs was entered November 16, 2023. The Memorandum affirming dismissal of petitioner's claims is unpublished and found at 2023 U.S. App. LEXIS 32650, 2023 WL 8542625. The order granting petitioner's request for 45-day extension to file a petition for rehearing and/or rehearing *en banc* was entered December 26, 2023. The order denying the petition for panel rehearing and rehearing *en banc* is unpublished and found at 2024 U.S. App. LEXIS 5316. The Mandate effectuating the judgment of the Ninth Circuit Court of Appeals is unreported/unpublished. No citation could be found in LexisNexis history of the case as of July 25, 2024.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals dismissing petitioner's claims was entered on December 11, 2023. The Panel denied a timely application for rehearing and/or rehearing *en banc* on March 5, 2023. The Mandate effectuating the judgment of the Ninth Circuit Court of Appeals was entered on March 15, 2024. On May 30, 2024, petitioner requested an extension of time to file a petition for writ of certiorari from June 3, 2024 to August 2, 2024. On June 4, 2024, the Honorable Justice Kagan granted the extension of time to file the petition to August 2, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 14th Amendment, Section 1 and 5

California Constitution, Article I § 7

STATEMENT OF THE CASE

I. CalWORKs and the Applicable Regulations

A. Background

In 1996, the federal government enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PROWA"), 42 U.S.C. § 602 *et seq*., which authorized funding to states for welfare-to-work programs. *Christensen v. Lightbourne*, 7 Cal. 5th 761, 767 (2019)[1]. Under PROWA, a program called Temporary Aid To Needy Families ("TANF") provided states with block funding to distribute to needy families. *Id.* (AOB-5).

In 1997, as part of its "comprehensive review and overhaul of its welfare system," California created the CalWORKs program through which it administers TANF block grants. *Sneed v. Saenz*, 120 Cal. App. 4th 1220, 1231 (2004). The CalWORKs program provides cash grants to families with minor children who meet certain requirements, including limited income and resources, and are deprived of the support of one or both parents due to factors such as absence, disability or unemployment." *Id.* The program consists of two welfare services: "(1) cash aid to parents and children; and (2) the welfare-to-work

[1] Unless otherwise noted, all internal citations and quotation marks are omitted, and all emphasis is added.

program, which seeks to end families' dependence on welfare." *Giles v. Horn*, 100 Cal. App. 4th 206, 212-213 (2002). AOB-6.

The CalWORKs program is administered by the counties under the supervision of the Department of Social Services ("DSS"). *Christensen*, 7 Cal. 5th at 768. Specifically, the DSS promulgates the rules and standards for the implementation of the statutes. *Id.* These rules and standards are published in the Manual of Policies and Procedures ("MPP"). *Id.see also* Cal. Welf. & Inst. Code §§ 10554, 11209. The DSS is also authorized to "implement, interpret, or make specific the amendments…by means of all-county letters or similar instructions from the department." Cal. Welf. & Inst. Code § 10606.2(a). AOB-6. The DSS's interpretations set forth in the MPP and all county letters are authoritative. See *Christensen*, 7 Cal. 5th at 768.[2] AOB-6-7.

In turn, county welfare departments make individual eligibility determinations for CalWORKs aid. *Id.* Among other things, each county is charged with administering the program "in such a manner as to achieve the

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[2] The CalWORKs regulations are available online at https://cdss.ca.gov/inforesources/calworks/regulations-and-policy. The All County Letters are available online at https://www.cdss.ca.gov/inforesources/letters-regulations/letters-and-notices/all-county-letters.

The Court can properly take judicial notice of the CalWORKs regulations and the All County Letters because these are documents that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b)(2). AOB-7.

greatest possible reduction in dependency and to promote the rehabilitation of recipients." Cal. Welf. & Inst. Code § 11207.

B. Eligibility for Benefits

To be eligible for CalWORKs, families must meet income and asset requirements, and children must be deprived of parental support or care. As relevant here, being "deprived of parental support or care" includes "[c]ontinued absence of a parent from the home due to divorce, separation, desertion, or any other reason." Cal. Welf. & Inst. Code § 11250(c). AOB-7.

Prior to recent amendments, a pregnant woman with no other eligible children in the home was eligible to apply for and start receiving CalWORKs benefits beginning in the second trimester of pregnancy (i.e., the sixth-month period immediately prior to the month of the anticipated birth.) *See id.* § 11450(b)(1)(B). Following recent amendments, a pregnant woman is eligible to apply for and start receiving CalWORKs benefits "as of the date of the application for aid," thus allowing pregnant women to start receiving benefits as soon as pregnancy is established. *Id.* § 11450(b)(2)(A). AOB-8.

Thus, in a situation where a couple splits before the child is born or the child is conceived out of wedlock and the parents live apart, the regulations permit a pregnant female applicant to apply for and start receiving CalWORKs benefits while she is pregnant. In contrast, the male applicant (the father of the unborn child) has to wait until (1) the child is born, (2) paternity is established, and (3) the father obtains at least 50/50 custody. AOB-8.

Paternity is one prerequisite to eligibility because the regulations require an eligible child to live in a home of a "caretaker relative" (MPP § 82-804.1), which the regulations define as any relative "by blood, marriage, or adoption who is with the fifth degree of kinship to the dependent child" (*id.* § 82-808.11). Where a child is born out of wedlock and the parents do not live together, the mother automatically qualifies, while the father must have his blood relationship established through the courts before he can be eligible. AOB-9.
Single fathers must also establish at least 50/50 custody over the child to be eligible because the regulations require the county to review "actual circumstances in each case to determine who exercises care and control for a child." *Id*. § 82-808.2. AOB-9.

