

October 5, 2022

Honorable Tani Cantil-Sakauye, Chief Justice  
Associate Justices, Supreme Court of California  
350 McAllister Street  
San Francisco, California 94102

Re: Amicus Letter of the National Coalition for a Civil Right to Counsel, *et al.*  
**Request for Review** of *Felipe Espinoza v. Superior Court of California for the County of Los Angeles*, Case No. 22STPB 04960  
Court of Appeal, Second Appellate District, Case No. B322665  
Supreme Court Case # S276444

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, the undersigned individuals and organizations write as amicus curiae to ask this Court to grant review in the above-entitled case and to hear the case on the merits. We support the arguments made by Petitioner, Felipe Espinoza, in his Petition for Review. Review on the merits is necessary because the petition seeks important guidance on how courts should address the right to counsel for parents in probate guardianship cases, and implicates fundamental rights and due process concerns for parents across the state.

**Interest of the Signatories**

The signatories of this letter work in various capacities to protect the fundamental rights, including those guaranteed under Article I Section 7 of the California Constitution, of parents and children alike, particularly those who are low-income and otherwise vulnerable, marginalized, or under-resourced in the California justice system, as Felipe Espinoza is in this case. The issues presented in this case affect the fundamental rights of the people that the undersigned organizations serve and the systems in which they are committed to preserving fair access and equity.

The undersigned constitute the following:

**Advokids** is a California-based nonprofit organization that advocates for the child welfare system to provide the legal rights and protections to which every foster child is entitled under law, including each child's right to safety, security, and a permanent home. Advokids' policy work includes filing and participating in amicus briefs on issues that directly affect the rights and well-being of foster children.



**Children's Law Center of California ("CLC")** is a non-profit public interest law firm that serves as appointed counsel for the over 33,000 abused and neglected children under the jurisdiction of the juvenile dependency courts in Los Angeles, Placer, and Sacramento counties. CLC's goal is to ensure that our clients have an effective voice and ability to actively participate in all aspects of the legal process while viewing children within the context of their families and the desire for all children to have loving permanent relationships.

**Leonard Edwards (Ret.)** served as a Superior Court Judge in Santa Clara County for twenty six years and then for six years as Judge-in-Residence at the Center for Families, Children & the Courts, a division of the California Administrative Office of the Courts. As a judge he worked in the juvenile court for over 20 years. As Judge-in-Residence he served California's courts as a consultant specializing in juvenile and family law, domestic violence, drug courts, mediation, judicial ethics, and other issues relating to children and families within the court system.

**Equal Justice Society** works to transform the nation's consciousness on race through law, social science, and the arts and to promote equity and fairness in the legal system.

The **Legal Aid Association of California (LAAC)** is an association of more than 100 legal aid nonprofits, all of which provide free civil legal services to low-income people and communities throughout California. LAAC serves and strengthens its members through advocacy in support of their efforts to ensure equal access to justice.

The **Los Angeles County Bar Association**, one of the largest voluntary bar associations in the country, actively works to improve the administration of justice and equal access to the judicial system.

**Los Angeles Dependency Lawyers, Incorporated (LADL)** defends the constitutionally protected relationship between parents and their children in the family regulation system.

**Justice Earl Johnson Jr. (Ret.)** served as an Associate Justice of the Court of Appeal, Second Appellate District, from 1982 to 2007.

The **National Coalition for a Civil Right to Counsel (NCCRC)** is an association of 600 participants and partners in 42 states who work to advance the right to counsel in civil cases involving basic human needs, such as child custody.

**A New Way of Life Reentry Project (ANWOL)** provides safe housing and pro bono legal services for formerly incarcerated women to help them get back on their feet and reintegrate into their communities. ANWOL also works to protect the civil rights of formerly incarcerated individuals through community organizing and advocacy, eliminate racial disparities in incarceration and family separation, and empower incarcerated and formerly incarcerated individuals.

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**Clare Pastore** is a Professor in the Practice of Law at the USC Gould School of Law Access to Justice Practicum.

