They Took My Child! An Examination of the Circuit Split over Emergency Removal of Children from Parental Custody

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When Katie Flanigan, a social worker, received a new case at noon on Monday, her supervisor instructed her to investigate the possibilities of child abuse and neglect. Tommy Perella’s schoolteacher had submitted a report of suspected abuse. According to the report, the teacher noticed frequent bruises on Tommy that he could not explain. Also, on the days that Tommy’s father picked him up from school, Tommy showed extreme anxiety from lunchtime through the end of the day, and recently had begun making up reasons why he should stay late after school. Based on these observations, the teacher suspected that Tommy’s father was the abuser. Ms. Flanigan researched Tommy’s family history and discovered that his father had a history of assault, battery, and drug use. After conferring with her supervisor, at 2:00 p.m. the same day, Ms. Flanigan went to the Perella’s home to meet and talk with Tommy and his parents. During the meeting Ms. Flanigan noticed that the house

\[\text{1. This paragraph contains a fictional fact pattern to illustrate how child protective services workers sometimes respond to a complaint of child abuse or neglect. Not all complaints of child abuse or neglect are investigated. Erin McCormick, Alarming Breakdown in State Foster Care, S.F. CHRON., Dec. 1, 2002, 2002 WL 4037015 ("A county social worker must review the complaint to see if an investigation is needed. Investigations are started for about 72 percent of complaints."). See CHILDREN’S BUREAU, U.S. DEPT OF HEALTH HUMAN SERVS. & OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING EVALUATION, NATIONAL STUDY OF CHILD PROTECTIVE SERVICES SYSTEMS AND REFORM EFFORTS: SUMMARY REPORT, at http:aspe.hhs.gov/hsp/CPS-status03/summary (May 2003) [hereinafter SUMMARY REPORT] (listing the ambitious goals of child abuse investigation, including the determination of whether “a child can safely live with his or her family, whether abuse or neglect has occurred, whether other children in the family are victims of abuse or neglect, and whether there is a risk for future abuse or neglect").}

\[\text{2. In some states, the response time for complaints to child protective services (CPS) agencies varies according to the severity of the complaint. See, e.g., Michelle Hunter, System Deserted Boy Before Father Did, Some Say, TIMES-PICAYUNE (New Orleans), Oct. 19, 2003, 2003 WL 60071003 (reporting that the Office of Community Service in East Jefferson, Louisiana responds to investigation-worthy complaints in accordance with their priority levels, and noting that emergency situations, including circumstances of child}

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was in a state of disrepair. Ms. Flanigan suspected that Mr. Perella was high on drugs during the entire meeting, and when she spoke to Mrs. Perella privately about her husband and his record of drug use, Mrs. Perella became very defensive and cut the conversation short with Ms. Flanigan. In addition, Tommy appeared timid and nervous in front of his father. After this meeting, Ms. Flanigan concluded that Tommy was in imminent danger of abuse. She consulted with her supervisor and their legal counsel, and the next day she removed Tommy from his parents' home.

These hypothetical facts present the question whether state agents can temporarily remove a child from his parents' custody under emergency circumstances without first gaining judicial authorization. The answer involves an analysis of the competing interests of the parents, the state, the child, and the constitutional protection these interests receive under Supreme Court precedent. Parents have a fundamental right to the care and custody of their children. The Supreme Court has recognized this fundamental right of parents under the Due Process Clause of the Fourteenth Amendment. Federal courts have interpreted the state's interests to include a parens patriae interest in the welfare of the child, as
well as administrative and financial costs associated with emergency removal procedures. Finally, under federal case law, the child's interests include a welfare interest to be free from abuse and neglect, and at the same time a due process right to remain with his natural parents free from unnecessary third party intervention.

In the context of emergency removal of children, the circuits reconcile these constitutional interests differently. For example, in Tenenbaum v. Williams, the Second Circuit held that the parents' procedural due process rights require social workers to consider whether there is sufficient time to obtain a court order prior to effecting an emergency removal of a child from parents' custody. In Doe v. Kearney, the Eleventh Circuit held that whether an emergency removal comports with due process does not hinge solely on whether there was time to obtain judicial authorization, but on a variety of relevant factors presented in the case.

This Comment examines the different ways the Second and Eleventh Circuits analyze the constitutionality of temporary removal of a child from parental custody in emergency situations, absent prior judicial authorization. It first discusses the Supreme Court's recognition of parents' fundamental right to care for their children and the protection this right receives under the Due Process Clause of the Fourteenth Amendment. This Comment then presents prior federal case law

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8. See Santosky, 455 U.S. at 766 (listing financial and administrative burdens as two state interests at stake in parental rights termination proceedings).

9. See Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.")

10. See Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844-45 (1977) (declaring the right of children to maintain uninterrupted the "emotional attachments that derive from the intimacy of daily association" with the parent); see also Raymond C. O'Brien, An Analysis of Realistic Due Process Rights of Children Versus Parents, 26 CONN. L. REV. 1209, 1247-48 nn.178-82 (1994) (listing various Supreme Court cases that sanction minors' fundamental rights, including a juvenile's right to due process).

11. See infra notes 14, 16 and accompanying text.

12. 193 F.3d 581 (2nd Cir. 1999).

13. Id. at 596.

14. 329 F.3d 1286 (11th Cir. 2003).

15. Id. at 1296-99. These factors include the "state's reasonableness in responding to [the perceived emergency and the] objective nature, likelihood, and immediacy of danger to [the] child." 3 BNA-USLWSCT 199, 2003.
indicating that children may be temporarily removed from their parents’ custody without violating the parents’ due process rights, as long as sufficient grounds exist to believe that the child is in imminent danger of abuse, i.e. emergency circumstances. Next, this Comment analyzes the recent split between the Second and the Eleventh Circuits: the circuits disagree over whether a case worker must demonstrate that there is insufficient time to gain judicial authorization to effect a constitutional, temporary removal of a child from parental custody. This Comment critiques each circuit’s opinion, drawing upon prior case law and public policy to conclude ultimately that the Eleventh Circuit’s reasoning is more sound, and that insufficient time to gain judicial authorization should not be an absolute requirement to constitutional emergency removal.

I. INTERPRETATION OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

A. The Supreme Court Recognizes Parental Rights

1. A Look at Parents’ Substantive Due Process Rights

The Supreme Court interprets the Fourteenth Amendment’s Due Process Clause to confer certain procedural and substantive rights upon U.S. residents. Among these substantive rights, in the area of parental and family matters, the Court recognizes that parents have a fundamental liberty interest in the care, custody, and management of their children. Throughout the past eighty years, the Supreme Court has developed a body of case law that continually reaffirms these fundamental rights.

Beginning with *Meyer v. Nebraska*, the Court held that the Due Process clause of the Fourteenth Amendment protects parents’ right to “establish a home and bring up children.” In *Stanley v. Illinois*, the

18. See Troxel v. Granville, 530 U.S. 57, 65 (2000) (confirming that “there is a constitutional dimension to the right of parents to direct the upbringing of their children”) (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
20. Id. at 399. In *Meyer*, the Supreme Court rejected the extension of Nebraska’s “police power” through a blanket prohibition of instruction of modern languages in schools. Id. at 396-403. The Court found that a state statute prohibiting the instruction of a foreign language to a child who had not yet completed the eighth grade violated the
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Court stated that “[t]he private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” The Court affirmed that the “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition” in Wisconsin v. Yoder. More recently, in Troxel v. Granville, a majority of the Supreme Court concluded that parents’ liberty interest in the care and custody of their children is “perhaps the oldest of the fundamental liberty interests recognized by this Court.” Drawing on Meyer, Stanley, Yoder, and other family law precedent, the Supreme Court in Troxel held that parental determination of the child’s best interests must be accorded “special” or “material” weight in decisions concerning the care, custody, and control of their children.

Fourteenth Amendment of the Constitution. Id.; see also id. at 400 (“[The instructor’s] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.”). A state may not arbitrarily interfere with the liberty “to acquire useful knowledge,” a right “long freely enjoyed,” unless the means by which it does so are narrowly tailored to eradicating a “harmful” emergency. See id. at 399, 403.


22. Id. at 651. In this case, the Illinois Supreme Court declared the children wards of the State upon the death of their mother, based on the fact that the father and mother had never been married. Id. at 646-47. The Supreme Court reversed, concluding that “as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him.” Id. at 649. The Court reasoned that parents are presumed “fit,” and therefore act in the best interest of their children. Id. at 652, 657-58. Under due process of law, all parents, wed and unwed, are entitled to a hearing on parental fitness “when the issue at stake is the dismemberment of [a] family.” Id. at 658.


25. Id. at 65. The Troxel Court based its ruling on a body of Supreme Court precedent that affirms parents’ fundamental right to make decisions regarding the care and custody of their children. Id. at 65-66.

26. Id. at 69-70 (“The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville’s determination of her daughters’ best interests.”). The Supreme Court criticized the lower court’s “failure] to accord the determination of Granville, a fit custodial parent, any material weight.” Id. at 72.
2. Substantive Fundamental Rights Receive Procedural Due Process Under the Fourteenth Amendment

Supreme Court precedent provides a two-step analytical framework for assessing procedural due process challenges. First, the Court examines whether an instrument of the government deprived a person of a fundamental right in the form of a liberty or property interest. Second, if the Court determines that due process requirements arise, it then examines how much process is due by balancing three factors: the nature of the private interest that will be affected by the official action, the risk that one might be wrongly deprived of such interest through the procedures used, and the costs and burdens of such procedures to the government. The development of this analytical structure was complete by 1976.

27. See, e.g., Matthews v. Eldridge, 424 U.S. 319, 332 (1976) (indicating that due process challenges involve individuals deprived of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment).

28. Bd. of Regents v. Roth, 408 U.S. 564, 569 (1972) (applying due process requirements only to liberty and property interests protected by the Fourteenth Amendment). Due process protection also may apply to lesser rights, as long as these lesser rights are tied to the fundamental rights of a property or liberty interest. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (finding that due process requirements apply in the case of state termination of welfare benefits). Recognizing the vital nature of welfare benefits, the Goldberg Court determined that the recipient acquired a property interest in the form of a statutory claim of entitlement. Id. at 261-62, 262 n.8. Accordingly, the Court ruled that the State must provide the welfare recipient with due process protection in the form of a pre-termination evidentiary hearing. Id. at 264.