At the heart of this case is MPP § 82-808.413, which addresses a situation "[w]hen each parent exercises an equal share of care and control responsibilities, and each has applied for aid for the child." Section 82-808.413 sets forth the following order of priority:

(a) the parent designated in a court order as the primary caretaker for public assistance shall be caretaker relative;

(b) where no court order designation exists and only one parent is eligible, the parent who is eligible shall be the caretaker relative;

(c) where both parents are eligible, the parents can designate one parent as the caretaker relative by a documented agreement; or

(d) if the parents cannot reach an agreement, "the parent who first applied for aid shall be the caretaker relative." *Id.* § 82-808.413(a)-(d). Thus, in the

event of both parents sharing equal care, control, responsibility, and custody and both being eligible, the regulations give preference to "the parent who first applied for aid." *Id.* § 82-808.413(d). AOB-10.

C. Duration of Benefits

Until recently, state law imposed a 48-month limit on receipt of CalWORKs benefits by adults. *See* Cal. Welf. & Inst. Code § 11454(a) (2021 version). This was increased to 60 months as of May 1, 2022. *Id.* (current version; *see also* Cal. Dep't. of Social Services, CalWORKs Annual Summary at p. xvii (Nov. 2022), available at https://www.cdss.ca.gov/Portals/9/CalWORKs/CalWORKsAnnualSummaryNovember2022.pdf (hereinafter, "2022 CalWORKs Report") AOB-11.

This limit, however, is subject to a number of exceptions. AOB-11.

D. Additional Available Benefits

Individuals receiving CalWORKs benefits also frequently receive or are eligible to receive a variety of additional benefits, including CalFresh benefits (monthly assistance to purchase food),[3] Medi-Cal benefits, CalWORKs childcare, and access to coordinated educational programs and activities through the California Community Colleges, which can include textbooks and other supplies, prepaid

[3] The CalFresh program (Cal. Welf. & Inst. Code § 18900 *et seq*.) was established by the California Legislature to enable California low-income households to receive benefits under the federal Supplemental Nutrition Assistance Program ("SNAP") (7 U.S.C. § 2011 *et. seq*.), formerly known as the food stamp program. *Ortega v. Johnson*, 57 Cal. App. 5th 552, 557 (2020).

gas cards, nutrition assistance, laptop loan programs, counseling, and similar services. See 2022 CalWORKs Report at p. 122; Pub. Policy Institute of California, Supporting Student Parents in Community College CalWORKs Programs, at pp. 12-15 (Oct. 2020), available at https://www.ppic.org/wp-content/uploads/supporting-student-parents-in-communicty-college-calworks-programs-october-2020.pdf; see also 3-ER-229, 238, 239 ((¶¶ 27, 56). Female recipients may also be eligible to receive the Women, Infants, and Children ("WIC") health and nutrition program subsidy. 2022 CalWORKs Report at p. 122. AOB-14.

II. District Court Proceedings

A. Factual Background

Petitioner is an unwed father of a minor daughter born in 2018. 3-ER-223; AOB-14. He has equal (50/50) custody of the child since May 22, 2019. *Id.* He is disabled, has no history of long-term, gainful employment, and is a client of the Department of Rehabilitation ("DOR") and a participant in the Disability Services and Programs for Students ("DSPS"). *Id.*

Petitioner became involved in a relationship with K.M., the mother of the child, in August 2017. AOB-14-15. When he found out he was going to be a father, he modified his DOR contract to allow him to find immediate employment so that he could support his child. He was able to obtain short-term temporary positions throughout 2018. Starting in December 2018, he was medically restricted from work duties and referred to the DOR for retraining. Since 2019, he has been a 3/4 time student under a modified contract. AOB-13-14.

When they met, K.M. was on parole from a 3-year 8-month prison sentence. She was working full-time earning $12 per hour and attending Folsom Lake College. She was attending Sacramento State University at the time of the appeal. AOB-15.

When they started dating, K.M. told petitioner she was incapable of bearing children. On November 5, 2017, she posted on Facebook that she was pregnant. 3-ER-224; AOB-15. K.M. was married at the time of the pregnancy. AOB-16. She filed for default dissolution of marriage without minor children and refused to provide petitioner with a waiver of paternity from the estranged husband. *Id.*

In April 2018, petitioner filed a motion to establish paternity and a parental relationship requesting 50/50 custody. Plaintiff's paternity could not be established prior to the birth of the child; the child was born without notice to petitioner. 3-ER-225; AOB-16. On July 28, 2018, the court ordered a DNA test. On August 2, 2018, petitioner was found to be the father of the newborn. *Id.*

Although petitioner's paternity was established, K.M. retained sole legal and physical custody while petitioner fought to obtain 50/50 custody. *Id.*

Petitioner was disabled, had no financial resources of his own, and his income was below the federal poverty level. *Id.* He had to borrow money extensively from friends and family in order to provide basic needs for his infant daughter. *Id.* In order to provide the basic necessities for his daughter when she was living with him (which was 50% of the time) and to provide appropriate care for her, petitioner applied for CalWORKs benefits in July 2019. 3-ER-227; AOB-

17. Despite meeting all of CalWORKs eligibility criteria, the County Defendants denied his application because K.M. applied first for the CalWORKs benefits, which she was able to do while pregnant. 3-ER-227; AOB-18.

Petitioner sought review before an administrative law judge ("ALJ"). 3-ER-232; AOB-18. By order dated February 3, 2020, the ALJ sustained the denial of petitioner's CalWORKs application, concluding that under MPP § 82-808.413(d), Plaintiff did not qualify as a "caretaker relative" because the mother of the child was first to apply for the aid. 3-ER-284-291; AOB-18. On June 5, 2020, the DSS denied petitioner's request for a rehearing. 3-ER-293-94; *Id.*

Petitioner filed a new CalWORKs application in 2020, when his circumstances changed and he became the "primary custodial parent" for IRS purposes based on a parenting schedule whereby *the child was with him more nights of the year*. 3-ER-227; *Id.*

It is undisputed that petitioner meets the income requirements to receive the CalWORKs benefits and that he is disabled and unable to work, whereas K.M. is not disabled and is able to work. However, at no point after the child was born and petitioner established his paternity and obtained 50/50 custody was there ***any*** process offered or hearing held whereby petitioner's eligibility and need for CalWORKs benefits could be weighed against K.M.'s eligibility and need for the benefits. This is so despite § 11265 providing that "[t]he county shall redetermine eligibility annually." *See* Cal. Welf. & Inst. Code § 11265(a). AOB-19.

