No. __-____

In the Supreme Court of the United States

E.T. *ET AL.*, PETITIONERS

v.

TANI CANTIL-SAKAUYE, JUDGE, CHAIR OF THE JUDICIAL COUNCIL OF CALIFORNIA, IN HER OFFICIAL CAPACITY, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT C. FELLMETH
EDWARD HOWARD
CHRISTINA MCCLURG RIEHL
Children's Advocacy Institute
University of San Diego School of Law
5998 Alcala Park
San Diego, CA 92110
(619) 260-4806

LINDA COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com

GENE SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000
gschaerr@winston.com

PETER E. PERKOWSKI
NAVDEEP K. PUNIA
Winston & Strawn LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 615-1700
pperkowski@winston.com

Counsel for Petitioners

QUESTION PRESENTED

In California, the Judicial Council governs state courts. It performs policymaking and—through its staff agency, the Administrative Office of the Courts (AOC)—administrative functions, including decisions on court budgets and allocation of resources. Petitioners challenged certain of these policies under 42 U.S.C. § 1983. Cementing a conflict among various circuits, the Ninth Circuit held that equitable abstention was required because Petitioners' challenge would cause the federal court to intrude on state-court administration. The question presented is:

> Does the abstention doctrine announced in *O'Shea* v. *Littleton*, 414 U.S. 488 (1973), require federal courts to refrain from adjudicating claims under 42 U.S.C. § 1983 whenever it would "intrude" upon state-court administration in any manner, as the court below held in joining the Second and Sixth Circuits, or does that doctrine require abstention only when adjudication requires supervising specific state-court events or displacing their "day-to-day operations," as the D.C. and First Circuits have held?

PARTIES TO THE PROCEEDINGS

Petitioners are individual foster children who are represented by attorneys in the dependency court system of Sacramento County, California.

Respondents are State officials responsible for setting policy for and overseeing the statewide administration of California courts, including Sacramento County dependency courts.

The amici curiae in support of rehearing or rehearing en banc below were individuals Erwin Chemerinsky, Dean of the University of California, Irvine, School of Law, Professors Allan Ides and Karl Manheim of Loyola Law School of Los Angeles, and Associate Professor Daniel L. Hatcher of the University of Baltimore; The American Civil Liberties Union of Southern California; the Western Center on Law and Poverty; Voices for America's Children; the National Association of Counsel for Children; the Juvenile Law Society; First Star; and Advokids.

RULE 29.6 STATEMENT

As individuals, Petitioners have no parent corporation and issue no stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION... 3

STATUTORY PROVISION INVOLVED 4

STATEMENT.. 4

A. Respondents and the California dependency court system............................... 4

B. Background of the "DRAFT" program 6

C. Effect of the program on children under dependency court supervision 8

D. The decisions below 9

REASONS FOR GRANTING THE PETITION........ 12

I. The Ninth Circuit's decision conflicts with decisions in other circuits and reflects the lower courts' confusion about how to apply this Court's decision in *O'Shea*. 13

II. The Ninth Circuit's approach is wrong as a matter of doctrine, equity, and policy................ 21

III. The Court's resolution of this issue is vital and this case is an ideal vehicle for resolving it. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

31 Foster Children v. *Bush*,
329 F.3d 1255 (11th Cir. 2003) 21

Allen v. *McCurry*,
449 U.S. 90 (1980) 24, 28

Ankenbrandt v. *Richards*,
504 U.S. 689 (1992) 25

Brian A. v. *Bredesen*,
No. 3-00-0445 (M.D. Tenn., filed May 10, 2000).. 27

Carey v. *Piphus*,
435 U.S. 247 (1978) 24, 28

Charlie & Nadine H. v. *Corzine*,
No. 99-3678 (D.N.J., filed Aug. 4, 1999) 27

Cohens v. *Virginia*,
6 Wheat. 264 (1821).. 1, 25

Colorado River Water Conservation Dist. v. *United States*,
424 U.S. 800 (1976) 24, 25, 26