**Michael S. Wald** is the Jackson Eli Reynolds Professor of Law, Emeritus at Stanford Law School and an Elected Fellow of the American Law Institute. He currently is serving on the Advisory Committee of the ALI Restatement of the Law, Children and the Law project. He is one of the leading national authorities on legal policy toward children, and he drafted the American Bar Association's Standards Related to Child Abuse and Neglect, as well as major federal and state legislation regarding child welfare. Professor Wald has served as deputy general counsel for the U.S. Department of Health and Human Services, executive director of the San Francisco Department of Human Services, and senior advisor to the president of the William and Flora Hewlett Foundation.

**Justice Laurie Zelon (Ret.)** served as an Associate Justice of the Court of Appeal, Second Appellate District, from 2003 to 2020.

#### **Reasons Review Should be Granted**

In light of the lack of basic due process protections available to parents in guardianship matters where they face a potential near-permanent loss of their fundamental right to the companionship, care, custody, and control of their children, the Court must determine (a) whether the trial court failed to engage in a due process analysis of Mr. Espinoza's right to counsel, (b) whether due process in fact entitles him to counsel, and (c) the protocols that trial courts should use in such situations to ensure the rights of parents are protected. These are critically important issues that the Court should address, as the presence of counsel is often determinative of the actual outcome in the case.

***Granting review will resolve conflicting lower court rulings on the important legal question of the right to counsel in the child guardianship context.***

As the Petitioner notes, in the absence of guidance as to whether and when indigent parents in probate guardianship cases have a right to appointed counsel, lower courts in California have "rendered inconsistent rulings, leading to arbitrary outcomes." (See Petition at p. 18.) A few courts have found a due process right to counsel exists (though without consistency in whether a federal or California analysis is applied), some have held a due process right does not exist, and others have not applied a due process test at all. (See Petition at pp. 18-23.) We urge this Court to grant review to resolve this question and put an end to these inconsistencies that are making our legal system unreliable and are disproportionately harming low-income parents.

***The profound interests and fundamental rights at stake in this case warrant this Court's consideration of how to address the due process disparities between juvenile court and probate court.***

The legal issues raised in this case are of the utmost importance, as the guardianship matter implicates Mr. Espinoza's due process right to the companionship, care, custody, and control of his children under Article I Section 7 of the California Constitution, as well as the rights of innumerable other parents who are similarly situated in such guardianship cases. The undersigned individuals and organizations have devoted significant time, energy, and resources to addressing barriers to access to justice in our legal system. Mr. Espinoza's case is a clear example of situation in which fundamental rights of an indigent person have not been protected, leading to a catastrophic result, not just for Mr. Espinoza, but for countless vulnerable families. The absence of a ruling from this Court on this important question of the right to counsel will endanger "the fundamental parental rights of thousands of indigent parents each year who lose custody of their children without receiving even the most basic of procedural safeguards." (See Petition at p. 35.)

And the question of procedural safeguards is enormous in this context. This country is increasingly confronting the phenomenon where parents are pressured under threat of a child welfare investigation and long-term loss of custody to voluntarily consent to foster care or probate guardianship, due in some instances to the State's desire to avoid the cost or burden of a dependency proceeding.<sup>1</sup> Such was seemingly the case here, where the Los Angeles Department for Children and Family Services (DCFS) urged Mr. Espinoza's sister to pursue a probate guardianship so that DCFS would not open a dependency matter. The net effect of the absence of a dependency proceeding is that the parents' right to counsel and the State's obligation to provide services to the parents and seek reunification are negated, leaving parents facing the prospect of permanent or near-permanent loss of custody. (See *In re Christian G.* (2011) Cal.App.4th 581, 598 ["Although a guardianship does not technically terminate a parent's rights, it does suspend them indefinitely, and it often leads to practical or legal termination of the parent-child relationship, or both ... [the] preference for family continuity and reunification is absent in the context of a guardianship proceeding."].) Importantly, in some situations probate guardianships can lead to an eventual termination of parental rights.<sup>2</sup>