Based on exceptions to the limit and extensions to benefits during the pandemic, K.M.'s benefits would likely expire some time in 2025. This does not

include additional exceptions that K.M. may be eligible for or any additional exemptions that may be adopted by the State of California or the DSS. AOB-19-20. All the while, petitioner is deprived of the same benefits even though he is at least equally situated with regard to his eligibility for the benefits – if not in a *more dire need* of those benefits due to his disability and inability to work. AOB-20.

B. District Court Ruling

Petitioner proceeded in *pro per* and *in forma pauperis* on February 4, 2021. The court dismissed his first complaint upon screening. Petitioner filed a first amended complaint which was dismissed because it failed to contain sequentially numbered paragraphs. On August 13, 2021, petitioner filed a second amended complaint ("Complaint"). Upon screening, the Court recommended petitioner dismiss claims against Governor Newsom. He agreed. Dist. Ct. Dkt. No. 10. AOB-20.

The Complaint asserts five causes of action: (1) violation of the Due Process Clause of the Fourteenth Amendment; (2) violation of the Equal Protection Clause of the Fourteenth Amendment; (3) violation of Title IX; (4) violation of equal protection under the California Constitution; and (5) violation of due process under the California Constitution. 3-ER-243-249; AOB-20-21.

Having recommended the dismissal of the federal law claims, the Magistrate Judge recommend that the court decline to exercise supplemental jurisdiction over petitioner's state law claims. The Magistrate Judge also recommended denial of leave to amend. AOB-23.

C. Ninth Circuit Ruling

Petitioner proceeded *in forma pauperis* with pro bono counsel, Yury Kolesnikov, who represented him until the matter was submitted, and the Court granted petitioner's unopposed motion to hear the matter on the briefs. (Dkt.No.48.)

The Ninth Circuit panel dismissed the case after allowing the State Defendants to raise a new issue on appeal. They argued that the "challenged regulatory scheme allows either parent to receive individualized review from the Custody Court…" SAAB-29. They argued that ".413(d) is merely a backup provision that applies only where custody is shared equally and both parents have made a *choice to apply .413(d)* rather that requesting a judicial determination under 3086 and 3087. Accordingly, even if .413(d) arguably has a *disparate impact on men* where parents elect to apply it, because *it applies only where fathers choose to allow it to apply*, its application cannot be deemed to constitute government conduct that discriminates against men." SAAB-29.

The Ninth Circuit panel concluded that ""[w]hile defendants did not address §§ 3086 and 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." Mem-3 (fn.2).

The Panel affirmed the district court's denial of leave to amend finding amendment would be futile. Mem-4.

Petitioner proceeded *pro se* to file a Petition for Rehearing and/or Rehearing *en banc* arguing that there were facts that he could have presented at trial. His request was denied. Petitioner included a brief overview of these facts in his request for an extension of time to file this petition.

REASONS FOR GRANTING THE PETITION

A. There are five reasons Certiorari should be granted. First, the Ninth Circuit's decision to allow State Defendants to raise a new issue on appeal that they failed to raise at trial prejudiced petitioner's case, violates the fourteenth amendment, and conflicts with this Court's doctrine of due process.

In *Saunders v. Shaw,* 244 U.S. 317 (1917), this court ruled that it is a violation of due process of law for a state supreme court to reverse a case…upon a proposition of fact which was ruled to be *immaterial at the trial* and concerning which the plaintiff had therefore *no occasion and no proper opportunity to introduce his evidence.*

Although the court did not preclude petitioner from presenting evidence in the case at bar, there is comparable consideration wherein petitioner's case was irrefutably prejudiced when the Ninth Circuit allowed

the Defendants to introduce a new defense on appeal upon which the Panel relied for dismissal. The general rule is that absent "exceptional circumstances," the Court will not consider arguments raised for the first time on appeal. *In re Home Am. T.V. Appliance Audio, Inc.* 232 F.3d 1046, 1052 (9th Cir. 2000); *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). The limited exceptions to this rule are: (1) review will prevent a "miscarriage of justice," (2) a change in the law raises a new issue pending appeal, and (3) "the issue presented in purely one of law and either does not depend upon the factual record developed below, or the pertinent record has been fully developed." *Home Am. T.V., 232 F.3d at 1052.* ARB-4.

The Ninth Circuit's decision rests upon the principle that 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. Carlson*, 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. To fall under the second *Bolker* exception, the State must demonstrate that petitioner "would not have presented new evidence or made new arguments at the hearing." *United States v. Gabriel*, 625 F.2d 830, 832 (9th Cir.1980) (citing *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir.1978)), cert. denied, 449 U.S. 1113, 101 S.Ct. 925, 66 L.Ed.2d 843 (1981).

The State has not made such a showing. *See U.S. v. Rubalcaba*, 811 F.2d 491 (9th Cir. 1986).

Petitioner can demonstrate here that he had material facts to present regarding his exhaustion of *all potential remedies*, both administrative and judicial, at the time he drafted his complaint. He could have included the failure of the DSS to update the MPP with the 'family code section' that the Defendants now argue is incorporated into MPP 82-808.413(d). He could have presented the prior MPP that previously cited Civil Code §4600.5(h). He could have stated that this civil code was provided to him by the Sacramento County Ombudsperson when he sought judicial review as part of a family law proceeding in 2019, prior to filing the complaint. Petitioner had no occasion to bring this up at trial, believing it had no bearing on the outcome of his case. *See Saunders; also Helis v. Ward*, 308 U.S. 521 (1939).

