No. 12-56

In The Supreme Court of the United States

E.T.; K.R.; C.B.; G.S.; FRANK DOUGHERTY, ON BEHALF OF E.T., K.R., C.B. AND G.S.,

Petitioners,

v.

TANI CANTIL-SAKAUYE, CHAIR OF THE JUDICIAL COUNCIL OF CALIFORNIA, IN HER OFFICIAL CAPACITY; WILLIAM C. VICKREY, ADMINISTRATIVE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURT OF THE JUDICIAL COUNCIL, IN HIS OFFICIAL CAPACITY; STEVEN W. WHITE, PRESIDING JUDGE OF THE SUPERIOR COURT OF THE COUNTY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ERWIN CHEMERINSKY ET AL. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST[1]

Amici Erwin Chemerinsky, Allan Ides and Karl Manheim are law professors who teach constitutional law and federal courts. They also represent clients in civil rights cases in federal court. The American Civil Liberties Union of Southern California is dedicated to protecting the rights of American citizens and frequently seeks to vindicate those rights in federal court. The Western Center on Law and Poverty is dedicated to improving the lives of the economically disadvantaged and frequently seeks redress against state government agencies in federal court.

Amici support Petitioners' request for *certiorari* because the Circuits are inconsistently applying abstention under *O'Shea v. Littleton*, 414 U.S. 488 (1974); because the Ninth Circuit, relying upon *O'Shea*, created a new form of abstention – when challenged state legislative policies affect state courts; and because this case presents an ideal opportunity for this Court for the first time to clarify *O'Shea*.

Accordingly, *amici* urge this Court to grant the Petition for Certiorari, reverse the Court of Appeals, and restore the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."

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[1] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of *amici*'s intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

Colo. River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976).

ARGUMENT

Younger v. Harris, 401 U.S. 37 (1971), manifests the "delicate balance in what [this Court] has termed 'Our Federalism.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 612 (Scalia, J., dissenting). Indeed, a "proper balance" is indispensible to the "concurrent operation of federal and state courts." *O'Shea*, 414 U.S. at 499. This Court has endeavored to maintain that balance through several important but narrow abstention doctrines. While the principles are clear, their application can be inconsistent in the lower courts, as it has been in the matter presented by the Petition.

Petitioners, and the class they represent, are children who are subject to removal from their homes and families in so-called "dependency proceedings" in the Superior Court of Sacramento County ("Juvenile Dependency Court"). Typically, this is the most important decision in a child's life. It can result in the termination of parental rights as well as a loss of a child's physical liberty.

Federal law recognizes the serious legal, personal and social consequences of these decisions. *See, e.g.*, Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(22) (2010). So too does California. Accordingly, it has required the State

Judicial Council to "adopt rules of court regarding the appointment of competent counsel in dependency proceedings." Cal. Welf. & Inst. Code § 317.6 (West 2008). *See also* Cal. Rules of Court, R. 5.660(d)(6) (West 2006) (caseloads for children's attorneys).

The Judicial Council has developed Dependency Counsel Caseload Standards. These recognize "a maximum caseload of 77 clients" per full-time dependency attorney "as necessary for an optimal, or best practice, standard of performance," and a "base-level standard" of 141 clients per attorney. Judicial Council of California, Dependency Counsel Caseload Standards (2008).[2]

Petitioners allege that, due to inadequate state funding, respondents authorize actual caseloads for dependency attorneys in Sacramento County of nearly 400 cases per year, resulting in as little as "two minutes of courtroom time per case." Complaint at 10. It is this unconscionable administrative policy that is the subject of this lawsuit.

Other federal courts have ordered States with similarly grim statistics to limit attorney caseloads in dependency cases. *See Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (ordering Georgia to adopt a caseload maximum of 100 clients as recommended by the American Bar Association

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[2] Available at http://www.courts.ca.gov/documents/DependencyCounselCaseloadStandards2008.pdf.

and National Association of Counsel for Children). *See also Olivia Y. ex rel. Johnson v. Barbour*, 351 F. Supp. 2d 543 (S.D. Miss. 2004). Under the reasoning of the decision below, these and similar cases should have been dismissed. But, as here, those federal courts were not asked and would not need to supervise the day-to-day operations of state courts nor enjoin an ongoing state proceeding to provide the respective plaintiffs the relief they sought.