Connor B. v. *Patrick*,
No. 3:10-cv-30073 (D. Mass., filed Apr. 15, 2010).. 27

County of Allegheny v. *Frank Mashuda Co.*,
360 U.S. 185 (1959) 24

D.G. v. *Henry*,
No. 4:08-cv-00074-GKF-FHM (N.D. Okla., filed Feb. 13, 2008) 27

Deakins v. *Monaghan*,
484 U.S. 193 (1988) 24

District of Columbia Court of Appeals v. *Feldman*,
460 U.S. 462 (1983) 26

Dwayne B. v. *Granholm*,
No. 2:06-cv-13548 (E.D. Mich., filed Aug. 8, 2006) 27

E.C. v. *Sherman*,
No. 05-0762-CV-W-SOW (W.D. Mo., filed Aug. 15, 2005) 27

E.T. v. Cantil-Sakauye,
657 F.3d 902 (9th Cir. 2011) 3, 11

Family Division Trial Lawyers of the Superior Court-D.C., Inc. v. *Moultrie*,
725 F.2d 695 (D.C. Cir. 1984) .... passim

G.L. v. *Sherman*,
No. 77-0242-CV (W.D. Mo., filed Mar. 28, 1977) 27

Gardner v. *Luckey*,
500 F.2d 712 (5th Cir. 1974) 11, 16

Gerstein v. *Pugh*,
420 U.S. 103 (1975) 20

In re Carissa G.,
76 Cal. App. 4th 731 (1999).................................... 5

In re D.R.,
185 Cal. App. 4th 852 (2010).................................. 5

Jeanine B. v. *Doyle*,
No. 2:93-cv-00547 (E.D. Wis., filed June 1, 1993).. 27

Joseph & Josephine A. v. *Bolson*,
No. 80-0623 (D.N.M., filed July 25, 1980) 27

Joseph A. v. *Ingram*,
275 F.3d 1253 (10th Cir. 2002) 11, 16

Juan F. v. *Rell*,
No. H-89-859 (AHN) (D. Conn., filed Dec. 19, 1989).. 27

Kaufman v. *Kaye*,
466 F.3d 83 (2d Cir. 2006).............................. 11, 15

Kenny A. v. *Perdue*,
218 F.R.D. 277 (N.D. Ga. 2003) 23

Kenny A. v. *Perdue*,
No. 1:02-cv-1686 (N.D. Ga., filed June 6, 2002).. 27

LaShawn A. v. *Fenty*,
C.A. No. 89-1754 (D.D.C., filed June 20, 1989).. 27

Lyons v. *City of Los Angeles*,
615 F.2d 1243 (9th Cir. 1980) 22

Marisol v. *Pataki*,
No. 95-Civ 27

Markham v. *Allen*,
326 U.S. 490 (1946) 25

Marshall v. *Marshall*,
547 U.S. 293 (2006) 1, 13, 25, 29

McNeese v. *Bd. of Educ. for Community Unit School Dist. 187*,
373 U.S. 668 (1963) 24

Mitchum v. *Foster*,
407 U.S. 225 (1972) 24

New Orleans Public Service, Inc. v. *City Council*,
491 U.S. 350 (1989) ("*NOPSI*") 19, 20, 24, 26

O'Shea v. *Littleton*,
414 U.S. 488 (1974) .... passim

Olivia Y. v. *Barbour*,
No. 3:04-cv-251-LN (S.D. Miss., filed Mar. 30, 2004).. 27

Parker v. *Turner*,
626 F.2d 1 (6th Cir. 1980) .... passim

Planned Parenthood League of Massachusetts v. *Bellotti*,
868 F.2d 459 (1st Cir. 1989)................................. 20

Polk County v. *Dodson*,
454 U.S. 312 (1981) 26

Pompey v. *Broward County*,
95 F.3d 1543 (11th Cir. 1996) 21

Sam & Tony M. v. *Carcieri*,
No. 1:07-cv-00241-L-LDA (D.R.I., filed June 28, 2007).. 27