This discrepancy in the treatment of the right to counsel is worsened by the fact that while the juvenile dependency laws have deficiencies in both form and practice, they do at least contain some "substantive standards and procedural safeguards intended to maintain family integrity and promote reunification, including the right to counsel" whereas "probate guardianship proceedings offer far fewer protections to safeguard parental rights." (See Petition for Review (Petition) at p. 31, citing *Guardianship of Christian G.*, (2011) 195 Cal.App.4th 581, 597-601.) For instance, in foster care cases the juvenile court typically orders family reunification services,<sup>3</sup> whereas family reunification services are prohibited in probate court

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<sup>1</sup> See e.g., Josh Gupta-Kagan, *America's Hidden Foster Care System* (2020) 72 STAN. L. REV. 841, available at <https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/04/Gupta-Kagan-72-Stan.-L.-Rev.-841.pdf>

<sup>2</sup> Probate Code Section 1516.5.

<sup>3</sup> Welfare & Institutions Code Sections 361.5(a) and 16501.

guardianship cases.<sup>4</sup> Additionally, a guardianship, once established, may be harder to undo than a dependency determination because the "critical finding" in probate guardianship cases "does not necessarily turn on parental unfitness", but rather "may be based on the prospect that a successful, established custodial arrangement would be disrupted."<sup>5</sup> Finally, a probate court has less information than does a juvenile court in making determinations due to court review and status review report requirements for dependency proceedings.<sup>6</sup>

For these reasons, if the Court fails to address the issues raised by this case, Californians' fundamental rights to family integrity and access to justice often will be determined not by the law or the merits of the case, but rather by which procedural route the case happens to take.

***There has been a national move towards recognizing a right to counsel for parents in child guardianship cases, highlighting the importance of taking up this critical question.***

While the First Appellate District, relying on the U.S. Supreme Court's ruling in *Lassiter*,<sup>7</sup> endorsed a case-by-case approach to appointment of counsel in guardianship petitions, *Guardianship of H.C.* (2011), 198 Cal. App. 4th 1235, 1246, we join Petitioner in urging this Court to reject that approach. (See *Petition* at 51). A consideration of the decisions and policies from across the country supports such a rejection where the State is involved in the matter, as was the case here.<sup>8</sup>

As a constitutional matter, courts have rejected the case-by-case approach for a number of types of civil cases, including child guardianship.<sup>9</sup> In 2015, the Supreme Judicial Court of Massachusetts unanimously

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<sup>4</sup> See Family Code Section 3026; *Guardianship of Kaylee J.* (1997) 55 Cal.App.4th 1425, 1430 (reversing probate court's order requiring parents to "develop a reunification plan" as part of order appointing guardian.)

<sup>5</sup> *Guardianship of Ann S.* (2009) 45 Cal.4th at 1123.

<sup>6</sup> While the Juvenile Court Law generally requires courts to review foster cases at six-month intervals, there is no such requirement in probate guardianship matters. (See Welf. & Inst. Code, §§ 366.21, 366.22, 366.25.) The DCFS Policy Manual requires DCFS to file a "status review report" for "every . . . child in foster care" before each hearing. (Cal. Dept. of Children and Fam. Servs., Child Welfare Policy Manual, § 0300-503.15 (July 8, 2016) [http://policy.dcfslacounty.gov/#Writing\\_the\\_Status\\_Review.htm](http://policy.dcfslacounty.gov/#Writing_the_Status_Review.htm) [as of August 29, 2022].) By contrast, DCFS does not supervise probate guardianship cases, and the only regularly scheduled court review in probate court is the optional annual "status report" described in Probate Code Section 1513.2, which simply requires the guardian to complete and file California Judicial Council form GC-251.

<sup>7</sup> *Lassiter v. Dept. of Soc. Servs.* (1981) 452 U.S. 18.

<sup>8</sup> The Supreme Court of California has indicated a willingness to look to the interpretations of other state due process clauses that are textually like its own. (See e.g., *People v. Chavez* (1980) 26 Cal.3d 334) (stating that "our sister state courts' interpretations of similar state constitutional provisions . . . will provide valuable guidance in the interpretation of our state constitutional guarantees.").