Abstention below was not based on the fact that some respondents are court officers, for they are sued in their administrative (non-adjudicative) capacities. Rather, it was because

> "*potential* remediation *might* involve examination of the administration of a substantial number of individual cases . . . amount[ing] to an ongoing federal audit of Sacramento Dependency Court proceedings."

Op. at 4 (emphasis added). Thus, despite that petitioners challenged only a generally applicable state administrative policy, not adjudications under that policy, the Court of Appeals held the case "necessarily require[d the district] court to intrude upon the state's administration of its government, and more specifically, its court system," Op. at 7.

The Court of Appeals' speculation of interference with ongoing state adjudications is not only based on a misreading of the relief sought by Petitioners (declaratory relief directed to respondents' administrative policy of unlawful caseloads, not review of

individual cases), but is also what sets its opinion apart from other similar cases denying abstention. *See, e.g.*, *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319, 1322 (D.C. Cir. 1993) (denying abstention in case challenging foster-child caseloads); *Olivia Y.* at 351 F. Supp. 570 (same); *Lahey v. Contra Costa County Dep't of Children & Family Servs.*, 2004 U.S. Dist. LEXIS 18292 (N.D. Cal. Aug. 31, 2004) ("Family and Juvenile Court proceedings [do not] provide the plaintiff an adequate opportunity to litigate federal claims"). Indeed, a different panel of the Ninth Circuit reached the opposite result as here in a similar case alleging inadequate judicial resources. *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992) (average judicial caseloads, resulting in a denial of due process).

To be subject to *O'Shea* abstention, a plaintiff must be seeking "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state . . . trials," which would require the federal court to monitor and supervise actual state-court proceedings. *O'Shea*, 414 U.S. at 500-01; *see also Los Angeles County Bar Ass'n*, 979 F.2d 703-04; *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1247 (9th Cir. 1980) ("plaintiffs in *O'Shea* . . . sought massive structural relief," asking federal courts, in effect, "to supervise the conduct of state officials and institutions over a long period of time"). Indeed, this Court in *O'Shea* identified cases, such as this one, that "seek to strike down a single state statute, either on its face or as

applied" as not raising the types of concerns that motivated *Younger*. 414 U.S. at 500.

Child welfare cases are hardly the only Section 1983 actions challenging state court policies at the systemic level. The manner in which state courts select juries (*Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs*, 622 F.2d 807, 829-30 (5th Cir. 1980)), pay court-appointed attorneys (*Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984)), hold probable cause hearings (*Gerstein v. Pugh*, 420 U.S. 103 (1975)), seize defendant assets (*Fuentes v. Shevin*, 407 U.S. 67, 71 n.3 (1972)), and a host of other challenges to the operating rules of state courts are properly within federal jurisdiction.

Yet, under the decision below, virtually all federal challenges to state-court rules, practices, statutes, and procedures would fall under *O'Shea*: *Batson* challenges; sentencing guidelines; the right to or adequacy of counsel; hiring, firing, and promotion practices of courts; Americans With Disabilities Act compliance challenges; facial challenges to state criminal and civil procedure rules; First Amendment challenges to court policies restricting demonstrations; and the lawfulness of local rules and internal operating procedures.

Because *O'Shea* does not come close to mandating such wholesale abstention, the Court of Appeals' decision conflicts with many cases involving federal court review of policies that happen to be implemented in

state courts: *e.g.*, *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482-87 (1983) (federal court could adjudicate constitutional challenge to D.C. bar admission rule); *Polk County v. Dodson*, 454 U.S. 312, 326-27 (1981) (adjudicating alleged constitutionally suspect policy of county public defender's office, finding no violation); *Miranda v. Clark County, Nevada*, 319 F.3d 465, 469-71 (9th Cir. 2003) (declaring unconstitutional practice of county public defender who, acting administratively, instituted attorney- and resource-allocation policies based in part on results of client polygraph tests).