Many of the facts of the case were developing after the Magistrate Judge sought dismissal of his case on January 14, 2022. Petitioner's parents assisted him with research for his custody case and discovered that the civil code had been superseded by the enactment of the Family Law Act. The legislative history and intent they requested from the Legislative Intent Service, Inc. on February 13, 2023 follows:

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 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. [4]

The Ninth Circuit accepted the State Defendants argument that [petitioner] was not prejudiced because he had the opportunity to address §§ 3086 and 3087 in his reply brief, which was prepared by counsel." Memo (fn.2) – 3. The reply brief was filed on August 7, 2023, ***over four years after petitioner had first applied for benefits***.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Petitioner argues that introducing these new facts on

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[4] Deering's California Codes, LexisNexis

appeal as the State discovered them is not a meaningful time or a meaningful manner and that the process fails to provide substitute safeguards as described in Mathews to avoid erroneous risk of deprivation through the procedures in place as discussed in *Mathews* at 335.

Petitioner brought a renewed motion on April 1, 2022 at the El Dorado County Superior Court under § 3086. The matter was heard on May 12, 2022 and continued on the child support calendar to July 11, ,2022. Petitioner had to serve the ***Department of Child Support Services***, which is a department within the ***Health and Human Services Agency***; ***Secretary Ghaly is a named defendant***. The matter was continued to July 11, 2022. At that hearing, Commissioner Gary 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 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." He gave leave to file a brief.

The matter was heard again on November 28, 2022 by Commissioner Hana Balfour. Reesa Miller, counsel for the Department of Child Support Services 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***." Commissioner Balfour denied the motion citing a "pending change in custody," and

concluded that "the court does not have authority." The pending change in custody has been a continuing threat to petitioner's liberty interest in raising his daughter. The Department of Child Support Services filed for a rehearing and recanted their position in December 2022, and the matter was set on calendar for January 23, 2023. Judge Bowers stated that the mother was receiving the benefits according to the eligibility requirements and that the eligibility is based on the 'child's need' not the 'parents need.' She found that the regulations are not discriminatory on the basis of sex, a matter outside of her jurisdiction, and she concluded that because the eligibility requirements allowed the mother to continue to receive the benefits that petitioner should look for resources that do 'not involve the minor.'

This is a circular argument similar to the one the District trial court made in defense of the State that was addressed in the opening brief. The Magistrate Judge also erred in relying on the challenged regulations (which restrict [petitioner] from receiving the CalWORKs benefits because the mother applied first) as a basis for concluding that [petitioner] did not have a legitimate claim of entitlement. See 1-ER-009. This conclusion is faulty because it is entirely circular! The court cannot use the challenged regulation that the plaintiff alleges violates due process and equal protection as a basis for concluding that there is no constitutional violation. AOB-55.

"[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.*

Another three quarters of a year had gone by without an adequate post-deprivation hearing to address petitioner's fundamental property interest in the benefits, and without the *Mathew's test* being applied to his situation, he has suffered grievous harm. Moreover, the child has also suffered and faces continual risk of becoming fatherless and losing her paternal grandparents.

Petitioner filed a writ with the Third Appellate District Court without success because he had no resources to obtain appellate legal counsel and the Superior Court's family law facilitator's office would not assist with appellate forms. He did not know whether there was statutory appellate jurisdiction.

This Court consistently had held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). See, e.g. *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). *See also Dent v. West Virginia*, 129 U.S. 114, 124-125, 9 S.Ct. 231, 234, 32 L.Ed. 623, (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm.v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95

L.Ed. 817 (1951) (Frankfurter J., concurring); cited in *Mathews v. Eldridge*. Petitioner's experienced Ninth Circuit appellate counsel did not raise new issues on appeal: they were not presented at trial, and many of the facts remained unresolved until after the Ninth Circuit May 10, 2023 answering brief was filed.

The State Defendants' answering brief characterizes §§ 3086 and 3087 as dispositive of all of [petitioner's] claims. ARB-4-5. But this argument was never raised in the court below, even though it was "indisputably available." *See G&G Prods. LLC v. Rusic*, 902 F.3d 940, 950 (9th Cir. 2018). ARB-4. If the State Defendants' interpretation of §§ 3086 and 3087 is such a clear statement of California law, one would expect both sets of Defendants to raise it as a defense in the court below. Instead, neither the State Defendants nor the County Defendants raised the applicability of §§ 3086 and 3087 at any point in the district court. Rather, it was only after Plaintiff (represented by counsel) filed his comprehensive opening brief on appeal that the State Defendants first advanced this novel argument. Tellingly, even the County Defendants do not embrace this newly-minted defense. See Dkt. No. 27. ARB-5.

A party's unexplained failure to raise an argument that was indisputably available below is perhaps the least 'exceptional' circumstance warranting [the Court's] exercise of discretion." *G&G Prods. LLC v. Rusic*, 902 F.3d 940, 950 (9th Cir. 2018). ARB-4.

The Ninth Circuit's decision to dismiss petitioner's case is prejudicial and justifies reversal.

B. The Ninth Circuit found that the district court did not err in denying petitioner's leave to amend. In light of the Court's exercise of discretion to allow Defendant's to raise a new issue on appeal, this decision ignores the fact-driven nature of determining the appropriate level of due process required before the government may impair a protected interest as articulated in *Mathews v. Eldridge*, 424 U.S. 310 (1976)

Despite the Ninth Circuit's consideration of State Defendants' new arguments on appeal, the "issue presented is not purely one of law." It is wholly fact-dependent, and the factual record had not been fully developed below" as set forth in *Home Am. T.V., 232 F.3d at 1052.*

Petitioner had additional facts he would have presented in the lower court had the Defendant's raised the defense at trial. *See Rubalcaba.* It is a miscarriage of justice for the Ninth Circuit to deny petitioner the opportunity to amend his complaint when the *Mathew's test* is highly fact dependent. *See Section D below*.