<sup>9</sup> See John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases* (2013) 61 Drake L.J. 763, available at [http://civilrighttocounsel.org/uploaded\\_files/4/The\\_Case\\_Against\\_Case-by-Case\\_Pollock\\_.pdf](http://civilrighttocounsel.org/uploaded_files/4/The_Case_Against_Case-by-Case_Pollock_.pdf)

ruled that parents have a due process right to counsel in probate proceedings to establish guardianship of their children under the state due process clause. (*Guardianship of V.V.* (2015) 470 Mass. 590 [24 N.E.3d 1022].) Notably, the Massachusetts due process clause is textually similar to the California due process clause.<sup>10</sup> The V.V. court noted that the parental rights at stake in a probate child guardianship proceeding are “no less compelling” than those at stake in a termination of parental rights case because “[t]he guardian’s rights and responsibilities to ensure the child’s welfare effectively displace those of the parent.” (*Id.* at 1024.) It then held that due to the importance of the interests at stake, the right to counsel in guardianship proceedings applies *regardless* of state involvement:

[T]here is every reason, given the fundamental rights that are at stake, why an indigent parent is entitled to the benefit of counsel when someone other than the parent, *whether it be the State or a private entity or individual*, seeks to displace the parent and assume the primary rights and responsibilities for the child, whether it be in a care and protection proceeding, a termination proceeding, an adoption case, or a guardianship proceeding.

(*Id.* at 1025) (emphasis added).<sup>11</sup> Compellingly, unlike in V.V., the state was heavily involved in Mr. Espinoza’s case, since DCFS induced Mr. Espinoza to ‘consent’ to the placement of his children with his sister and encouraged his sister to file for guardianship.

Additionally, in *Young v. Alongi* (1993) 123 Or.App. 74 [858 P.2d 1339], the Oregon Court of Appeals found a right to counsel for parents appealing an adverse child guardianship decision by the trial court. The Court stated:

Appointment of a guardian has serious consequences, because it may deprive the natural parent of the right to the child’s custody and to control her associations and upbringing ... Guardianship actions can significantly affect custodial rights. ... The powers of a guardian are equal to those of a parent in custody of a child” (iterations omitted) ... It cannot be gainsaid that a natural parent who participates in a guardianship proceeding regarding her child faces a substantial possibility of the loss, or a long-term deprivation, of custody and a significant interruption of the parent-child relationship.

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<sup>10</sup> See Art. 10 of Mass. Declaration of Rights (“No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>11</sup> Notably, the Massachusetts high court later affirmed and expanded this in *L.B. v. Chief Justice of the Probate and Family Court* (2016) 474 Mass. 231 [49 N.E.3d 230] (finding that parents have a due process right to counsel when seeking modification or termination of guardianship of their children, provided that the parent “make a modest yet meaningful preliminary showing that he or she has a colorable case” for removal or modification. The Court reasoned, “It would be incongruous to recognize the significance of the parent’s rights for due process purposes at the time those rights are first displaced, as we did in *Guardianship of V.V.*, but not to do so at the time the parent seeks to regain them.”).

(*Id.* at 1342.) Although the Court acknowledged that a guardianship proceeding was not “identical” to a termination of parental rights proceeding,

[T]o an indigent parent facing a guardianship proceeding that will interrupt her custody over her child for a lengthy period, it matters little whether the court is proceeding under ORS 126.070 or under the juvenile court’s authority in ORS 419.507. In each case, the same standard—the child’s best interest—controls the court’s decision making. We can discern no relevant distinction between the two statutory schemes on which the legislature could or did base a policy choice to provide court-appointed counsel to indigent parents appealing a guardianship order under ORS 419.561 and ORS 419.563, but to deny that privilege to a similarly situated parent appealing a guardianship order under ORS 126.070. The persons who receive that disparate treatment are identifiable by their personal characteristic of parenthood, not by statutory descriptors that identify those persons who are entitled to receive the claimed privilege.