29. This Comment primarily focuses on the first factor. It addresses the second and third factors only in the following footnotes. See infra notes 30-31.

30. See, e.g., CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., DECISION-MAKING IN UNSUBSTANTIATED CHILD PROTECTIVE SERVICES CASES: A SYNTHESIS OF RECENT RESEARCH, available at http://nccanch.acf.hhs.gov/pubs/focus/decisionmaking.pdf, at 1 (June 2003) (stating that in 2000, nearly two-thirds of the referrals received by child protective services were unsubstantiated). In this source, "substantiated" means an investigation by child protective services determined there is reasonable cause to believe that the child has been abused or neglected. 'Unsubstantiated' means an investigation determined no maltreatment occurred, or there was insufficient evidence under state law or agency policy to conclude that the child was maltreated." Id; see also Brief for Appellees-Cross-Appellants at 13, Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) (No. 97-9488) ("In the State of New York, approximately two-thirds of the complaints which the Register receives turn out, upon investigation, to be completely groundless or 'unfounded,' i.e., not supported by any credible evidence whatsoever.” (citations omitted)).

31. Matthews, 424 U.S. at 334-35. In Matthews, the respondent received social security benefits for four years while back problems and diabetes prevented him from working. Id. at 323-24 n.2. Later, he was informed by mail of the Social Security Administration's (SSA) conclusion that he was no longer disabled, and that the SSA would terminate his benefits within a month. Id. at 324 n.2. Respondent filed suit, seeking an evidentiary hearing prior to the termination of his benefits under Goldberg. Id. at 324-
B. Prior to Tenenbaum, Circuits Sanctioned Removal Without Authorization

Prior to Tenenbaum and Kearney, the Supreme Court lacked an established framework for analyzing parents’ constitutionally protected liberty interest in the care and custody of children in the specific context of emergency removal. Accordingly, federal case law in this area, including Supreme Court precedent involving parents’ due process rights, provides the background for Tenenbaum and Kearney.

In its 1977 decision, Duchesne v. Sugarman, the Second Circuit laid the foundation for the “emergency circumstances” doctrine. In this case, the State took children into custody without a court order after their mother entered a psychiatric ward. The mother moved in and out of the psychiatric hospital for twenty-seven months, while the State took custody of the children without judicial authorization. The court found that the initial removal of the children without a court order was constitutional because emergency circumstances existed and due process could be postponed. The court acknowledged that the emergency

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25; see supra note 28. The Court distinguished Goldberg, noting that “a controversy over eligibility [for welfare benefits] may deprive an eligible recipient of the very means by which to live while he waits,” whereas eligibility for social security benefits is not based on financial need or any other income the worker may have. Matthews, 424 U.S. at 340-41 (quoting Goldberg, 397 U.S. at 264). The Court opined that a “disabled worker’s need is likely to be less than that of a welfare recipient.” Id. at 342. Ultimately, the Court concluded that the administrative procedures in place for the termination of disability benefits satisfied due process requirements without requiring a pre-termination evidentiary hearing. Id. at 349.

32. See Matthews, 424 U.S. at 333-34 (discussing the Court’s opportunity over the years to evaluate “the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter”).

33. See Reply Brief of Defendant-Appellant-Cross-Appellee and Appellants-Cross-Appellees at 9, Tenenbaum (No. 97-9488). To this day, the Supreme Court has not addressed this issue directly. Id.

34. See infra Part I.B.

35. 566 F.2d 817 (2d Cir. 1977).

36. Id. at 826-28.

37. Id. at 822. The mother left the children with a neighbor because she expected to receive outpatient treatment at the hospital and return later that day. Id. However, she was admitted and hospitalized for six days. Id. The neighbor with whom the mother left the children contacted the authorities because she was unable to care for the children herself. Id.

38. Id. at 822-24. After an extended separation from her children, the mother filed a petition for a writ of habeas corpus with the New York Supreme Court. Id. at 824.

39. Id. at 826.
circumstances doctrine is a unique exception to typical due process analysis.\textsuperscript{40}

In \textit{Myers v. Morris},\textsuperscript{41} the Eighth Circuit interpreted parents’ liberty interest as “not absolute.”\textsuperscript{42} \textit{Myers} appears to be a foundation for \textit{Kearney}, recognizing that “there [is no] legal precedent which suggests that acting upon a reasonable belief that children are endangered by continued presence in their homes must be deferred until the completion of additional investigation.”\textsuperscript{43} The \textit{Myers} court argued that the government’s compelling interest in protecting children limits the parental liberty interest in keeping a family intact.\textsuperscript{44} Furthermore, in \textit{Robison v. Via}\textsuperscript{45} the Second Circuit noted that it was a “well established fact” that state officials can remove children from parental custody prior to gaining a court order when emergency circumstances exist.\textsuperscript{46} By 1991, the Second Circuit made it increasingly clear that a parent’s liberty interest in the care and custody of his or her child remained constitutionally protected, and a parent could not be deprived of this interest “without due process, generally in the form of a predeprivation hearing. . . except where emergency circumstances exist.”\textsuperscript{47}

The Fourth Circuit in \textit{Weller v. Department of Social Services}\textsuperscript{48} rejected the contention that the State’s emergency intervention into the custody of the plaintiff’s son violated his substantive due process rights.\textsuperscript{49} The

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\item \textsuperscript{40} Id. (calling the deprivation of a constitutionally protected right without due process an “extraordinary situation[,]”). Further, the court determined that a parent’s liberty interest in the custody of her children demands the protection of due process once the emergency circumstances cease. \textit{Id.} at 826 (noting that “the constitutional requirements of notice and an opportunity to be heard are not eliminated [in emergency situations], but merely postponed”). In that case, any further retention of the child requires judicial authorization in order to overcome a due process challenge. \textit{Id.} at 828.
\item \textsuperscript{41} 810 F.2d 1437 (8th Cir. 1987).
\item \textsuperscript{42} \textit{Id.} at 1462. The court stated, “[t]he liberty interest in familial relations is limited by the compelling governmental interest in protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves.” \textit{Id.}
\item \textsuperscript{43} \textit{Id.} at 1463; \textit{cf. Doe v. Kearney}, 329 F.3d 1286, 1295 (11th Cir. 2003) (affirming that a state does not have to wait to gain judicial authorization in order to remove a child from parental custody where there is “probable cause to believe the child is threatened with imminent harm”).
\item \textsuperscript{44} \textit{Myers}, 810 F.2d at 1462 (emphasizing the application of this limitation when children require protection from their own parents).
\item \textsuperscript{45} 821 F.2d 913 (2d Cir. 1987).
\item \textsuperscript{46} \textit{Id.} at 921 (“‘When a child’s safety is threatened, that is justification enough for action first and hearing afterward.’”) (quoting \textit{Sims v. State Dep’t of Pub. Welfare}, 438 F. Supp. 1179, 1192 (S.D. Tex. 1977)).
\item \textsuperscript{47} \textit{Hurlman v. Rice}, 927 F.2d 74, 79-80 (2d Cir. 1991).
\item \textsuperscript{48} 901 F.2d 387 (4th Cir. 1990).
\item \textsuperscript{49} \textit{Id.} at 391.
\end{itemize}
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court stated, "[i]t does not shock the conscience to hear that defendants removed a child in emergency action from the custody of a parent suspected of abusing him, based upon some evidence of child abuse," and upheld the emergency circumstances exception. As for the plaintiff's claim that the State violated his procedural due process rights by twice transferring custody of his son without a prior hearing, the court swiftly stated that "Due Process does not mandate a prior hearing in cases where emergency action may be needed to protect a child." Just as in *Duchesne*, the court found that Maryland's custody statutes were constitutional, but held that Maryland's failure to provide post-removal judicial review violated the father's procedural due process rights.

*Cecere v. City of New York* also recognized the emergency circumstances doctrine. In 1992, Gina Cecere alleged that a supervisor of the Office of Special Services for Children (SSC), various agencies of the city of New York, and Cecere's mother, Elda Brown, violated Cecere's due process rights by taking away her daughter. Cecere's mother had contacted the SSC and expressed concerns about Cecere's drug and alcohol use, inability to care for the child, and suicidal tendencies. After Cecere asked her mother to take and care for her daughter, a SSC supervisor issued a letter to prevent Cecere from regaining custody of the child until the SSC could begin proceedings in family court. The Second Circuit found no due process violation because the supervisor had an objectively reasonable belief that an emergency situation existed. The facts of *Cecere*, the court noted, "[fell] within *Duchesne*'s explicit recognition that temporary assertions of custodial authority in the face of a reasonably perceived emergency do not violate due process."


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50. *Id.* at 391, 393.

51. *Id.*

52. *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977); *see supra* text accompanying notes 35-40.


54. 967 F.2d 826 (2d Cir. 1992).

55. *Id.* at 829.

56. *Id.* at 827.

57. *See id.* at 827-28.

58. *Id.* at 828.

59. *Id.* at 829-30.

60. *Id.* at 830.