C. The third reason Certiorari should be granted is that the government's expectation that an indigent, disabled unwed father should have to undergo *judicial review to reallocate benefits* both "shocks the conscience" and creates a different process for obtaining CalWORKs benefits in violation of Equal Protection.

Petitioner's opening brief exhaustively demonstrates how the statutory and regulatory scheme violates equal protection, due process, and Title IX. ARB-1. It further demonstrates that reversal is necessary because the Magistrate Judge

committed clear legal errors (such as applying the wrong legal standards contrary to Ninth Circuit precedent) and impermissibly accepted Defendants' proffered facts disputed by petitioner. ARB-1. The State Defendants barely attempt to rebut these arguments. ARB-2. The County Defendants' spend pages attempting to distinguish the facts involved in petitioner's cited cases but fail to rebut the legal principles flowing from those cases. ARB-3.

The Ninth Circuit accepted the State Defendants contention that the challenged regulatory scheme allows *either parent* to receive individualized review from the Custody Court to determine which parent should be the Designated Caretaker, both at the time of the Custody order's issuance and afterwards as dispositive of most of petitioner's claims. SD-ARB-29; Memo-3-6.

The State Defendants argued that challenged regulation is merely a ***backup provision*** that applies ***only where custody is shared equally and both parents*** have made a ***choice to apply 82-808.413(d)*** rather than requesting a judicial determination under § 3086 or § 3087. AAB-29.

Accordingly, even if 82-808.413(d) arguably has a disparate impact on men where parents ***elect to apply it***, because it applies ***only where fathers choose to apply it***, its application cannot be deemed to constitute governmental conduct that discriminates against men. AAB-29.

In reality, unwed fathers do not *choose to apply the regulation* and forego the benefits to which they are entitled because the mother is receiving them. 82-808.413 is not a *backup provision*; it is the *default provision*. Both of petitioner's applications were denied on this basis. The denial of his second application

violated due process because the County Defendants were obligated to apply MPP § 82-808.3, instead of MPP 82-808.413(d), given that Plaintiff and K.M. were not exercising the same amount of care and control. See AOB at 56–57.

The Ninth Circuit panel noted that [petitioner] unsuccessfully appealed his denial of benefits to an administrative law judge who considered whether he had shown that the "exercises the majority care and control" for his child." Memo-4.

Therefore, the only opportunity for an unwed father to obtain benefits to which he is eligible when the mother has first applied is to seek a *reallocation of benefits,* which is disparate treatment of unwed fathers. All persons similar situated should be treated alike. *Klinger v. Dept. of Corr.,* 31 F.3d 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: Requires an attorney or knowledge of the legal process; requires financial resources; is public record[5] ; excludes retroactive eligibility; can require appellate review; there is no time limit for the judicial process to complete; the criteria for reallocation are not the same as the requirements for eligibility in CalWORKs.

The State Defendants have the power pursuant Welf. and Inst. Code §§10600-10619 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.

D. Certiorari should be granted as the Ninth Circuit Court of Appeals has decided the important federal question of the Fourteenth Amendment requirements of Due Process in a way that conflicts with this Court's decisions in *Mathews v. Eldridge,* 424 U.S. 310 (1976) and *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) and innumerable other cases.

The State Defendants argued that the mere existence of two provisions in the California Family Code provide petitioner with adequate procedural protections to vindicate his protected property right to CalWORKs benefits for which he was and remains eligible.

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[5] 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).

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." (*Cafeteria & Rest. Workers v. McElroy*, 367, U.S. 886, 894-95 (1961).

By default, petitioner's county application was denied on the basis of 82-808.413(d), that the mother applied first, resulting in repeated denials with no expedient, administrative deprivation hearing available. There was no consideration of his needs when the county annually reviewed and renewed the mother's application pursuant Cal Welf. & Inst. Code § 11265(a). AOB-18-19.

The Ninth Circuit failed to apply the *Mathews* test in the case at bar. They simply accepted the State's newly-minted argument and concluded that the mere *existence of a process* was sufficient to protect petitioner's deprived interests, stating that "[t]o the extent [petitioner] 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," citing *Ching v. Mayorkas*, 725 F.3d 1149, 1156 (9th Cir. 2013). Memo-4.

It should be noted that in *Ching*, this Court found that the plaintiff's due process rights were violated and that additional process was due pursuant to *Mathews v. Eldridge*. Accordingly, this Court reversed the Ninth Circuit's grant of summary judgment as to the due process claim and remanded for further proceedings.

In *Mathews*, this Court held that "procedural due process must be evaluated by three distinct factors that consider: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such

interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." (*Id.* at 335) *See Goldberg v. Kelly*, supra, 397 U.S., at 263-271, 90 S. Ct., at 1018-1022.

According to the Cornell Law School Legal Information Institute's (herein, "LII") article, *Due Process Test in Mathews v. Eldridge*, "application of this standard is highly fact-dependent," as is demonstrated in the comparison of *Goldberg* and *Mathews* whereby in the former, the termination of welfare benefits affecting "persons on the very margin of subsistence" required a pre-deprivation hearing, but in *Mathews*, protections were less stringent because disability benefits are not based on financial need and a terminated recipient could apply for welfare if needed. (*Id.* at 341).

The LII article illustrates the *Mathews test* dependence on case-specific facts through a brief comparative analysis. In *Brock v. Roadway Express, Inc.* "the principal difference from the *Mathews* test was that the Court acknowledged two conflicting private interests to weigh in the equation…" In *City of Los Angeles v. David*, the Court weighed the compensation of interest to the individual with the administrative burden on the city to shorten a payment delay. The Court applied the *Mathews* test in *Nelson v. Colorado*, "striking down a provision of law." These and many other cases demonstrate that the determination of the required due process are fact-driven and case-specific and the outcome is unique to the facts involved in stark contradiction to the assertion made by the Ninth Circuit panel.