Suggs v. *Brannon*,
804 F.2d 274 (4th Cir. 1986) 21

Wooley v. *Maynard*,
430 U.S. 705 (1977) 13

Wyatt v. *Cole*,
504 U.S. 158 (1992) 24, 28

Younger v. *Harris*,
401 U.S. 37 (1971) .... passim

STATUTES

28 U.S.C. § 1254(1) 3

42 U.S.C. § 1983.. passim

Cal. Welf. & Inst. Code § 300 5

Cal. Welf. & Inst. Code § 300.2 5

Cal. Welf. & Inst. Code §§ 305-305.6 5

Cal. Welf. & Inst. Code §§ 305-359 5

Cal. Welf. & Inst. Code § 317 6

Cal. Welf. & Inst. Code § 317(c) 7

Cal. Welf. & Inst. Code § 325 5

Cal. Welf. & Inst. Code § 364 6

Cal. Welf. & Inst. Code §§ 366.21-366.22 6

Civil Rights Act of 1871 4

OTHER AUTHORITIES

Cal. Const. Art. 6, sec. 6(d) 4

INTRODUCTION

Only six terms ago, this Court unanimously reaffirmed the bedrock principles governing the exercise of federal court jurisdiction:

> In *Cohens* v. *Virginia*, Chief Justice Marshall famously cautioned: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 6 Wheat. 264, 404, 5 L. Ed. 257 (1821).

Marshall v. *Marshall*, 547 U.S. 293, 298-99 (2006) In so holding, the Court severely curtailed the "probate exception" that some lower courts had created as an obstacle to federal jurisdiction, just as the Court had previously had to rein in a similar "domestic relations exception."

As with the "probate exception" and the "domestic relations exception," this case presents a situation in which well-meaning federal courts have improperly "decline[d] the exercise of jurisdiction which is given" them by a federal statute. And just as the Court has curtailed those earlier judge-made "exceptions" to federal jurisdiction, it should curtail the overly expansive judge-made exception to § 1983 jurisdiction applied here.

Specifically, Petitioners seek review of a Ninth Circuit decision substantially expanding the abstention doctrine articulated by this Court in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). Like rulings in a few other circuits, the Ninth Circuit's ruling dramatically contracts federal jurisdiction over civil rights suits against state agencies—particularly state courts—

such that even non-judicial *policies* would be categorically immune from challenge in federal court.

This 42 U.S.C. § 1983 action challenges a funding and resource-allocation policy involving certain civil courts in the county of Sacramento, California. The policy does not implicate the procedures, rulings, or decisions of any particular court or judicial officer. Rather, it concerns attorney caseloads—specifically, the average number of clients assigned to dependency court attorneys acting as guardians *ad litem* for Sacramento County's foster children. Respondents impose this extra-courtroom policy through a contract with a company providing the lawyers, and under it the average caseload is too high—nearly twice as high as the maximum acceptable caseload, according to Respondents' own figures.

Nevertheless, the court below decided that the federal courts must abstain from adjudicating this dispute. The Ninth Circuit panel concluded that adjudicating Petitioners' claims would require the federal court to "intrude upon the state's administration of its government, and more specifically, its court system." (Pet 7a.) But to abstain under these circumstances, the court had to expand *O'Shea* beyond its breaking point, transforming it from a "narrow exception" to a doctrine that will—contrary to the commands of Congress—bar from federal court *all* § 1983 cases against court administrators and policymakers.

In doing so, the Ninth Circuit widened a conflict among the circuits on the scope and application of *O'Shea* abstention. The D.C. Circuit, along with the First, Fourth, and Eleventh Circuits, applies *O'Shea* narrowly, abstaining only when federal relief would encroach upon state-court proceedings by directing

specific events in state court or requiring otherwise discretionary rulings or outcomes, thus requiring the monitoring of state courts. By contrast, the Ninth Circuit has now joined the Second, Fifth, Sixth and Tenth Circuits in applying *O'Shea* broadly, abstaining when federal relief would "intrude" to any significant degree into overall administration or general policymaking governing the state courts as a whole, regardless of how far removed from the actual courtroom the challenged policy is.