61. 15 F.3d 333 (4th Cir. 1994).
claimed that state authorities violated their constitutional rights by removing their son when he was "never . . . in imminent danger of irremediable harm." The Jordans' main challenge focused on the constitutionality of Virginia's statutory provisions that permit a delay of several days before allowing judicial review of an emergency removal. For this article's purpose, however, the case's true significance resounds in the parents' failure to challenge the Virginia code section providing for the emergency removal of children without judicial authorization. The

62. Id. at 343. This case is about "the awesome and, regrettably, sometimes necessary, power of the state to take custody of children from their parents in order to protect the children from irreparable injury or death." Id. at 336. Today, even as some states seek to reform child welfare systems, there appears a desire to leave the emergency circumstances doctrine in place. See, e.g., Matthew Franck, Panel Backs Opening Foster Care Hearings; Proposals Aim to Answer Criticisms of State System. ST. LOUIS POST-DISPATCH, Apr. 1, 2003, 2003 WL 3567305 (discussing several changes that the Missouri Commission on Children's Justice seeks to make within the state's foster care system, including "requir[ing] a team of state workers, child advocates and court officials to meet before a child is removed from a home, except in emergencies") (emphasis added). The Commission's intentional exclusion of emergency circumstances from a proposed mandatory meeting before removal implies a continuing belief in the necessity of this doctrine. See id.; see also Matthew B. Stannard, Baby's Father Charged With Murder/ New Foster Care Policies Might Have Saved Him, S.F. CHRON., Dec. 31, 2002, 2002 WL 4039365 (detailing a series of reforms to the child welfare system in nine California counties that will bring together foster parents, natural parents, case workers, and other involved parties with a facilitator to make group decisions about a child's case, but under which "case workers [will] still have sole discretion to act in emergencies—such as deciding to remove a child from its home").

63. Jackson, 15 F.3d at 337. The Jordans were a married couple, parents, and both worked full-time. Id. at 336. They had two daughters, ages three and six, who were in day care and with babysitters when they were not in school. Id. The Jordans also had a son, Christopher, age ten, who took care of himself after school, usually for an hour and a half. Id. One day someone called the local Department of Social Services (DSS) and reported that Christopher was home alone, before and after school, and had been fighting with other kids at the bus stop. Id. DSS assigned the case to a social worker who, on the very next day, without contacting the Jordans first to obtain any additional information, seized Christopher as he was walking home from his school bus stop, pursuant to Virginia law, VA. CODE ANN. § 63.1-248.9 (Michie Supp. 1993). Id. Three days later, DSS returned Christopher to his parents. Id. at 337.

64. Jackson, 15 F.3d at 337.

65. Id. at 341-42 (emphasizing that the Jordans did not wish to challenge the statute that authorizes the emergency removal of children). In addition to Virginia, forty-six other states plus the District of Columbia have statutes that provide for the emergency removal of children without a court order. ALA. CODE § 26-14-6 (1992); ALASKA STAT. § 47.10.142(a) (Michie 2002); ARIZ. REV. STAT. ANN. § 8-821(B) (West Supp. 2003); ARK. CODE ANN. § 12-12-516(a)(1) (Michie 2003); CAL. WELF. AND INST. CODE § 306(a)(2) (Deering 2001); COLO. REV. STAT. § 19-3-401 (2002); CONN. GEN. STAT. ANN. § 17a-101g(e) (West Supp. 2003); DEL. CODE ANN. tit. 16, § 907 (2003); D.C. CODE ANN. § 16-2309(a) (2003); FLA. STAT. ANN. § 39.401(1)(b) (West 2003); GA. CODE ANN. § 15-11-45(a)(4) (2003); HAW. REV. STAT. ANN. § 587-22(a) (Michie 1999); IDAHO CODE § 16-1612(a)(1) (Michie Supp. 2003); 325 ILL. COMP. STAT. ANN. 5/5 (West 2001); IND. CODE
Jordans’ decision to forego this constitutional challenge indicates a possibly growing recognition and tolerance of the emergency removal exception.\textsuperscript{66}

In 1997, the Tenth Circuit in \textit{Hollingsworth v. Hill}\textsuperscript{67} affirmed the ability of the state to remove children from parental custody without a court order.\textsuperscript{68} The court described the purpose of two Oklahoma statutes, the

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\item \textsuperscript{66} See \textit{Jackson}, 15 F.3d at 343 (noting appellants’ concession that “it is well-settled that the requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child,” and citing case law from various circuits supporting this proposition, including Weller v. Dep’t of Soc. Servs., 901 F.2d 387, 393 (4th Cir. 1990) and Duchesne v. Sugarman, 566 F.2d 817, 826 (2d Cir. 1977)).
\item \textsuperscript{67} 110 F.3d 733 (10th Cir. 1997).
\item \textsuperscript{68} \textit{Id.} at 739 (citing Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987)). This case arose out of a dispute between spouses. \textit{Id.} at 736. The day after an argument with his
“Oklahoma Children’s Code” and Oklahoma’s “Protection from Domestic Abuse Act,” as follows:

Under each statutory scheme, Oklahoma protects [the State’s interest in the safety of its children and the parents’ interest in the care, custody and management of their children] through procedures designed to ensure both that parents whose children are removed receive notice and an opportunity to be heard “at a meaningful time and in a meaningful manner,” . . . and that children are removed from parental custody in time to avoid threats to their health and safety.

wife, Mr. Hollingsworth “obtain[ed] a victim’s protective order that limited Ms. Hollingsworth’s legal contact with her husband and children.” Id. While her husband was obtaining the court order, Ms. Hollingsworth left home and took her children to a motel. Id. Eventually, the police located Ms. Hollingsworth, served her with the protective order, and removed her children from her custody. Id. at 736-37. Ms. Hollingsworth then sued members of the police department alleging deprivation of her constitutional rights. Id. at 737-40 (noting that it was unclear to the court whether Ms. Hollingsworth intended to allege violations under the Fourth or Fourteenth Amendments, and deciding to analyze both possible claims). Ultimately, the court determined that “the Oklahoma child abuse law [did] not justify the removal of Ms. Hollingsworth’s children without prior notice and a hearing.” Id. at 739. The court emphasized how “the record contain[ed] no evidence that Ms. Hollingsworth posed an immediate threat to [her children’s] safety,” or that she “actually endangered the welfare of her children prior to their removal,” Id. at 739-40. That is, although dicta indicated that “[u]nder appropriate circumstances,” such sudden removal might be constitutional, those circumstances were not present in this case. Id. at 739.

69. OKLA. STAT. tit. 10, §§ 1101-1149 (1998). The Oklahoma State Legislature has rewritten and renumbered several sections of these statutes in recent years. The Oklahoma Children’s Code now appears in chapter 70 of title 10. Id. §§ 7001-1.1 to 7006-1.5 (West Supp. 2004).

70. Hollingsworth, 110 F.3d at 739 (citation omitted); see tit. 10, §§ 7001-7003; id. tit. 22, § 60-60.7. The pertinent subsection regarding “remov[al] from parental custody in time to avoid threats to their health and safety,” Hollingsworth, 110 F.3d at 739, appears as follows: “A. [A] child may be taken into protective custody prior to the filing of a petition: 1. By a peace officer or employee of the court, without a court order if the child’s surroundings are such as to endanger the welfare of the child.” Tit. 10, § 7003-2.1. This subsection was amended in 2002, adding the language “or if continuation of the child in the child’s home is contrary to the health, safety or welfare of the child.” OKLA. STAT. ANN. tit. 10, § 7303-1.1(A)(1) (West Supp. 2004). Unfortunately, even the additional language does not help to clarify the scope of the statute. For example, what exactly are “surroundings [that] endanger the welfare of the child?” OKLA. STAT. tit. 10, § 7003-2.1 (1998). Which situations are “contrary to the health, safety or welfare of the child,” and which are not? OKLA. STAT. ANN. tit. 10, § 7303-1.1(A)(1) (West Supp. 2004). Such loose statutory language not only leaves social workers without a clear indication of what constitutes exigent circumstances that warrant lawful emergency removal, but it also lends no help to the judiciary when forced to review an immediate removal under this statute. Some have argued that vague statutory language should be redrafted in order to decrease the occurrence of defensive social work and unnecessary spontaneous removals. See, e.g., Paul Chill, Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings, 41 FAM. CT. REV. 457, 463 (2003) (declaring that “[s]tates should
Although neither statute provided for the lawful removal of Ms. Hollingsworth’s children, the court attempted to clarify the goals of the statutes, and affirmed the validity of the emergency circumstances doctrine.\textsuperscript{71} Two years later, the Second Circuit would dramatically depart from this doctrine in \textit{Tenenbaum v. Williams}.\textsuperscript{72}

\textbf{C. An Anomaly in the Law: Tenenbaum v. Williams}

At the time of her removal, Sarah Tenenbaum was five years old.\textsuperscript{73} Sarah’s teacher suspected abuse by Sarah’s father and contacted the proper authorities.\textsuperscript{74} Nat Williams, a supervisor for the Child Welfare


71. \textit{Hollingsworth}, 110 F.3d at 739-40.

72. \textit{See infra} Part I.C.

73. \textit{Tenenbaum v. Williams}, 193 F.3d 581, 588 (2d Cir. 1999). Sarah suffered from delayed development and elective mutism, communicating mostly by pictures and one or two-word sentences. \textit{Id}.

74. \textit{Id}. One day at school, five-year-old Sarah slept during story-time and later awoke crying. \textit{Id}. When her teacher asked her if anyone hurt her, Sarah nodded “yes.”
Administration (CWA), received the Tenenbaum case at approximately noon on Friday, January 5, 1990.\textsuperscript{75} That same day, a caseworker met with Sarah's parents, examined Sarah for signs of abuse, and reported back to Williams.\textsuperscript{76} However, Williams did not choose to remove Sarah from school until Tuesday, four days later.\textsuperscript{77} Without obtaining parental consent and without a court order, a caseworker removed Sarah from school and took her to the local hospital, where a doctor performed a gynecological examination to check for signs of sexual abuse.\textsuperscript{78} When the doctors did not find any evidence of sexual abuse, CWA returned Sarah to her parents, and eventually marked Sarah's case as "unfounded."\textsuperscript{79} Sarah's parents sued, alleging multiple constitutional violations by the State and its actors.\textsuperscript{80}

\textsuperscript{75} Id. The teacher then listed the names of several people in Sarah's life, and when she asked Sarah if her father hurt her, Sarah nodded "yes" and began to cry. \textit{Id.} Later, Sarah indicated twice "where she was being hurt" by pointing to the groin area on a doll. \textit{Id.} Sarah's teacher chose not to report anything to the authorities that day. \textit{Id.} However, when Sarah's teacher asked her to explain a picture Sarah drew the next day, Sarah said, "Sarah and . . . Daddy kneeling, hurt." \textit{Id.} Following this, Sarah's teacher decided to report Sarah's behavior to her supervisors. \textit{Id.} 

\textsuperscript{76} \textit{Id.} at 588-89. Despite the teacher's report of Sarah's communication about her father hurting her, investigator James was unable to obtain similar information from Sarah upon visiting her at school. Brief for Appellees-Cross-Appellants at 15-16, \textit{Tenenbaum} (No. 97-9488). When James questioned Sarah about the alleged abuse, Sarah did not respond. \textit{Id.} at 15. When James asked Murphy, Sarah's teacher, to recreate the events by which Murphy obtained answers from Sarah, inconsistencies appeared. \textit{Id.} at 15-16; \textit{id.} at 16 (Sarah shook her head "no" when Murphy asked her, in front of James, if her father hurt her). Nonetheless, the trial court eventually found that an emergency existed, despite the child's claimed recantation before James. \textit{Id.} at 42. The trial court also found "as a matter of law, that the information provided by [Murphy] to James established reasonable grounds for the emergency removal of Sarah. Accordingly, none of the defendants violated a due process right of any of the plaintiffs." \textit{Id.} at 8 (citations omitted). 