Indeed, the caption of this lawsuit should easily dispense with the Court of Appeals' concern. Each respondent is sued only in his or her administrative capacity. The Superior Court is not named, nor is any judge in any case, nor even the initiating party in Dependency Court – the Department of Health and Human Services. Accordingly, the District Court could not review or interfere with the decision in an individual case or set of cases even if it wanted to, since no adverse parties to those proceedings are named.[3] *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 372 (1989) ("a challenge to

[3] To the extent that statistical analysis of case proceedings and outcomes is relevant to the constitutional question (whether child plaintiffs are deprived of their constitutional right to adequate representation), that analysis would be undertaken of past cases rather than pending or future ones. Those closed cases would be used for analytical purposes only, not for purposes of collateral review.

completed legislative action . . . represents neither the interference with ongoing judicial proceedings against which *Younger* was directed, nor the interference with an ongoing legislative process. . . . It is, insofar as our policies of federal comity are concerned, no different in substance from a facial challenge to an allegedly unconstitutional statute or zoning ordinance – which we would assuredly not require to be brought in state courts").

Like *Los Angeles County Bar Ass'n*, this is a case about inadequate state funding of judicial resources, not an attack on how courts apply those resources in particular cases. Accordingly, the decision below is also at odds with another Ninth Circuit opinion, *L.H. v. Jamieson*, 643 F.2d 1351 (9th Cir. 1981), where the court declined to apply *Younger* abstention in a challenge to inadequate funding of foster care facilities under Arizona law. Although the children in *L.H.* were under the continuing jurisdiction of Arizona courts, abstention was denied because:

> "the juveniles are not seeking to enjoin any state proceeding, nor are they seeking to enjoin state officials from enforcing any state law. They are instead requesting an order that would require Arizona to spend more money to fund dispositional alternatives for juveniles in state custody. This relief may enrich the variety of dispositional alternatives available to a juvenile court judge, and, to this extent, affect pending and ongoing state juvenile proceedings. It does not, however, have the wholly disruptive consequences

> associated with enjoining a state judicial proceeding or enjoining further enforcement of a state statute."

Id., 643 F.2d at 1354. *See also M.D. v. Perry*, 799 F. Supp. 2d 712 (S.D. Tex. 2011) (*Younger* abstention inappropriate in challenge to Texas foster care system), *rev'd on other grounds*, 675 F.3d 832 (5th Cir. 2012).

The distinction between a challenge to a state's general rules and the application of those rules in individual adjudications is fundamental to the question of federal jurisdiction. *Feldman*, 460 U.S. 462. Because the Court of Appeals blurred that distinction in this case, its opinion represents a departure from *Younger* and a significant expansion of that doctrine.

If California law were to affirmatively deny counsel to children in dependency proceedings, thereby violating *In re Gault*, 387 U.S. 1 (1967), a federal challenge to such a law would *not* be seen as interfering with ongoing judicial proceedings. *Family Div. Trial Lawyer*, 725 F.2d at 701 (" . . . local judicial administration is not immune from attacks in federal court on the ground that some of its practices violate federal constitutional rights."). Nor should a challenge to a law (such as we have in respondents' policy) that sets caseloads at unconstitutional levels. That a state court is involved at some step of the due process deprivation is insufficient, without more, to require abstention under either *Younger* or *O'Shea*.

CONCLUSION

Review by this Court is necessary to resolve the conflict among the circuits in abstention cases, particularly those seeking systemic relief against inadequately funded child welfare institutions. Of greatest concern to *amici* and civil rights claimants generally is the Court of Appeals' suggestion that federal courts must abstain whenever an unconstitutional state policy touches upon a state's judicial process. That is neither the *Younger* nor *O'Shea* doctrines, but a new and broader form of abstention.

Dated: August 7, 2012

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 7th day of August, 2012, send out from Omaha, NE 2 package(s) containing 3 copies of the BRIEF OF AMICI CURIAE ERWIN CHEMERINSKY ET AL. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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Subscribed and sworn to before me this 7th day of August, 2012.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

ANDREW COCKLE
General Notary
State of Nebraska
My Commission Expires Apr 9, 2014

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Respondents.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF OF AMICI CURIAE ERWIN CHEMERINSKY ET AL. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 2184 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 7th day of August, 2012.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

ANDREW COCKLE
General Notary
State of Nebraska
My Commission Expires Apr 9, 2014

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