LII reported that "[t]he termination of welfare benefits in *Goldberg*, which affected "persons on the very margin of subsistence" and could have resulted in the challenger's loss of food or shelter, had required a pre-deprivation hearing." Petitioner notes that the effect of deprivation through automatic denial of an application for CalWORKs benefits produces the same effect as deprivation through termination of benefits. "The right of the needy applicant to welfare benefits is as fundamental as the right of a recipient to continued benefits. Because need is a condition of benefits, ***erroneous denial of aid*** in either case ***deprives the eligible person*** " 'of the very means for his survival and his situation becomes immediately desperate.'" *Frink v. Prod*, 31 Cal.3d 166 (1982); citing *Harlow v. Carleson*, 16 Cal.3d at p. 737 (1976).

The Ninth Circuit erroneously found that the district court properly dismissed petitioner's substantive due process claims because he had not alleged any deprivation of his right to parent his child. *See Lehr v. Robertson*, 463 U.S. 248, 261 (1983). However, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,'…and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970), (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

Counsel argued that the Magistrate Judge erred in dismissing the substantive due process claim because petitioner has demonstrated both a protectable property interest in the receipt of CalWORKs benefits and that

Defendants' action in denying him access to the benefits interferes with his fundamental liberty interest to establish a home and bring up his child. AOB-27.

Petitioner demonstrated how the Magistrate Judge erred by improperly crediting Defendants' proffered facts (disputed by petitioner) that K.M.'s eligibility would end after 60 months and then utilizing those facts to conclude that there was no violation of equal protection (see 1-ER-012 – 13). See AOB at 11–13, 48–51. Among other things, petitioner has shown how K.M.'s benefits would likely only expire after 109 months, instead of 60 months, which is some time in 2025. *Id.* On appeal, Defendants do not contest the fact that K.M.'s benefits are likely to expire in 2025 nor do they defend the Magistrate Judge's erroneous conclusion in this regard. ARB-28. The County Defendants' only argument is that "the precise timing of when [K.M.'s benefits would expire] is not germane to the equal protection analysis." *See County Ds' Br. at 21.* But it is germane because the Magistrate Judge relied on this false factual argument to conclude that there was no equal protection violation. See 1-ER-012 – 13. ARB-29. It is also germane because the longer the period of time during which the benefits are denied to [petitioner], the more it is likely that he may not be able to maintain adequate resources to justify continued 50/50 joint custody. As a result, the mother or the State may argue that petitioner should no longer have 50/50 custody if he cannot provide for his child when she is residing with him. The withdrawal of 50/50 custody would make [petitioner] ineligible to receive CalWORKs benefits even if the mother's benefits run out. This is a substantial risk and a further factor that petitioner's equal protection and substantive due process rights (including the fundamental

right to establish a home and bring up his child) are infringed by the continued denial of benefits. ARB-29.

Regardless of the Ninth Circuit discrediting of petitioner's argument in the case at bar, it had previously found a protected property right to welfare benefits under the predecessor law to CalWORKs by plaintiffs who never received the benefits at issue. *Griffeth v. Detrich*, 603 F.2d 118, 120–21 (9th Cir. 1979). ARB-30. Similarly, the California Supreme Court has observed that "[t]he right of the needy applicant to welfare benefits is as fundamental as the right of a recipient to continued benefits." *Frink v. Prod*, 31 Cal. 3d 166, 179 (1982); accord *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970). ARB-30. Defendants do not defend the Magistrate Judge's erroneous conclusion and, thus, concede that it was a reversible error for the Magistrate Judge to find that Plaintiff had no protectable interest in receiving CalWORKs benefits on the ground that he was not previously receiving those benefits. ARB-30. The Ninth Circuit dismissed all of petitioners claims despite both procedural and substantive due process violations that are applicable on the deprivation of property alone.

E. The Court should grant Certiorari because the error of the Ninth Circuit to consider the Defendants' new arguments on appeal resulted in erroneous denial of petitioner's Title IX claims on the basis that "the available state processes for seeking a change in the allocation of benefits" was sufficient to conclude that petitioner was not denied benefits "on the basis of sex." 20 U.S.C. § 1681(a).

Title IX prohibits discrimination on the basis of sex by educational institutions receiving federal financial assistance. AOB-64. Because these benefits are tied by interagency agreement to the receipt of CalWORKs benefits, the error in allowing the State Defendants to raise a new issue on appeal infringes petitioner's standing on this matter. His counsel prepared the arguments which warrant consideration because the Ninth Circuit has ignored its own rules and authoritative case law to dismiss all of petitioner's claims.

The Magistrate Judge at the district court incorrectly applied the deliberate indifference standard and required Plaintiff to demonstrate "actual knowledge of the alleged discrimination." See 1-ER-014. AOB-66. In any event, Plaintiff has more than adequately alleged that California Community Colleges ("CCC") collect and collate the relevant data on CalWORKs participation rates, which includes a breakdown by gender. *See* 3-ER-238, 303 – 308. AOB-68. [Petitioner] alleges that CCC collects this data for purposes of federal funding and that it is statutorily required. See, e.g., Cal. Educ. Code §§ 79200-79209; see also 34 C.F.R. §§ 106.3, 106.4. AOB-68. [Petitioner's] opening brief demonstrated how the Magistrate Judge erred as a matter of law by applying the wrong legal standard to Plaintiff's Title IX claim. See AOB at 64–68 (discussing *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957 (9th Cir. 2010)). As the Court held in *Mansourian*, this error (by itself) warrants reversal of the dismissal of Title IX claim. See 602 F.3d at 969 (reversing district court's order granting summary judgment). The State Defendants acknowledge that because CCC's educational programs are funded in part by federal funds, they are subject to Title IX. *See State Ds' Br. at 36.* They

argue, however, that the standard set forth in *Mansourian* is inapplicable because CCC relies on the DSS's eligibility determinations and, therefore, cannot be liable unless it had actual knowledge. Id. at 37–38. This argument is incompatible with *Mansourian*. ARB-37.