\textsuperscript{77} \textit{Tenenbaum}, 193 F.3d at 590.

\textsuperscript{78} \textit{Id.} at 591. Sarah had to wait several hours in the emergency room with the caseworker. \textit{Id.} Finally, Sarah received a gynecological examination. \textit{Id.} The court explained what happened to Sarah:

Sarah was stripped and subjected to a body cavity search, including an inspection of her vagina and surrounding area, as well as penetration of her vagina and anus with q-tips, all in the presence of James. That was the first time in her life that Sarah had undergone a gynecological exam.

Brief for Appellees-Cross-Appellants at 16, \textit{Tenenbaum} (No. 97-9488).

\textsuperscript{79} \textit{Tenenbaum}, 193 F.3d at 591.

\textsuperscript{80} \textit{Id.} This Comment will focus on the Court's discussion of whether the State violated Sarah's parents' rights to procedural due process.
1. The Majority Opinion Adds a Brand New Requirement to the Assessment of Due Process Challenges Resulting from Emergency Removal of Children

On appeal, the Second Circuit began its constitutional analysis by recognizing parents' fundamental right in the care and custody of their children. The court then acknowledged the emergency circumstances exception, but disagreed with the district court that emergency circumstances existed in the case of Sarah's removal.

The Court of Appeals for the Second Circuit stated that evidence suggested the CWA removed Sarah to check for possible signs of abuse, not to remove her from an emergency situation. The majority reasoned that "a properly instructed jury" could conclude that there was sufficient time to obtain a court order, and if there was sufficient time, then there was no emergency. If there was no emergency, then a jury could conclude that the State acted unconstitutionally by removing Sarah without a court order. In an effort to prevent such an unconstitutional removal from occurring again, the court handed down a bold, unprecedented holding.

The Second Circuit stated that "where there is

81. Id. at 593.
82. Id. at 594 ("In 'emergency' circumstances, a child may be taken into custody by a responsible State official without court authorization or parental consent.") (citing Hurlman v. Rice, 927 F.2d 74, 79 (2d Cir. 1991), and Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987)).
83. Id. (recounting the district court's findings that Williams had "probable cause, i.e., an objectively reasonable basis, to believe emergency circumstances existed because the substance of what the child communicated to [her teacher] . . . is essentially uncontroverted, viz. that Sarah's father hurt her through contact with her vaginal area at night"). The Second Circuit found that this was insufficient information to rule as a matter of law that emergency circumstances existed, permitting a constitutional emergency removal. See id.
84. Id. at 595.
85. Id. But see id. at 608-11 (Jacobs, J., dissenting in part) (criticizing the effect of the majority's new rule, which places the subjective decision of whether there was time for the caseworker to obtain a court order in the hands of the jury). Judge Jacobs disagrees with taking the objective decision of whether an emergency exists out of the determination of the trial judge. See id. at 610 (Jacobs, J., dissenting in part) ("Ordinarily, a judge would have little trouble ascertaining as a matter of law that the child welfare worker faced an emergency, objectively considered."). Judge Jacobs further disagrees with placing this determination into the hands of the jury, which, under the majority's new rule, requires the jury to answer subjective questions such as, "[w]as there time [to obtain a court order] in this case?," and "[h]ow long does it take?" Id. at 608 (Jacobs, J., dissenting in part). He rejects the majority's view that "a properly instructed jury" could answer these types of questions with any consistency. Id. (Jacobs, J., dissenting in part).
86. Tenenbaum, 193 F.3d at 595. But see id. at 608 (Jacobs, J., dissenting in part); see also supra note 85.
87. Id. at 596 (admitting that "not until today [has the court] specifically held" that state workers must consider whether there is sufficient time to gain a court order before
reasonable time consistent with the safety of the child to obtain a judicial order, the ‘emergency’ removal of a child is unwarranted. The practical effect of this holding is that, in the Second Circuit, state workers must determine that there is insufficient time to gain a court order before effecting an emergency removal of a child.

2. The Dissent Laments the Departure from Previous Precedent and Warns of Negative Impacts

In his dissenting opinion, Judge Jacobs argued that the majority incorrectly changed the standard for when an emergency is an exigent situation, i.e., an emergency for purposes of removing a child from his or her parents. His concern stemmed from the majority’s “recast[ing of] a child-welfare emergency in terms of a procedural emergency, i.e., whether the danger to the child is so pressing that no court order is feasible.” According to Judge Jacobs, the problem with such an approach is threefold. First, the majority does not provide, and indeed it seems impossible to provide, how a jury could objectively determine if effecting an emergency removal).

Some state statutes use a reasonable cause standard and, in addition, explicitly require that there be no time to apply for or obtain a court order. See, e.g., DEL. CODE ANN. tit. 16 § 907 (2003); 325 ILL. COMP. STAT. ANN. 5/5 (West 2001); IND. CODE ANN. § 31-34-2-3(a) (Michie 1997); IOWA CODE ANN. §232.79(1) (West Supp. 2003); MO. ANN. STAT. § 210.125(2) (West 1996) (providing that there be “reasonable cause to believe the harm or threat to life may occur before a juvenile court could issue a temporary protective custody order or before a juvenile officer could take the child into protective custody”); N.H. REV. STAT. ANN. § 169-C:6(1) (2001); N.J. STAT. ANN. § 9:6-8.29(a) (West 2002); N.C. GEN. STAT. § 7B-500(a) (2002); S.C. CODE ANN. § 20-7-610(A)(1) (Law. Co-op. 2002); S.D. CODIFIED LAWS § 26-7A-12(4) (Michie 1999); VA. CODE ANN. § 63.2-1517(A) (Michie Supp. 2003) (provided that “a court order is not immediately obtainable”); cf. TEX. FAM. CODE ANN. § 262.104 (Vernon 2002) (“if there is no time to obtain a temporary restraining order or attachment”). However, the Second Circuit’s holding was unprecedented because it made the new requirement (that state workers must consider whether there is sufficient time to gain a court order) an outcome-determinative test to effecting a constitutional emergency removal, as opposed to one of several factors to be balanced and considered together. See Tenenbaum, 193 F.3d at 596.

88. Tenenbaum, 193 F.3d at 596.

89. See Doe v. Kearney, 329 F.3d 1286, 1296 (11th Cir. 2003) (restating the holding of Tenenbaum).

90. Tenenbaum, 193 F.3d at 607-08 (Jacobs, J., dissenting in part) (articulating the emergency circumstances standard used in previous cases, and criticizing the majority’s “new and incompatible principle: that there is no such emergency, notwithstanding the exigency, if there is or may be time to obtain a court order”). Judge Jacobs wrote separately, concurring in the dismissal of the Tenenbaums’ substantive due process and state law claims, but dissenting from the majority’s conclusion that a jury could find a procedural due process violation, and strongly objecting to the majority’s new standard of review for emergency removal cases. Id. at 607-13 (Jacobs, J., concurring in part and dissenting in part).

91. Id. at 608 (Jacobs, J., dissenting in part).

92. See infra notes 93-97 and accompanying text.
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enough time existed to obtain a court order. Judge Jacobs argued that requiring such a subjective determination wholly contradicts the Second Circuit’s objective precedent in this area of the law. Second, from an administrative standpoint, the majority’s decision will increase the workload of courts because nearly every due process challenge to an emergency child removal will require a jury determination. Third, Judge Jacobs feared that the majority’s approach will expose social workers to liability for their actions, resulting in an increased likelihood that children will remain in dangerous situations.

93. *Tenenbaum*, 193 F.3d at 608-10 (Jacobs, J., dissenting in part) (cautioning against leaving to juries the “highly subjective determination as to whether there is time to get a court order”); see supra note 85.

94. *Tenenbaum*, 193 F.3d at 607-08 (Jacobs, J., dissenting in part) (citing multiple cases where the court analyzed due process challenges to emergency removals in strictly objective terms). The dissent points out that the majority cited to *Hurlman v. Rice* for the proposition that “in emergency circumstances, a child may be taken into custody by a responsible state official without court authorization or parental consent.” *Id.* at 607 (noting the majority’s citation to *Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir. 1991)). Judge Jacobs then emphasized that “[t]his standard has been applied again and again.” *Id.* (Jacobs, J., dissenting in part).

95. *Id.* at 610 (Jacobs, J., dissenting in part) (predicting that summary judgment will become impossible for the majority of emergency removal cases because social workers’ action or inaction, sometimes the result of bureaucratic delays, will be sufficient to raise material questions of fact).

96. *Id.* at 610-11 (Jacobs, J., dissenting in part). Judge Jacobs noted that incentives already exist for social workers to err on the side of erroneous failure to remove. *Id.* (citing John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 74-78 (1998)). Now, the majority’s new requirement has the potential to strip social workers of their qualified immunity:

Every time a child welfare worker has reason to suspect child abuse, she will have to consider (i) whether there is reason to believe the child is in imminent danger (which until now has been all that was required) and (ii) whether there is time to get to court and obtain a court order (the majority’s new requirement) as well as (iii) whether a court or jury will second-guess that decision on the basis that more efficient decision-making would have afforded sufficient time to obtain the court order. In terms of litigation, individual liability and damages, an error on the side of removal is risky, while an error on the other side is safe.

