A Legal Resource for Foster Children And Their Advocates
5643 Paradise Drive, Suite 12B, Corte Madera, CA 94925
PHONE 415.924.0587, FAX 415.924.0586, www.advokids.org

October 3, 2011

Molly Dwyer, Clerk of the Court
Office of the Clerk
United States Court of Appeals or the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *E.T. et al. v. Cantil-Sakauye, et al.*, Case No. 10-15248
Amicus Letter In Support of Plaintiffs' Petition for Panel Rehearing and Petition for Rehearing En Banc

Dear Ms. Dwyer:

Advokids submits this letter in support of plaintiffs' Petition for Panel Rehearing and Petition for Rehearing En Banc

STATEMENT OF AMICUS

Advokids is a California noprofit organization. It has no parent company and it does not issue stock. Advokids works to promote, protect, and secure for every child in the California foster care system the legal rights to which that child is entitled, including each child's rights to safety, security, stability, and permanency. Because California law makes it the duty of court-appointed counsel for the child to secure these rights for the child within the context of the juvenile dependency system, adequate representation for each child is a focus of Advokids' advocacy and training efforts. As an advocate for the rights of children in foster care, including their right to competent representation, Cal. Welf. & Inst. Code § 317.5(a), Advokids has a clear interest in this case. The opinion in this case raises serious questions about the future ability of foster children to secure their federal and constitutional rights in a federal court.

DISCUSSION

The court's September 13, 2011decision vastly expands the abstention doctrine and virtually closes the federal courts to persons who wish to challenge the constitutionality of state court policies or practices. When the constitutional or federal law claim involves policies or practices of an administrative arm of the state's highest court, as was the case here, the decision denies those persons adversely affected by the challenged administrative policy or practice the ability to seek relief federal courts. In so holding, it effectively denies affected persons the ability to seek relief in any court. Plaintiffs cannot resort to state courts for relief because the juvenile courts have no jurisdiction over such claims and no other state court may impartially hear a challenge to judicial branch administrative policies or practices when the defendants are the same judicial branch administrators upon whom those state courts must depend for funding, staffing, and other judicial resources. Given the breadth of the court's opinion in this case, even state judicial branch policies and procedures that clearly violate the constitution or federal law would be insulated from any judicial scrutiny in federal court if the relief sought would require the state judicial branch to take steps to amend or reform those policies or procedures.

The decision in this case is in direct conflict with that of this court in *Los Angeles County Bar Ass' v. Eu*, 979 F.2d 697 (9th Cir. 1992). In that case, that Bar Association challenged the constitutionality of a state statute specifying the number of judges on the Los Angeles County Superior Court bench. The complaint alleged that the shortage of judges caused inordinate delays in civil litigation, depriving litigants of their right of access to the courts and their rights to equal protection. *Id.* at p. 699. This court rejected the defendant's argument that federal courts should abstain whenever the relief sought involves the administration of the state judicial system. *Id.* at p. 703. The court observed that when the relief sought would require restructuring of state governmental institutions, federal courts will still intervene upon a finding of a clear constitutional violation but only to the extent necessary to remedy the violation. *Ibid.* The court declined to abstain, holding that in determining whether to exercise discretionary declaratory jurisdiction, "federal courts should consider whether a declaratory judgment will serve a useful purpose in clarifying and settling the legal relations between the parties, and whether it will terminate the controversy." *Ibid.* Noting that the Bar Association's complaint framed the issue as a facial challenge to average delays, as opposed to challenging delays in any particular case, the court concluded that it should exercise its

declaratory jurisdiction because to do so would resolve a substantial and important question currently dividing the parties. *Id.* at pp. 703-704.

The dissenting justice in *Los Angeles Bar Ass'n* was of the opinion that the court should decline to exercise its declaratory jurisdiction because "[w]e cannot properly declare that the state legislative decision to allocate 224 or 238 judges to Los Angeles County is wrong, where there are no legal standards to say what the right number is." *Id.* pp. 709-710 (dis. op. of Kleinfeld, J.). That does not present a problem in this case. The complaint alleges that the defendants themselves, pursuant to state law charging them with the duty to do so, have set a maximum caseload standard of 188 cases per attorney if that attorney also has the assistance of a half-time social worker or investigator. Complaint, ¶41. Thus, as the majority recognized in *Los Angeles Bar Ass'n,* the relevant facts are clear and the case is a proper one for the exercise of declaratory jurisdiction. *Id.* at. p. 704.

As was the case in *Los Angeles Bar Ass'n*, this case presents a facial challenge--it challenges the average caseloads of attorneys appointed to represent children in dependency proceedings in Sacramento County; it does not challenge the competency of court-appointed counsel for the child in any given case. Resolution of plaintiffs' claims would not, as the opinion suggests by quoting the district court's speculation, require "a generalized inquiry into how many cases are constitutionally and/or statutorily permissible, whether some types of cases require more investigation or preparation, which types of those cases deserve more resources, [or] how much time or attention is constitutionally and/or statutorily permissible." Opinion at p. 17461. The issue is not what caseload standard is constitutionally or statutorily permissible. The issue is whether the existing average caseload is so high as to be constitutionally impermissible. If so, it would then be up to judicial branch administrators to craft a plan to address the problem. While that plan might require state judicial branch administrators to change the methods by which they choose to provide competent counsel for children in dependency cases as required by state and federal law, the federal court would neither be required to "audit" state dependency proceedings nor to interfere with state court adjudications in individual cases. A declaratory judgment as to whether the average caseload is so high as to violate a foster child's due process rights or the dictates of federal law would resolve a substantial and important question and would resolve the controversy.

CONCLUSION

Children in foster care are among the most vulnerable persons in our society. By definition, every legal decision that is made about the life of a foster child is made by a state court, which is subject to policies and procedures imposed by state judicial branch administrators. If federal courts must abstain from protecting foster children's federal rights because state court administrators might be required to amend their policies and procedures to accommodate those rights, all of those children are effectively precluded from seeking redress in federal court. The effect of the decision in this case is to effectively bar the doors of federal courthouses to foster children. This court should grant the plaintiffs' petition for rehearing or rehearing en banc.

Respectfully submitted,

s/ Janet G. Sherwood
Janet G. Sherwood, SBN 67525
Attorney at Law
5643 Paradise Dr., Suite 12
Corte Madera, CA 94925
Telephone: 415-924-0585
Attorney for Advokids