CONCLUSION

For over five years since petitioner first applied for CalWORKs benefits, he has languished in abject poverty while borrowing to protect his fundamental right to parent his child that has repeatedly been challenged not only by the mother, who has sought to exclude him from parenting since the pregnancy, but also by the court itself after he brought the federal case.

His daughter is now six years old and would be devastated by the loss of her father's love, affection, and involvement in her life.

Meanwhile, the mother has been receiving the CalWORKs benefits for herself and the child and now has another child in her home that is also eligible under the welfare rules as a half-sibling. She resides with a cohabiting partner in an affluent neighborhood in a home paid for with cash and owned by a relative of the partner. While on public benefits, she obtained six years of education, including a master's degree in May 2024. She has been working under the welfare-to-work rules that allow her to continue to receive tax benefits that are exempt from welfare and child support calculations. She has protections as an indigent parent, such as fee waivers for filing custody motions and avoiding sanctions in family court because she is "too poor" to pay. There is no statutory or

regulatory mandate for her to return to full gainful employment at her earning capacity which is at least $35/hr.

In contrast, Petitioner was required to return to school for vocational retraining due to disability that prevents him from working at full capacity in physically challenging jobs.

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..."[6]

There is a federal mandate[7] that requires all states to adopt child support guidelines. It's against public policy for a parent to be allowed to waive their duty to support their child. When the State administers public benefits to one parent, it is assigned the right to collect the child support from the other parent for the purpose of recovering these very same funds. These policies are predicated on the outdated and obsolete stereotype that fathers are the primary breadwinners.

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

[7] (See: 42 U.S.C. § 651; 45 C.F.R. ch. III).

The family code sections § 3086 and § 3087 fail as remedies to address erroneous deprivation of a protected property interest. They offer no opportunity for the deprived party to recover their lost property interest allowing it to become an irreparable deprivation.

This being the highest court of equity in the land, petitioner should have the opportunity to demonstrate the inequity and expose the erroneous deprivation that he has suffered as an "eligible" applicant for CalWORKs, if not for the process..

For all of these reasons, petitioner respectfully requests the Court grant certiorari and reverse and remand.

APPENDIX A

Mandate
United States Court of Appeals for the Ninth Circuit
March 15, 2024

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 15 2024

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

JUSTIN G. REEDY,

Plaintiff - Appellant,

v.

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; et al.,

Defendants - Appellees,

and

STATE OF CALIFORNIA and GAVIN NEWSOM,

Defendants.

No. 22-16214

D.C. No. 2:21-cv-00223-TLN-CKD
U.S. District Court for Eastern California, Sacramento

MANDATE

The judgment of this Court, entered December 11, 2023, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

APPENDIX A

Order
United States Court of Appeals for the Ninth Circuit
March 5, 2024

FILED

MAR 5 2024

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,

Defendants.

No. 22-16214

D.C. No.
2:21-cv-00223-TLN-CKD
Eastern District of California,
Sacramento

ORDER

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

* The Honorable David A. Ezra, United States District Judge for the

The panel unanimously voted to deny the petition for panel rehearing. Judge Bress and Judge Johnstone voted to deny the petition for rehearing en banc, and Judge Ezra so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, Dkt. No. 57, is DENIED.

District of Hawaii, sitting by designation.

APPENDIX A

Memorandum
United States Court of Appeals for the Ninth Circuit
December 11, 2023

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

[**] 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

[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 ("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.

APPENDIX A

Order
United States Court of Appeals for the Ninth Circuit

November 16, 2023

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 16 2023

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

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,

Defendants.

No. 22-16214

D.C. No.
2:21-cv-00223-TLN-CKD
Eastern District of California,
Sacramento

ORDER

Appellant's unopposed motion to submit this case on the briefs is granted. Dkts. 48, 51. The court is of the unanimous opinion that the facts and legal

arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. This case shall be submitted on the briefs and record, without oral argument, on December 4, 2023, in San Francisco, California. Fed. R. App. P. 34(a)(2).

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

APPENDIX B

Judgment in a Civil Case
United States District Court, Eastern District of California
June 6, 2022

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

JUSTIN G. REEDY,

CASE NO: **2:21−CV−00223−TLN−CKD**

V.

STATE OF CALIFORNIA, ET AL.,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 6/2/2022

Keith Holland
Clerk of Court

ENTERED: **June 2, 2022**

by: /s/ L. Reader
Deputy Clerk

APPENDIX B

Order
United States District Court, Eastern District of California
June 6, 2022

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JUSTIN G. REEDY,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

No. 2:21-cv-00223-TLN-CKD

ORDER

This matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(19). On January 14, 2022, the magistrate judge filed findings and recommendations herein which contained notice that any objections to the findings and recommendations were to be filed within fourteen days. (ECF No. 38.) Plaintiff was granted an extension of time to file objections and timely filed objections. (ECF No. 41.) Defendants Dye and Edwards filed a response to Plaintiff's objections. (ECF No. 42.)

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this Court has conducted a review of this matter. The Court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED:

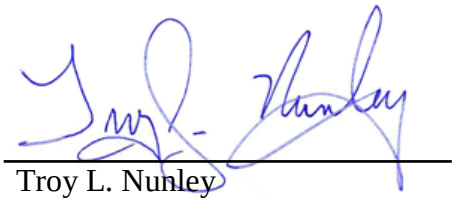
1. The findings and recommendations filed January 14, 2022, (ECF No. 38), are adopted in full;

2. The Motion to Dismiss by Defendants Oakley, Ghaly and Johnson (ECF No. 16) is GRANTED;

3. The Motion to Dismiss by Defendants Edwards and Dye (ECF No. 17) is GRANTED; and

4. The Clerk of the Court is directed to close this case.

DATED: June 1, 2022



Troy L. Nunley
United States District Judge

APPENDIX B

Order
United States District Court, Eastern District of California
October 13, 2022

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JUSTIN G. REEDY,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