D. Doe v. Kearney—the Eleventh Circuit Explicitly Rejects the Second Circuit's Approach

On January 18, 2000, the Florida Department of Children and Family Services ("DCF") learned that T.O., a nine-year-old deaf girl, reported sexual abuse by her uncle, John Doe, four years earlier. Doe alleged that when she was five, John Doe made her touch his penis and perform oral sex. DCF assigned the case to social worker Deborah O'Brien. O'Brien immediately began her investigation and, after an hour and a half of research, determined that Doe had a history of sexual crimes. Specifically, O'Brien discovered that Doe had been accused of sexually abusing a three-year-old boy, convicted of two counts of larceny and lascivious behavior, charged with solicitation of prostitution, and accused of rape. O'Brien talked with her supervisor and DCF's legal counsel, who advised her to take Doe's three children into custody. After meeting with the Doe family, O'Brien concluded that "the children were in danger of abuse from John Doe." O'Brien took the children, constitutional rights preserved—to return home to a predatory adult." (Jacobs, J., dissenting in part).

99. Id. The record does not indicate whether T.O. was living with her uncle at the time.
100. Kearney, 329 F.3d at 1290. The report stated that the "children in this home could be at risk. Dad has a history of molesting other children in the past." Answer Brief of Appellees at 16, Kearney (No. 02-13874-B). Contra Brief for Appellants at 5, Kearney (No. 02-13874-B) (stating that DCF viewed the report as indicating a "low to intermediate" risk of harm to the children).
101. Kearney, 329 F.3d at 1290.
102. Id. O'Brien learned that DCF investigated Doe in 1995, when Doe was accused of sodomizing a three-year-old boy whom Jane Doe was baby-sitting. Despite DCF's belief in the truth of the allegation, it did not press charges due to "lack of cooperation from the victim." Id.
103. Id. According to the police report, John Doe was masturbating in his vehicle in front of two young girls standing at a school bus stop, although Doe claimed he did not know the girls were nearby. Id. n.6. O'Brien may have misread the report as containing a conviction for "child fondling," while Doe was actually convicted of fondling himself in front of children. Id.
104. Id. at 1290.
105. Id. The record does not reflect why Doe was accused of, but not charged with, rape. Id. Doe was also convicted of four counts of burglary. Id. at 1290 n.5.
106. Id. at 1290. DCF's legal counsel made the recommendation for O'Brien to take the children into custody at approximately 2:45 p.m. Id.
107. Id. at 1291. At trial, O'Brien testified that during her interview with the Doe family, she learned the Doe children "did not know good touch [from] bad touch." Answer Brief of Appellees at 18, Kearney (No. 02-13874-B). O'Brien also understood that "John Doe's pattern of sexual behavior was progressing from strangers to relatives." Id. In addition, O'Brien felt that Jane Doe "would not protect the children from communication with their dad over the evening before a court hearing could be held." Id.
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without a court order, to their maternal grandparents’ house to spend the night. The next morning, a state judge concluded that there was “a lack of probable cause” to retain the children any further and ordered them returned to their parents. The Does sued, alleging that the statute under which O’Brien acted violated the Fourteenth Amendment.

The Eleventh Circuit began its opinion by acknowledging the “general rule” that the state cannot deprive parents of their liberty interest in the care and custody of their children without due process, usually in the form of a hearing. The court noted the state’s profound interest in the welfare of children and listed cases from various circuits that recognized the emergency circumstances doctrine in an effort to balance these conflicting interests. After disposing of the plaintiff’s facial invalidity challenge, the court addressed the Does’ due process claim that the Florida statute was unconstitutional as applied to them.

The Florida statute in question permits state workers to effect emergency removals, without a court order, when the agent has probable cause to believe that the child is the victim of abuse or is in imminent danger thereof. The Does argued that this statute was unconstitutional for these reasons, O’Brien determined that an emergency removal was necessary to protect the children from imminent danger of abuse. Id.

108. Kearney, 329 F.3d at 1291.
109. Id.
110. Id. The Does also alleged a Fourth Amendment claim, the analysis of which is beyond the scope of this Comment. Id. The Does first sought summary judgment. Answer Brief of Appellees at 14, Kearney (No. 02-13874-B). The trial court denied summary judgment with respect to Florida Statute chapter 39.401(1) because the statute conditioned pre-judicial removal upon probable cause, and it provided for a hearing within twenty-four hours of the removal. Answer Brief of Appellees at 14, Kearney (No. 02-13874-B). The court found that “the state’s interest in protecting the child outweighed the parent’s [sic] liberty interest and, [given the probable cause and post-removal hearing provisions], all constitutional mandates had been met.” Id.
111. Kearney, 329 F.3d at 1293.
112. Id. at 1293-94 (citing Mabe v. San Bernardino County, 237 F.3d 1101, 1106 (9th Cir. 2001); Brokaw v. Mercer County, 235 F.3d 1000, 1020 (7th Cir. 2000); Tenenbaum v. Williams, 193 F.3d 581, 593-94 (2d Cir. 1999); Hollingsworth v. Hill, 110 F.3d 733, 739 (10th Cir. 1997); Jordan by Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994)); cf. United States v. Edmondson, 791 F.2d 1512, 1514 (11th Cir. 1986) (allowing warrantless search and seizure in criminal cases where exigent circumstances exist). According to the Kearney court, limiting warrantless removals to true emergencies properly balances the rights and interests of all parties involved. 329 F.3d at 1294.
113. Kearney, 329 F.3d at 1294-95. The statute to which the Does referred was Florida Statute chapter 39.401(1).
114. FLA. STAT. ch. 39.401(1) (2003). The text of this subsection is as follows:

1. A child may only be taken into custody....
2. (b) By a law enforcement officer, or an authorized agent of the department, if the officer or authorized agent has probable cause to support a finding: 1. That the child has been abused, neglected,
as applied to them because it permitted the State to remove their children when emergency circumstances did not actually exist, thereby violating the Due Process Clause.\textsuperscript{115} Appellants argued that probable cause alone was insufficient for removal. The Constitution, they argued, requires both probable cause and exigent circumstances, i.e., insufficient time to obtain a court order, for a constitutional emergency removal.\textsuperscript{116} The practical effect of arguing that probable cause is inadequate and that social workers must prove insufficient time to obtain a court order is that social workers must prove that the child was actually in imminent danger of abuse and neglect. In other words, the Does were asking the court to hold that social workers must be correct in their suspicions—that the abuse must actually exist in order to effect an emergency removal.\textsuperscript{117} The Eleventh Circuit disagreed that the Constitution requires "such an inflexible rule."\textsuperscript{118} Although counsel for appellants argued that case law

or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment ... 

\textit{Id.} Under this statute, an investigator can seize a child based on probable cause, without considering whether there is time to obtain a court order. Brief for Appellants at 8, \textit{Kearney} (No. 02-13874-B). Deposition testimony of a review specialist and expert in the Department of Children and Families' policies and practices is illustrative:

Q. Chapter 39.401 authorizes ... the removal of a child from the home without prior warrant based solely on probable cause to believe the child has been sexually abused?
A. Correct.
Q. Is there any instance under Chapter 39 where a court order would be required? Assuming, of course, there is probable cause to believe the child has been sexually abused.
A. Not that I can recall.
Q. But if the parent simply answers the door and says, oh, here are my children, then the investigator can simply take the children and leave?
A. Correct.
Q. Without a warrant—without a court order?
A. Without a court order.

\textit{Id.} at 9 n.9.

\textsuperscript{115} See Brief for Appellants at 25, 41, \textit{Kearney} (No. 02-13874-B).

\textsuperscript{116} See Answer Brief of Appellees at 24-25, \textit{Kearney} (No. 02-13874-B). The Eleventh Circuit characterized the Does' argument as follows:

They would have us craft a rule that reads something like this: Due process requires that a state official obtain a court order prior to removing a suspected victim of child abuse from parental custody, unless: (1) the official has probable cause to believe the child is in immediate danger of abuse; and (2) the official reasonably determines that there is insufficient time to obtain judicial permission before temporarily removing the child.

\textit{Kearney}, 329 F.3d at 1295.

\textsuperscript{117} See infra note 184.

\textsuperscript{118} \textit{Kearney}, 329 F.3d at 1295. The court noted that the flexible doctrine of due process requires a multifactor examination of all relevant circumstances in a case, not the fulfillment of a single factor. \textit{Id.} In addition to due process concerns, this argument raises
supported the Does' argument, the Eleventh Circuit stated that none of the cases, save *Tennenbaum*, supported appellants' position.\textsuperscript{119}

The *Tennenbaum* decision held that a state worker cannot constitutionally remove a child from her parents' custody without parental consent or a court order unless the state worker meets two requirements.\textsuperscript{120} The state worker must have probable cause to believe the child is in imminent danger of abuse or neglect and must believe there is insufficient time to obtain prior judicial authorization.\textsuperscript{121} The Eleventh Circuit flatly rejected this more demanding standard.\textsuperscript{122} The court in *Kearney* cited to the dissenting opinion in *Tennenbaum*, which concerns over the realistic capabilities of child protective service (CPS) workers, who already have complex determinations to make. \textit{See supra} note 1. During their investigations of possible child abuse or neglect, these workers "have the difficult tasks of figuring out what has happened and predicting what will happen." \textit{SUMMARY REPORT, supra} note 1. In making these "predictions," CPS workers follow a variety of procedures and perform multiple tasks. \textit{Id.} The \textit{SUMMARY REPORT} provides:

When asked whether procedures would "always," "sometimes," "rarely," or "never" be followed, more than two-thirds of agencies in the Nation were estimated to "always" include the following activities during an investigation: [c]onsider the severity of the case; [c]onsider required standards of evidence; [r]evIEW prior CPS records; [i]nterview or formally observe children; interview caregivers; [c]onsult with available clinicians, domestic violence specialists, substance abuse specialists, and child fatality teams; [n]otify the perpetrator, if abuse or neglect was founded; and [a]dd the perpetrator's name to the Central Registry. \textit{Id.} CPS workers use these activities to make the best possible prediction as to whether the child is in an emergency situation. \textit{Id.} It seems highly irrational to require CPS workers to determine that there is insufficient time to obtain a court order before they can constitutionally remove a child from parental custody. \textit{See supra} note 89 and accompanying text (paraphrasing the holding in *Tennenbaum*, which requires case workers to determine that there is insufficient time to obtain a court order before removing a child in emergency circumstances).