*Id.* at 1343. The Court then held that the state’s practice of providing a right to counsel for parents in guardianship matters within a dependency proceeding but not in separate probate child guardianship cases outside the juvenile court violated equal protection. *Id.*

The shift towards a right to counsel has occurred not just in the courts, but in the policy realm as well. For instance, the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act calls for the appointment of counsel in these cases.<sup>12</sup> Additionally, a number of states have created a statutory right to counsel for parents in probate child guardianship cases.<sup>13</sup>

***Even if a case-by-case analysis applies to the right to counsel, this Court should grant review to address what information parents should be provided such that they can meaningfully make a case to the probate court as to why they should have counsel.***

Appointment of counsel for parents like Mr. Espinoza ensures that courts are best suited to make placement determinations according to the child’s best interests and helps avoid the irreparable, unconscionable harm done when family ties are erroneously and indefinitely—and sometimes, permanently—severed. Though we support a categorical right-to-counsel approach, where courts follow a case-by-case approach to appointment, *pro se* parents must be provided with accessible, plain-language notice advising them of (a) their potential right to counsel; and (b) the factors that a court will consider in determining whether to appoint, including (c) a presumption in favor of appointment where there is state involvement. Anything less would result in an egregious deprivation of the due process rights of parents and children alike and would render the case-by-case approach a functional nullity, as it is unrealistic to

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<sup>12</sup> Section 204(e), <https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c> (requiring appointment of counsel if parent objects to guardianship).

<sup>13</sup> See e.g., Conn. Stat. Ann. § 45a-620; Iowa Code § 232D.304; 18-A M.R.S. § 5-204; N.Y. Fam. Ct. § 262(a); N.D. Cent. Code § 27-20.1-09(2); Wash. Rev. Code § 11.130.200.

expect pro se parents to know the legal standard or relevant facts to present when the case-by-case test is applied. And in fact, our experience in other states with a case-by-case approach without any rules is that unrepresented litigants do not know how to effectively advocate for their need for counsel, a problem caused in part by their lack of knowledge as to what factors the courts consider relevant in making such a determination.

Additionally, it is extremely difficult for unrepresented parents to reverse an erroneous denial of counsel on appeal, making it even more critical that parents are provided the necessary information to make an informed and effective request at the outset. As U.S. Supreme Court Justice Blackmun pointed out:

The Court assumes that a review of the record will establish whether a defendant, proceeding without counsel, has suffered an [un]fair disadvantage. But in the ordinary case, this simply is not so. The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense. Such failures, however, often cut to the essence of the fairness of the trial, and a court's inability to compensate for them effectively eviscerates the presumption of innocence. Because a parent acting pro se is even more likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that the typical case has been adequately presented.<sup>14</sup>

***By any standard, the trial court in the Petitioner's case clearly erred given its failure to actually apply the case-by-case test as well as the presence of strong considerations in favor of appointing counsel.***

In the instant case, as explained by the Petitioner, the trial court clearly erred in failing to engage in any real analysis of the due process considerations prior to ruling on Mr. Espinoza's *ex parte* application for appointment of counsel. As noted earlier, the California Court of Appeal has long recognized the importance of the parent-child relationship, espousing stringent due process protections for both parents and children whose relations are jeopardized by legal proceedings, including guardianship matters. (*In re Christian G.* (2011) 195 Cal. App. 4th 581, 598-99, 608-09 [noting that guardianship "often leads to the practical or legal termination of the parent-child relationship,"]). Accordingly, Mr. Espinoza was entitled to due process protections here. Additionally, had the trial court engaged in the analysis, it should have resulted in the appointment of counsel due to (i) the significant state involvement present; (ii) the high risk of erroneous deprivation given the few protections available to parents in guardianship matters as compared to parents subject to abuse or neglect proceedings, Mr. Espinoza's lack of understanding and preparedness, and Mr. Espinoza's language issues, as well as (iii) the complexity of the case.

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<sup>14</sup> *Lassiter* (1981), 452 U.S. at 51 (Blackmun, J., dissenting).

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Associate Justices, Supreme Court of California  
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For these reasons, we respectfully request that this Honorable Court grant Mr. Espinoza's petition and review this crucial case on its merits.