This latter reading of *O'Shea* has broad consequences, severely curtailing the full extent of federal jurisdiction granted by Congress. Without review, this judge-made exception promises to bar all manner of § 1983 claims. Certiorari is warranted to resolve the conflict among the circuits and correct the inappropriate curtailment of federal jurisdiction.

OPINIONS BELOW

The Ninth Circuit's original per curiam opinion is reported at 657 F.3d 902. The Ninth Circuit's decision denying rehearing and rehearing en banc and amending the panel opinion (Pet. 1a-10a) is reported at --- F.3d ----, 2012 WL 763541. The relevant decision of the District Court for the Eastern District of California (Damrell, J.) (Pet. 11a-63a) is reported at 681 F. Supp. 2d 1151.

JURISDICTION

The Ninth Circuit entered judgment on September 13, 2011, and denied a timely rehearing petition on March 12, 2012. On June 1, 2012, Justice Kennedy extended to July 11, 2012 the time to petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1871, as amended, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT

A. Respondents and the California dependency court system

The Judicial Council is the policymaking body of the California courts. It "is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice. The [AOC] serves as the council's staff agency. Judicial Council of Cal., Fact Sheet (2009), available at http://www.courtinfo.ca.gov/reference/documents/factsheets/Judicial_Council_of_California.pdf; see also Cal. Const. Art. 6, sec. 6(d).

All twenty-one members of the Judicial Council are appointed by the Chief Justice, who serves as the Chair, and fourteen of them are active judges on California's superior courts or courts of appeals. Among other things, the Judicial Council and AOC ("Respondents") approve the budgets of all California courts, including the superior courts in each county.

Among the courts that Respondents supervise and administer are the dependency courts, part of California's juvenile dependency system. The system is designed to protect the safety and well-being of abused or neglected children whose parents or guardians do not do so. (ER 319-320 ¶ 28.[1]) Dependency proceedings are initiated by the state, acting *in loco parentis*, to protect minors from such abuse or neglect. (ER 318-320 ¶¶ 23, 28.) See Cal. Welf. & Inst. Code §§ 300, 300.2, 305-305.6; *In re D.R.*, 185 Cal. App. 4th 852 (2010); *In re Carissa G.*, 76 Cal. App. 4th 731, 736-37 (1999).

Once proceedings are initiated, dependency courts first hold a jurisdictional hearing to determine if a child falls within one of ten grounds for dependency jurisdiction. (ER 2:20-23, 319-320 ¶ 28.) See Cal. Welf. & Inst. Code §§ 300, 325. If the child falls within the court's jurisdiction, the dependency court holds additional hearings to determine the proper treatment and disposition of the child, including detention, family reunification, foster care, and permanent placement." *Id.* §§ 305-359. Dependency courts then conduct six-month periodic reviews until the child reaches majority or can be placed safely back with his

---

[1] References to the Excerpts of Record in the Ninth Circuit are preceded by "ER."

or her parent or permanent guardian. (ER 2:24-23, 319-320 ¶ 28.) *Id.* §§ 364, 366.21-366.22.

California law requires that counsel be appointed for children in almost all dependency cases. (ER 322 ¶ 34.) See Cal. Welf. & Inst. Code § 317. In Sacramento County, a standing order requires that counsel automatically be appointed both "to represent each child who is the subject of dependency proceedings in that county," and to act "as the child's guardian ad litem." (ER 3:9-20, 327 ¶ 50.) As a result, federal and state constitutional and statutory law obligate appointed counsel to "advocate for the protection, safety and physical and emotional well-being of the children" (ER 322 ¶ 35), and entitle children who are the subject of dependency hearings "to adequate and effective assistance of counsel * * * in both dependency proceedings and ensuing appeals" (ER 325 ¶ 42, 322-323 ¶¶ 36-37). See Cal. Welf. & Inst. Code § 317.