\textsuperscript{119} *Kearney*, 329 F.3d at 1295-96 (pointing out that, with the exception of *Tennenbaum* v. *Williams*, these cases only require probable cause to believe the child is in imminent danger for a state worker to effect a constitutional emergency removal, without the additional requirement of insufficient time to obtain a court order) (citing Roska v. Peterson, 304 F.3d 982, 993 (10th Cir. 2002); Brokaw v. Mercer County, 235 F.3d 1000, 1020 (7th Cir. 2000); Hollingsworth v. Hill, 110 F.3d 733, 739 (10th Cir. 1997); Weller v. Dep't of Soc. Servs., 901 F.2d 387, 393 (4th Cir. 1990)); \textit{see also} Mabe v. San Bernadino County, Dep't of Public Soc. Servs., 237 F.3d 1101 (9th Cir. 2001); Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000); *Tennenbaum* v. *Williams*, 193 F.3d 581 (2d Cir. 1999); United States v. Edmondson, 791 F.2d 1512, 1514 (11th Cir. 1986); Jordan by Jordan v. Jackson, 15 F.3d 333, 344 (4th Cir. 1994); Brief for Appellants at 17-21, *Kearney* (No. 02-13874-B) (citing Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987)).

\textsuperscript{120} *Tennenbaum*, 193 F.3d at 594-95.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{See} *Kearney*, 329 F.3d at 1296-98 (describing the facts and procedural history of *Tennenbaum* and rejecting the majority's reasoning in adopting the requirement that there be insufficient time to obtain a court order).
warned that *Tenenbaum* marked a "dramatic departure from previous Second Circuit precedent." The Eleventh Circuit stated that due process is a flexible doctrine requiring a balancing of the many factors and interests at stake, not reliance on one outcome-determinative factor.

II. THE FALLOUT FROM THE *TENENBAUM*-KEARNEY CONFLICT—A CLOSER LOOK AT THE VARIOUS ANALYTICAL APPROACHES

A. Why the Second Circuit's Reasoning Is Misplaced

The Second Circuit in *Tenenbaum* disagreed with the district court that the removal of Sarah Tenenbaum was "an appropriate response to a legitimately perceived emergency." The court of appeals also disagreed that the state agent had probable cause, that is, "an objectively reasonable basis, to believe emergency circumstances existed." However, even if probable cause existed, the Second Circuit demanded a higher standard. Further analysis of the majority opinion in *Tenenbaum* reveals the flaw in the court's reasoning.

One reason to discount the Second Circuit's due process analysis is the court's apparent misunderstanding of the "reasonable" or "probable cause" requirement. The court characterized the probable cause standard in emergency circumstances cases as an "infinite license" for the state and its agents to remove children from their parents' custody. Not only is the Second Circuit the first to characterize "probable cause" as an "infinite license," but decades of appellate decisions demonstrate that probable cause is a strict, objective standard that comports with due process. Accordingly, the Second Circuit's position that probable cause is an "infinite license" for the state and its agents to remove children from their parents' custody is misplaced.

123. *Id.* at 1297; see supra note 90 and accompanying text.
124. *Kearney*, 329 F.3d at 1297-98 (criticizing the approach of "simply asking whether there was time to get a warrant," and recommending "a careful balancing of [all] interests at stake"); see also *supra* note 15.
126. *Id.*
127. *Id.* (disagreeing that Williams' probable cause "was enough . . . as a matter of law" to satisfy the emergency circumstances doctrine and permit Sarah's removal without a court order).
128. See *id.* at 595; see also infra notes 129-31 and accompanying text.
129. *Tenenbaum*, 193 F.3d at 595.
130. See *id.* at 607-08 (Jacobs, J., dissenting in part); see also *Gottlieb* v. County of Orange, 84 F.3d 511, 520 (2d Cir. 1996) ("It is established . . . that government officials may remove a child from his or her parents' custody before a hearing is held where there is an objectively reasonable basis for believing that a threat to the child's health or safety is imminent."); *Cecere* v. City of New York, 967 F.2d 826, 829 (2d Cir. 1992); *Robison* v. *Via*,
cause is constitutionally insufficient for emergency removals is defective.\textsuperscript{131}

Furthermore, prior decisions of federal courts of appeal, including those cited by the majority in 
Tenenbaum,\textsuperscript{132} do not support the position that emergency removals necessitate anything more than probable cause.\textsuperscript{3} As described above, the emergency circumstances doctrine evolved to protect the rights of children in the face of the strong constitutional protection of parental rights in the care and custody of their children.\textsuperscript{133} Although Supreme Court precedent in family law such as Pierce v. Society of Sisters,\textsuperscript{134} Parham v. J.R.,\textsuperscript{135} Stanley v. Illinois,\textsuperscript{136} and Troxel v. Granville\textsuperscript{137} create a strong presumption in favor of the parents' decisions, the Second Circuit could not rely on such cases in its modified due process analysis because these cases are not applicable to emergency

821 F.2d 913, 922 (2d Cir. 1987) ("[i]t is sufficient if the officials have been presented with evidence of serious ongoing abuse and therefore have reason to fear imminent recurrence."); Duchesne v. Sugarman, 566 F.2d 817, 825-26 (2d Cir. 1977); Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1125-26 (3rd Cir. 1997) (holding that the state may remove a child without a court order upon reasonable cause to believe a child is in imminent danger of abuse).


132. See supra note 112 and accompanying text.

133. See supra Part I.A-B, D.

134. 268 U.S. 510 (1925).


137. 530 U.S. 57 (2000).
Illustrative of this is *Troxel*, one of the more modern cases in this area, in which the Supreme Court stated:

[S]o long as a parent adequately cares for his or her children, (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children . . . . [There is a] traditional presumption that a fit parent will act in the best interest of his or her child.

*Troxel*, which relied upon *Parham*, *Stanley*, and *Pierce*, therefore does not apply to emergency circumstances cases because the nature of these situations rebuts the presumption that a parent is fit.

The majority of Supreme Court precedent in the area of family law is distinguishable from *Tenenbaum* because these cases do not involve situations where the Court could assume that the parents’ interests contradicted the child’s. See, e.g., *Parham*, 442 U.S. 584; *Stanley*, 405 U.S. 645; *Pierce*, 268 U.S. 510. On the contrary, the Supreme Court regularly assumes in these cases that the child’s best interest is to remain with the parents. *See Pierce*, 268 U.S. at 535 (implying that the best interest of the child lies first with fit parents). In *Stanley*, the Court rejected an Illinois statute on the basis that it unconstitutionally presumed that unwed fathers were unfit parents, and that the statute “needlessly risk[ed] running roughshod over the important interests of both parent and child” by ignoring the premise that it is in the child’s best interest to remain with his parents unless the parents are proved unfit in a court hearing. *Stanley*, 405 U.S. at 650, 657-58. In *Parham*, Chief Justice Burger stated:

The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

This presumption, that the parent acts in the best interest of the child, is immediately challenged in a situation involving child abuse. *Id.* *Troxel*’s holding is grounded in the historical model of legal analysis. 530 U.S. at 602. The Court in *Troxel* held that the judiciary should continue to grant material weight to parents’ determinations of what is in the best interest of their child because, historically, this Nation has recognized that the care, concern, and management of children is a fundamental right of parents protected by the Constitution. *Id.* at 66; cf. Joel R. Brandes & Carole L. Weidman, *An Abused Child’s Emergency Removal from Home*, N.Y. L.J., Feb. 27, 1996, at http://www.brandeslaw.com/child_abuse/abused_child_emergency_remova.htm. Brandes and Weidman argue,

While parents have a right to raise their children as they see fit, they must do so within reason and with an eye toward the good of the child. Parents have an affirmative obligation to protect their children. If they fail to meet that obligation, the state can and will intervene to protect them.

*Id.*


140. *Id.* at 66, 69, 77. It is axiomatic that a parent who is suspected of abusing or neglecting his child to the extent necessary to satisfy probable cause is simultaneously suspected not to be acting in the best interests of his or her child. *See supra* text accompanying note 139. Justice Stevens’ dissent in *Troxel* implies that under the
The Second Circuit cited *Stanley v. Illinois* in support of an additional requirement to make emergency removals comport with due process, but its reliance on *Stanley* was misplaced. The quoted passage from *Stanley* reads, "[t]he establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher value than speed and efficiency." Indeed, one could argue that the Constitution does not merely recognize, but elevates, the values our nation places on the welfare of our children, particularly children's freedom from abuse and neglect, over efficiency of state procedures. The *Stanley* court argued that the doctrine of due process was designed to trump administrative convenience in favor of protecting our "vulnerable" citizens. Accordingly, *Stanley* does not support the Tenenbaum majority's argument that emergency removals (a practice which affects very vulnerable citizens) require any additional emergency circumstances doctrine, reasonable suspicion of abuse or neglect rebuts the parental presumption and the corresponding due process protections granted to parents:

"Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child. Moreover, and critical in this case, our cases applying this principle have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that "natural bonds of affection lead parents to act in the best interests of their children." *Troxel*, 530 U.S. at 87 (Stevens, J., dissenting). Imminent danger of abuse or neglect fits snugly within the "exceptional circumstances" mentioned by Justice Stevens. *See id.* (Stevens, J., dissenting). Because these exceptional circumstances rebut the presumption that parents are acting in the best interest of their children, *id.* (Stevens, J., dissenting), parents whose children are deemed to be in emergency circumstances will not receive the typical due process protection that accompanies a presumption of fitness. *See discussion supra note 138; cf. Schall v. Martin, 467 U.S. 253, 265 (1984)* (supporting the assertion that the law provides for situations when the welfare of the child predominates over the interests of the parents). In *Schall*, Justice Rehnquist stated that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae.*" *Id.*

141. 405 U.S. 645 (1972).
142. Tenenbaum v. Williams, 193 F.3d 581, 595 (2d Cir. 1999).
143. *Id.*
144. *Stanley*, 405 U.S. at 656. The Court in *Stanley* stated:

"Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

*Id.*

145. *See id.* at 657; *see also supra* note 144.
element in order to comport with administrative convenience or due process.  