Sincerely,



**Clare Pastore**, on behalf  
of the below signatories  
USC Gould School of Law

**Janet G. Sherwood**  
Advokids

**Earl Johnson**  
Justice, Court of  
Appeal, Ret.

**Mona Tawatao**  
**Alexandra Santa Ana**  
Equal Justice Society

**Lorin Kline**  
Legal Aid Association of CA

**John Pollock**  
NCCRC

**Brian Tan**  
A New Way of Life  
Reentry Project

**Ann I. Park**  
Los Angeles County  
Bar Association

**Rachel Ewing**  
Los Angeles Dependency  
Lawyers, Incorporated

**Laurie Zelon**  
Justice, Court of Appeal,  
Ret.

**Leslie Heimov**  
Children's Law Center  
of California

**Leonard Edwards**  
Superior Court Judge (Ret.)

**Michael S. Wald**  
Stanford Law School

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES  
(Cal. R. Ct., Rule 8.25(a))**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is SKIERMONT DERBY LLP, 633 West Fifth Street, Suite 5800, Los Angeles, California 90071. On October 5, 2022, I served true and correct copies of the documents described below on the interested parties in this action as set forth on the attached service list:

**AMICUS LETTER IN SUPPORT OF WRIT PETITION IN *ESPINOZA***

**MAIL AND PERSONAL SERVICE VIA MESSENGER.** By providing the above documents to Nationwide Legal with instructions for personal delivery on this date to the persons at the addresses listed below, and if personal service is unsuccessful after reasonable efforts, to leave copies of said documents at the addresses below with mailed copies to follow.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on October 5, 2022 at Los Angeles, California.



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Gloria Ibarra

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Associate Justices, Supreme Court of California  
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**SERVICE LIST**

**VIA U.S. MAIL**

*(Counsel for petitioner consented to mail server per email dated 9/1/22)*

**Counsel for Petitioner**

**PUBLIC COUNSEL**

TARA CHANTELE FORD  
610 South Ardmore Avenue,  
Los Angeles, California 90005  
(213) 385-2977; Fax: (213) 385-9090

**WESTERN CENTER ON LAW AND POVERTY**

ROBERT D. NEWMAN  
ANTIONETTE DOZIER  
3701 Wilshire Boulevard, Ste. 208  
Los Angeles, California 90010  
(213) 487-7211; Fax: (213) 487-0242

**GREENBERG GROSS LLP**

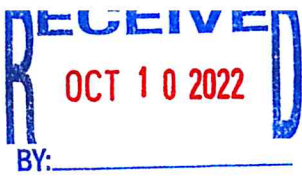
SARAH KELLY-KILGORE  
601 S. Figueroa Street, 30th Floor  
Los Angeles, California 90017  
(213) 334-7000; Fax: (213) 334-7001

**ELLIS GEORGE CIPOLLONE O'BRIEN ANNAGUEY LLP**

NICHOLAS J. BEGAKIS  
801 S. Figueroa Street, Suite 2000  
Los Angeles, California 90017  
(213) 725-9800; Fax: (213) 725-9808

**ROBERT JACOBS LAW**

ROBERT N. JACOBS  
550 E. Green Street, Suite 203  
Pasadena, California 91101  
(626) 795-1986; Fax: (626) 795-3204



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**SKIERMONT DERBY LLP**

JOHN J. O'KANE IV  
633 West Fifth Street, Suite 5800  
Los Angeles, California 90071  
(213) 788-4500; Fax: (213) 788-4545

**VIA PERSONAL SERVICE**

**Real Party in Interest**

MARISOL ESPINOZA,  
as temporary court-appointed  
guardian of Felipe Alfonso  
Espinoza Jr. and  
Octavio Leonardo Espinoza  
193 1/2 East 49th Street  
Los Angeles, California 90011  
Tel. (323) 807-8684

**VIA U.S. MAIL**

**Counsel for Minors**

EDWARD NAVARRO, Esq.,  
as court-appointed counsel  
for Felipe Alfonso Espinoza Jr.  
and Octavio Leonardo Espinoza  
Navarro Law Firm APC  
205 S. Broadway, Suite 200  
Los Angeles, California 90012  
Tel. (213) 625-2400

**Non-Party Respondent Court**

SUPERIOR COURT OF  
CALIFORNIA, COUNTY OF  
LOS ANGELES  
Department 004 (Hon. Gus T. May)  
111 N. Hill Street  
Los Angeles, California 90012