B. Background of the "DRAFT" program

Given the extent of State control over the lives of children in dependency proceedings, Respondents recognize the importance of providing adequate resources to fulfill the State's obligations to them:

> In order to meet the needs of children and families in the Foster Care System, the Judicial Council … should give priority to children and their families in the child welfare system in the allocation and administration of resources, including public funding. (ER 283.)

In 2004, the Judicial Council established the Dependency Representation, Administration, Funding, and Training program ("DRAFT") to centralize the administration of court-appointed counsel services within the AOC. (ER 329-330 ¶ 55.) Through DRAFT, the

AOC contracts directly with local providers of dependency counsel services in participating California counties. (ER 313 ¶ 10.)

DRAFT grew out of a 2002 caseload study, conducted for the Judicial Council, that examined "trial-level court-appointed dependency counsel based on an assessment of the duties required as part of representation and the amount of time needed to perform those duties." (ER 179-250 at 190.) Meant "to identify maximum per-attorney caseloads" for dependency counsel "based on quantifiable standards of practice," the results showed an "optimal" maximum caseload of 77 cases per dependency attorney, and a "basic practice standard" maximum of 141 cases. (ER 190.) California law also requires that dependency attorneys "shall have a caseload * * * that ensures adequate representation of the child" and requires the Judicial Council to promulgate a court rule establishing such standards. Cal. Welf. & Inst. Code § 317(c).

Eventually, AOC staff increased the standard identified in the 2002 study to the now-current standard of no more than 188 clients per full-time dependency attorney. (ER 194; see also ER 327-328 ¶ 151.) Rather than immediately enforce a caseload standard based on these results, the Judicial Council "directed staff to pilot a best-practice standard, or caseload reduction" as part of the DRAFT program. (ER 191.) Under the program, "[a]ttorney caseload * * * standards [are] implemented through direct contracting." (ER 310.)

Sacramento County agreed to participate in the DRAFT program in 2008. (ER 19-20 ¶ 55.) Consistent with its policy, the AOC arranged for court-appointed dependency counsel services for the County by con-

tracting with a third-party agency. Because of the AOC's failure to adequately fund the program, however, the average caseloads for dependency counsel in the County far exceed Respondents' own ceiling of 188, instead averaging up to 395 cases (meaning child clients) per attorney. (ER 327-330 ¶¶ 51,55-58.)

C. Effect of the program on children under dependency court supervision

State and federal statutes and constitutions vest children in dependency proceedings with a right to counsel. (ER Tab 4 ¶¶ 22-27.) As with any right to counsel, the child has a right to counsel that is effective, competent, and adequate. Nevertheless, the staff attorneys for the non-profit vendor with which Defendants have contracted for dependency attorney services in Sacramento County are required by that contract to carry more than double Respondents' 188 caseload standard and nearly four times the ceiling established by the National Association of Counsel for Children. (ER 327-328 ¶¶ 50-51.)

Consequently, Sacramento County dependency lawyers must rely on brief telephone contact or courtroom exchanges to assess the needs of their child clients. The lawyers have no time to conduct complete investigations or client-specific legal analysis. They routinely are unable contact social workers and other professionals associated with their clients' cases, greatly hindering their abilities to develop those cases or to identify inappropriate—perhaps dangerous—placements. (ER 328-329 ¶ 53.) Critical pleadings, motions, responses, and objections often are neglected. Without an attorney to file motions to enforce court orders, a child may go without, for example, mandated visits with family members. The delay of

court-ordered visitation can then lead to a delay of family reunification and permanence—the goal of the dependency system. (E.g., ER 328-329 ¶¶ 53-54; ER 331 ¶ 65; ER 332 ¶¶ 68-69.)