1. The Tenenbaum Majority's Definition of Emergency Is Circular

The majority in *Tenenbaum* held that in order to have a constitutional emergency removal, the social worker must demonstrate that there is insufficient time to obtain prior judicial authorization.  

Yet the only guidance the court provided was that if there was sufficient time to obtain a court order, then there was no emergency. Thus, the court's holding is tautological and finds no support in case law. The emergency circumstances doctrine exists for situations where the application of normal due process requirements, such as obtaining judicial authorization, becomes impractical because a child's welfare is in danger—it exists as an exception to typical due process requirements. To say that there will be some situations where the child is in imminent danger, but not imminent enough to forgo obtaining judicial authorization, without providing any guidance as to where to draw this elusive line, undermines the purpose of an emergency circumstances doctrine with circular, unintelligible constraints.

2. Circuits Have Refused to Adopt Tenenbaum's Holding—Wallis, Brokaw, and Mabe

Four months after the Second Circuit decided *Tenenbaum*, the Ninth Circuit decided *Wallis v. Spencer*. At issue in this case was whether state officials had reasonable cause to believe that an emergency existed, thus warranting the removal of the Wallis children without a court

146. *Stanley*, 405 U.S. at 657; see also supra note 144.

147. *Tenenbaum*, 193 F.3d at 594-95.

148. *Id.* at 594 ("If the danger to the child is not so imminent that there is reasonably sufficient time to seek prior judicial authorization, *ex parte* or otherwise, for the child's removal, then the circumstances are not emergent . . ."); see also supra notes 85, 93 and accompanying text.

149. *Id.* As support for its new holding, the court cites *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993) (proposing that the welfare of the child is a multifaceted concern, which includes the child's relationship to the family). *Tenenbaum*, 193 F.3d at 595. However, *Franz* in no way undercuts the *Tenenbaum* court's admission that "when child abuse is asserted, the child's welfare predominates over other interests of her parents and the State." *Id.* The fact that *Franz* contemplates the welfare of the child as "multifaceted" brings it closer in line with the Eleventh Circuit's view of due process as a flexible doctrine that requires a balancing of multiple factors. *Doe v. Kearney*, 329 F.3d 1286, 1295 (11th Cir. 2003); see supra note 124 and accompanying text.

150. See supra note 40 and accompanying text.

151. See *Tenenbaum*, 193 F.3d at 607-11 (Jacobs, J., dissenting in part).

152. 202 F.3d 1126 (9th Cir. 1999).
order. 153 Although the State claimed it had reasonable cause based on the report of Mrs. Wallis' sister, 154 the court set out existing case law to elucidate the boundaries of reasonable cause 155 and determined that a jury could find that the officers did not have reasonable cause to remove the Wallis children prior to gaining judicial authorization. 156 Nonetheless, the Ninth Circuit chose not to adopt Tenenbaum's additional requirement in due process assessments of emergency child removals. 157 A year later, the Ninth Circuit had another opportunity to incorporate Tenenbaum's "sufficient time to obtain a court order" test, but chose not to do so in Mabe v. San Bernardino County. 158 A strong inference, then, may be drawn that the Ninth Circuit felt Tenenbaum's holding unnecessary.

Ten months later, the Seventh Circuit had the opportunity to adopt the Tenenbaum approach in Brokaw v. Mercer County. 159 Here, upon reaching the age of majority, the plaintiff alleged that state actors

153. Id. at 1137-38. The court began its constitutional analysis of the Fourteenth Amendment by acknowledging the constitutional right of parents and children to live together free from governmental interference. Id. at 1136. The court then cited the well-established exception to this right: the case of emergency circumstances. Id. at 1136-37 (citing Stanley, 405 U.S. 645, 651 (1972)).

154. Id. at 1131-40. This woman had a history of psychiatric problems. Id. She previously reported falsely that Mr. Wallis sexually abused his daughter. Id. In this instance, she reported that Mr. Wallis was in a satanic cult and planned to sacrifice his son to Satan. Id.

155. Id. at 1138. The court explained:
First, the state may not remove children from their parents' custody without a court order unless there is specific, articulable evidence that provides reasonable cause to believe that a child is in imminent danger of abuse. Moreover, the police cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued, particularly where it is not clear that a crime has been—or will be—committed. Whether a reasonable avenue of investigation exists, however, depends in part upon the time element and the nature of the allegations.

Id.; see also Hurlman v. Rice, 927 F.2d 74, 81 (2d Cir. 1991) (warning of the negative consequences that would result if the "mere possibility" of danger constituted an emergency).

156. Wallis, 202 F.3d at 1140.

157. See id. at 1141-42 n.12 (The Court of Appeals for the Ninth Circuit cited to Tenenbaum, but only with respect to the issue of requiring a warrant before subjecting minor children to invasive medical examinations.).

158. See Mabe v. San Bernardino County, 237 F.3d 1101, 1106-07 (9th Cir. 2001) (citing to Wallis for the proposition that government officials cannot intrude on a parent's custody of her child without prior judicial authorization unless there is "reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury," but declining to add that government officials must also consider whether there is sufficient time, consistent with the child's safety, to obtain such judicial authorization).

159. 235 F.3d 1000 (7th Cir. 2000).
conspired with members of his family to forcibly remove him and his sister from his parents' house without a court order. On appeal, the court analyzed whether the plaintiff could prevail on due process claims. The court cited to Tenenbaum five times in its opinion, but not once with respect to procedural due process. That is, when the court discussed its decision to remand on the issue of procedural due process, it made no mention of Tenenbaum's "sufficient time to seek judicial authorization" test. The fact that the court accepted many propositions in Tenenbaum yet was silent on the new Tenenbaum test implies an unwillingness to adopt the new requirement.

Wallis, Brokaw, and Mabe are just three examples of circuits that chose not to adopt the rationale in Tenenbaum. Taken as a whole, the case law subsequent to Tenenbaum and prior to Kearney made it clear that Tenenbaum was an aberration in this area of the law. By August 18, 2004, courts had cited to the Tenenbaum decision 153 times. Of these, only one court followed Tenenbaum to add another prerequisite to removal in emergency circumstances. The fact that only one court

160. Id. at 1006-07.
161. Id. at 1017-22. The court also analyzed the plaintiff's Fourth Amendment claim, but that is beyond the scope of this Comment. Id. at 1009-17.
162. See id. at 1010, 1022-23 (referencing Tenenbaum during its analysis of plaintiff's Fourth Amendment claim and defendant's qualified immunity defense, but omitting any reference to Tenenbaum in its procedural due process analysis).
163. See id. at 1020-22.
164. See supra notes 157-62 and accompanying text.
165. See infra notes 167-68, 170.
167. Velez v. Reynolds, 2004 U.S. Dist. LEXIS 14129, at *26 (S.D.N.Y. Jul. 10, 2004) ("Tenenbaum held that an "emergency" removal would be warranted only if ACS did not have sufficient time consistent with the child's safety, to obtain prior court authorization."). Six other decisions followed Tenenbaum, but for other reasons. See Phifer v. City of New York, 289 F.3d 49, 60-61 (2d Cir. 2002) (adhering to Tenenbaum's Fourth Amendment analysis, justifying warrantless seizures in exigent circumstances); Hogan v. Conn. Judicial Branch, 220 F. Supp. 2d 111, 123 (D. Conn. 2002) (adhering to Tenenbaum's substantive due process analysis, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims") (alteration in original) (citations omitted); New York v. Moulds Holding Corp., 196 F. Supp. 2d 210, 213 (N.D.N.Y. 2002) (citing Tenenbaum for the applicable standard of review of a summary judgment decision, that the evidence must be construed in the light most favorable to the non-moving party); People United for Children, Inc. v. City of New York, 108 F. Supp. 2d 275, 292 (S.D.N.Y. 2000) (following Tenenbaum's substantive due process analysis, that "[s]ubstantive due-process rights guard against the government's 'exercise of power without any reasonable justification in the service of a legitimate governmental objective' ") (citation omitted); Hamad v. Nassau County Med. Ctr., 191 F. Supp. 2d 286, 302-03 (E.D.N.Y. 2000)
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(within the Second Circuit's controlling jurisdiction) followed Tenenbaum on procedural due process grounds weakens the authority of the Tenenbaum approach. 168

3. Tenenbaum—a True Circuit Split with Kearney, or a Response to the Outrageous Facts of the Case?

Although the two circuits pronounced two different rules of law, several observations suggest that Tenenbaum is not a valid approach. First, Second Circuit case law did not foreshadow in any way the bold step that the court made in Tenenbaum. 169 Second, since Tenenbaum was decided, only one court has followed its emergency removal analysis. 170 Third, Tenenbaum appears to be a judicial overreaction to outrageous circumstances. 171 Counsel for the Tenenbaums persuasively captured the shocking nature of the facts of this case in its appellate brief:

Sarah Tenenbaum, a developmentally delayed five-year-old girl, was removed from her parents and subjected to a body cavity search as a result of a discredited report made by an inexperienced teacher . . . . Sarah was removed, not to protect her from immediate danger, but in order to conduct a strip search of her most private body parts. The course chosen by defendants—having a stranger summarily remove the girl from school and take her to a city hospital emergency room—was the most traumatic method of obtaining information, the most intrusive . . . and was nothing more than a shocking display of raw governmental authority. 172

(adhering to Tenenbaum's analysis of plaintiff's deprivation of rights claim under 42 U.S.C. § 1983, agreeing that the plaintiff must identify a particular custom adopted by the municipality under which the injury arose to "ensure that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality") (citation omitted); Galante v. County of Nassau, 720 N.Y.S. 2d 325, 327-28 (N.Y. Sup. Ct. 2000) (relying heavily on Tenenbaum in its analysis of defendant's qualified immunity defense).