No. 2:21-cv-00223-TLN-CKD

ORDER

On August 18, 2021, the magistrate judge filed an order and findings and recommendations (ECF No. 10) which were served on Plaintiff and which contained notice that any objections to the findings and recommendations were to be filed within 14 days. No objections were filed. Accordingly, the Court presumes that any findings of fact are correct. *See Orand v. United States*, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed *de novo*. *See Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

The Court has reviewed the applicable legal standards. Good cause appearing, the Court concludes it is appropriate to adopt the findings and recommendations in full. Accordingly, IT IS HEREBY ORDERED:

1. The findings and recommendations (ECF No. 10) are adopted in full;

///

2. Defendant Governor Gavin Newsom, sued in his individual and official capacity, is dismissed from this case as a defendant; and

3. This matter is referred back to the assigned magistrate judge for further pretrial proceedings.

Date: October 7, 2021

Troy L. Nunley
United States District Judge

APPENDIX C

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Fourteenth Amendment

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution - Cons
Article I Declaration Of Rights [Section 1 - Sec. 32] (Article 1 adopted 1879.)

SEC. 7- (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.
(Subdivision (a) amended Nov. 6, 1979, by Prop. 1. Res.Ch. 18, 1979. Other Source: Entire Sec.
7 was added Nov. 5, 1974, by Prop. 7; Res.Ch. 90, 1974.)

Challenged regulation: MPP 808.413(d)
accessed online 7/31/2024
https://cdss.ca.gov/Portals/9/Regs/Man/EAS/23EAS.docx?ver=2024-02-23-150844-473

See next page:
MPP - Eligibility and Assistance Standards Page 906

STATUTES ARE PROVIDED FOR REFERENCE ONLY

FAMILY CODE - FAM
DIVISION 8. CUSTODY OF CHILDREN [3000 - 3465]
(Division 8 enacted by Stats. 1992, Ch. 162, Sec. 10.)

PART 2. RIGHT TO CUSTODY OF MINOR CHILD [3020 - 3204]
(Part 2 enacted by Stats. 1992, Ch. 162, Sec. 10.)

CHAPTER 4. Joint Custody [3080 - 3089]
(Chapter 4 enacted by Stats. 1992, Ch. 162, Sec. 10.)

3086.
In making an order of joint physical custody or joint legal custody, the court may specify one parent as the primary caretaker of the child and one home as the primary home of the child, for the purposes of determining eligibility for public assistance.

(Enacted by Stats. 1992, Ch. 162, Sec. 10. Operative January 1, 1994.)

3087.
An order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires modification or termination of the order. If either parent opposes the modification or termination order, the court shall state in its decision the reasons for modification or termination of the joint custody order.

(Enacted by Stats. 1992, Ch. 162, Sec. 10. Operative January 1, 1994.)

82-808 CARETAKER RELATIVE REQUIREMENTS (Continued)

.412 Applying Parent

When the child spends an equal amount of time with each parent and each parent exercises an equal share of care and control responsibilities, the parent who applies for aid shall be the caretaker relative, providing that the child's other parent is not currently applying for or receiving aid for the child.

.413 Equal Time

When each parent exercises an equal share of care and control responsibilities, and each has applied for aid for the child, the caretaker relative shall be determined in the following order:

(a) The parent designated in a current court order as the primary caretaker for purposes of public assistance, under Civil Code Section 4600.5(h).

HANDBOOK BEGINS HERE

Civil Code Section 4600.5(h) states:

In making an order of joint physical custody or joint legal custody, the court may specify one parent as the primary caretaker of the child and one home as the primary home of the child, for the purposes of determining eligibility for public assistance.

HANDBOOK ENDS HERE

(b) When no court order designation exists and only one parent would be eligible for aid, the parent who would be eligible shall be the caretaker relative.

(c) When both parents would be eligible, the parents shall designate one parent as the caretaker relative. The agreement shall be documented by a CA 13.

(d) If the parents cannot reach agreement on the designation of a caretaker relative, the parent who first applied for aid for the child shall be the caretaker relative.

APPENDIX D

Partial Email Correspondence
Debra Reedy and Annamaria Anderson
Legislative Intent Service, Inc.
February 21, 2023

debra.reedy@att.net

From: debra.reedy@att.net
Sent: Tuesday, February 21, 2023 12:25 PM
To: 'Annamaria Anderson'
Subject: RE: Legislative Intent Service, Inc. quote re Fam 3086 - Debra Reedy
Attachments: 23EAS page 7.pdf

Hi Annamaria,

I was able to locate the archived enactment, but I am having trouble with a newer one that would have augmented § 4660.5 by adding some additional language that relates to the family court having the authority to specify one parent as the primary caregiver for the purpose of determining eligibility for social services. Without any reference to this change, I cannot locate it. It is in the Dept. of Social Services Manual of Policies and Procedures Handbook dated 1997 as § 4660.5(h).

If you have any idea when that was added, that's really all I need to know because I can find the archived data online. I know I'm not a paying customer, but I am doing a public service by taking my own time to try to educate the legislators about an issue of discrimination affecting poor fathers and how the welfare system and the family court system are complicit in this discrimination. This is the last piece of the puzzle for me!

Debra

"Guard well within yourself that treasure, kindness. Know how to give without hesitation, how to lose without regret, how to acquire without meanness." George Sand

From: Annamaria Anderson <aanderson@legintent.com>
Sent: Tuesday, February 21, 2023 10:20 AM
To: debra.reedy@att.net
Cc: quote@legintent.com
Subject: RE: Legislative Intent Service, Inc. quote re Fam 3086 - Debra Reedy

Debra - Thank you for your e-mail.

If you were interested in the original 1979 enactment, which may best fit your research needs at this point, we could provide our archived store research for $250 (instead of the normal $300). We would require prepayment if you chose to place this order.

Please let us know if you have any additional questions.

Take care,
Annamaria

Annamaria Bereczky-Anderson, Attorney at Law
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