168. See supra notes 166-67 and accompanying text.

169. See supra note 94 and accompanying text.

170. See Velez, 2004 U.S. Dist. LEXIS 14129, at *26; see supra notes 166-68 and accompanying text. It is possible that other courts researching this area of the law do not view Tenenbaum as a valid approach to adopt—as an alternative to the approach in Kearney—but rather as a random aberration among the established case law in all other circuits.

171. See supra note 78 and accompanying text.

172. Brief for Appellees-Cross-Appellants at 12, Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) (No. 97-9488). The trial court noted that while "Sarah probably would have been subjected to essentially the same type of physical examination" even with a court order, "there are compelling reasons to believe that the emotional distress experienced by Sarah on that date would have been significantly ameliorated had appropriate procedures
This shocking story may explain the Second Circuit’s reaction. Finally, the Supreme Court denied certiorari in *Tenenbaum* and recently denied certiorari in *Doe v. Kearney*. It is possible that the Court simply did not see evidence of a true *Tenenbaum*/Kearney split among the various circuits.

**B. Kearney Properly Applied Existing Constitutional Law to the Facts; A Proper Definition of Emergency Leads to a Proper Application of the Emergency Circumstances Doctrine**

In contrast to the Second Circuit in *Tenenbaum*, the Eleventh Circuit in *Kearney* properly applied case law to support its definition of “emergency.” *Kearney* defined “emergency” synonymously with “exigency” and “imminent danger,” and noted that courts use these terms interchangeably. *Kearney* followed established case law by holding that “reasonable cause to believe that the child is in imminent danger” constitutes an emergency.

It follows that because the Eleventh Circuit disagreed with the Second Circuit on how to define the term “emergency”—a fundamental concept to the correct application of the emergency circumstances doctrine—it would also disagree on the due process requirements involved in the emergency removal of children. The court in *Kearney* acknowledged that “cases simply recognize—as we do—that a state may not remove a child from parental custody without judicial authorization unless there is been followed.” *Id.* at 18. The court wrote, “[Sarah’s] mother, or another trusted individual, could have provided reassurance to the child prior to the examination.” *Id.*

173. *See supra* note 172 and accompanying text.
176. In reality, there is no inconsistency—circuits consistently reject the *Tenenbaum* approach. *See supra* notes 166-68 and accompanying text.
177. *Doe v. Kearney*, 329 F.3d 1286, 1294-95 (11th Cir. 2003) (implying that the main distinction between the approach taken in *Tenenbaum* and the approach taken by the court in *Kearney* “boils down to how we define an emergency”).
178. *Id.* at 1294 n.10.
179. *Id.* For support, *Kearney* cited to *Mabe v. San Bernardino County*, 237 F.3d 1101, 1106 (9th Cir. 2001), a case holding that reasonable cause to believe a child is in imminent danger is sufficient grounds for a government official to remove a child from parental custody without judicial authorization. *Id.* Though the *Kearney* court also cited to *Tenenbaum* for its definition of emergency, *id.* (“In emergency circumstances a child may be taken into custody by a responsible State official without court authorization or parental consent.”), the majority in *Tenenbaum* borrowed that quotation from *Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir. 1991). Therefore, the court in *Kearney* did not rely on *Tenenbaum* for its definition of emergency, but merely included other, prior case law from the Second Circuit as the foundation for its definition. *See Kearney*, 329 F.3d at 1294 n.10.
180. *Kearney*, 329 F.3d at 1297 n.13 (disagreeing with the Court of Appeals for the Second Circuit’s decision of “how emergency circumstances should be defined”).
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probable cause to believe the child is threatened with imminent harm."\(^{181}\) By allowing "probable cause" and "imminent danger" to enter into the definition of "emergency," the Eleventh Circuit found a way to apply the emergency circumstances doctrine in a manner consistent with its view that due process is a "flexible concept."\(^{182}\) The Eleventh Circuit's definition of "emergency" allows it to determine what process is due by weighing multiple factors involved in individual cases, a "subtle balancing" consistent with Supreme Court precedent\(^{183}\) that would be thwarted by the Second Circuit's "simply asking whether there was time to get a warrant."\(^{184}\)

III. WHY THE EMERGENCY CIRCUMSTANCES DOCTRINE SHOULD NOT INCORPORATE THE TENENBAUM REQUIREMENT

A. The Additional Tenenbaum Requirement Would Swallow the Emergency Circumstances Exception

If "insufficient time to obtain a court order" became a prerequisite to emergency removal in addition to "lack of probable cause of imminent danger," it would defeat the emergency circumstances doctrine.\(^{185}\) This

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181. *Id.* at 1295 (citing multiple cases to illustrate how the emergency circumstances doctrine allows for an exception to typical due process requirements). These cases include *Mabe v. San Bernardino County*, 237 F.3d 1101 (9th Cir. 2001), and *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000). *Kearney*, 329 F.3d at 1293.

182. *Kearney*, 329 F.3d at 1297 (emphasizing the importance of maintaining flexibility in due process analysis "particularly where the well-being of children is concerned"). *But cf.* Tenenbaum v. Williams, 193 F.3d 581, 609-10 (2d Cir. 1999) (Jacobs, J., dissenting in part) (using terms such as "reasonable" cause and "imminent" danger to assess due process challenges to emergency removals, but emphasizing that these are objective terms).


184. *Kearney*, 329 F.3d at 1297-98. In *Doe v. Kearney*, the appellees presented another argument against making outcome-determinative the decision of whether there is sufficient time to obtain a warrant before effecting an emergency removal. Answer Brief of Appellees at 26-27, *Kearney* (No. 02-13874-B). According to the appellees:

A case worker in the field must have the flexibility to make this snap decision where there is a sufficient basis to conclude that the child's safety is threatened without the concern of whether he or she will be sued for taking such action in the event a judicial officer later decides there was a lack of evidence to support the concern.

*Id.* Essentially, they argued that the only other way a caseworker could avoid this concern about being sued, under the Tenenbaum requirement, would be if the caseworker was positive that the evidence *did* support her concern of abuse. *See id.*

185. *Cf.* *Miller v. City of Philadelphia*, 174 F.3d 368, 373-74 (3d Cir. 1999) (holding that the city human services department's refusal to allow a mother or her attorney to participate in an emergency child custody hearing did not violate due process, even though the mother and her attorney were available). The court explained:
exception to typical due process protection allows state workers to remove a child when probable cause exists to suspect imminent danger of abuse. Some emergency removal statutes require a court hearing to retain the child after findings of abuse are confirmed. Other statutes require the state to release the child back into the custody of his parents immediately upon discovery of an unfounded allegation. These statutes recognize that state workers may effect emergency removals based on probable cause that the child is in danger of abuse, not absolute certainty; if state workers had to be certain of children’s danger, then provisions regarding unfounded suspicions would be surplussage.

We do not discount parents’ strong interest in the custody of their children, but requiring that a parent or his attorney be included in emergency pre-deprivation hearings “when available” or “when at hand” would build delay into these time-sensitive hearings and encourage litigation over “availability.” Such a requirement would thus inhibit, deter and, at times, subvert the crucial function of ex parte custody hearings—protecting children who are in imminent danger of harm.

Id. at 374.

186. See, e.g., Duchesne v. Sugarman, 566 F.2d 817, 826 (2d Cir. 1977).


While most states refer to “an emergency hearing,” this hearing is referred to in some jurisdictions as a “shelter care hearing,” “preliminary protective hearing,” or “temporary custody hearing.” Despite differences in terminology, the states’ statutes construe these hearings in a similar manner as the more typical “emergency hearing” at which the court reviews the sufficiency of cause for involuntary removal of the child from the home. [Several] state statutes...[mandate] time frames for a hearing to occur immediately before or immediately after the child is removed from home in an emergency...

Id. Washington, D.C., Delaware, Florida, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, West Virginia, Wyoming and all require an emergency hearing between twenty-four hours and ten days of removal. Id.; see also, e.g., Colleen Jenkins, DCF Must Justify Moving Elderly, St. PETERSBURG TIMES, April 1, 2003, 2003 WL 10615133 (reporting that in Florida, after DCF removes a child, it must appear before a judge to defend its action within twenty-four hours).

188. See, e.g., FLA. STAT. ch. 39.401(3) (West 2003). The statute provides:

If the child is taken into custody by, or is delivered to, an authorized agent of the department, the authorized agent shall review the facts supporting the removal with an attorney representing the department. The purpose of this review shall be to determine whether probable cause exists for the filing of a shelter petition. If the facts are not sufficient to support the filing of the shelter petition, the child shall immediately be returned to the custody of the parent or legal custodian.

Id.

189. See id.
Furthermore, probable cause to suspect that the child is in imminent danger rebuts the presumption that the parents are fit. 190 This is yet another reason why, in the context of emergency circumstances, parental due process rights cannot receive normal protection. 191 Any other interpretation, including that of the majority in Tenenbaum, would abolish the probable cause standard and swallow up the emergency circumstances doctrine.

IV. CONCLUSION

Removing a child from parental custody without judicial authorization, under emergency circumstances, does not violate parents’ procedural due process rights. As the Eleventh Circuit held in Kearney, an emergency exists any time a state worker has reasonable cause to suspect that the child is in imminent danger of abuse or neglect. 192 To say that an emergency exists only when there is insufficient time to obtain a court order not only misunderstands the nature of exigent circumstances, but it also undercuts the constitutional protection that children’s welfare deserves. Across the Nation, facially valid statutes and clear case law allow states to intervene in family situations without compromising parents’ rights or caseworkers’ ability to perform their duties. 193 These statutes balance the interests of the parents, state, and child, while considering the exigent circumstances under which emergency removals occur. 194 The balancing of all relevant factors allows an exception to typical due process analysis, which courts should continue to apply, without regard to the anomaly of Tenenbaum v. Williams.

190. See supra note 138 and accompanying text.
191. See supra note 138 and accompanying text.
193. See supra note 65.
194. See Miller, supra note 65.