In the four years before the filing of the complaint, Sacramento County dependency attorneys had themselves taken only one extraordinary writ appealing a dependency court decision. (ER 329 ¶ 54.) This means that hundreds of children have been forced to remain in possibly illegal placements or live under possibly unlawful visitation plans simply because there was no attorney available to take the next step in their cases.

D. The decisions below

In 2009, Petitioners—minor foster-care children in Sacramento County—sued on behalf of themselves and a proposed class of the County's foster children. (ER 311-339.) The suit asserted a claim under § 1983, as well as pendent state-law claims, based on alleged constitutional and statutory violations arising from the unduly high average caseloads of Petitioners' dependency attorneys and dependency court judicial officers. Petitioners subsequently eliminated the claim related to high average judicial caseloads. Thus, their claims are in essence a facial attack on the average caseloads that Respondents impose on Sacramento County's dependency attorneys.

The Complaint initially sought injunctive and declaratory relief. It did not, however, seek federal court supervision of state court judges, nor any relief that would impair the ability of state court judges to make independent rulings in existing or future matters.

Respondents moved to dismiss. The district court granted the motion. (Pet. 10a-63a.) The opinion expressed two main reasons for the decision.

First, the court concluded that "principles of equity, comity, and federalism require the court to equitably abstain from adjudicating [the] claims." (Pet. 39a.) The reasoning was based primarily on this Court's decision in *O'Shea*, which the district court acknowledged applies when the federal relief requested would require "intrusive follow-up" and ongoing "monitoring" of state court decisions. (Pet. 27a.) Disregarding that Respondents' own research had established an appropriate average caseload for dependency counsel, and the court's own broad discretion to tailor appropriate relief, the district court speculated about what it would "necessarily have to consider" (Pet. 32a-34a) to resolve the claims and to craft (and enforce) relief. (Pet. 37a-39a.)

Second, the district court concluded that this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971) also required abstention. (Pet. 39a-62a.) Ignoring the purely prospective nature of the relief that Petitioners' sought, the court decided that such relief would "call[] into question the validity of every decision made in pending and future dependency court cases before the resolution of this litigation." (Pet. 47a-48a.) The court also determined that granting relief would "impact the conduct of" (Pet. 49a) and—without specifying precisely how—"interfere with" (Pet. 47a) ongoing dependency court proceedings. Discounting or disregarding the real, practical, and uncontested obstacles to Petitioners' opportunity to present these claims in dependency court, the district court further decided that such opportunities existed. (ER 44-48.) Finding the other *Younger* factors met,

and no exceptions were presented, the district court therefore abstained.

On appeal, Petitioners dropped the request for injunctive relief and sought only a declaratory judgment that the average caseloads of Sacramento County's dependency attorneys are unlawful. Recognizing that *O'Shea* abstention is motivated by concern for preserving state judicial independence, a panel of Ninth Circuit judges affirmed the district court's abstention ruling. It held: (i) the district court "properly concluded" that Petitioners' challenges would "necessarily require the court to intrude upon the state's administration of its government, and more specifically, its court system"; and (ii) though Petitioners facially challenged a state policy, resolution of the case "*might* involve examination of the administration of a substantial number of individual cases." See *E.T. v. Cantil-Sakauye*, 657 F.3d 902, 905-06 (9th Cir. 2011). In support of this sweeping interpretation of *O'Shea,* the panel relied upon several decisions from other circuits, including *Kaufman* v. *Kaye*, 466 F.3d 83 (2d Cir. 2006); *Gardner* v. *Luckey*, 500 F.2d 712, 713 (5th Cir. 1974); *Parker* v. *Turner*, 626 F.2d 1 (6th Cir. 1980); and *Joseph A.* v. *Ingram*, 275 F.3d 1253 (10th Cir. 2002). However, the panel did not cite the contrary decision of the D.C. Circuit in *Family Division Trial Lawyers of the Superior Court-D.C., Inc.* v. *Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), which noted a conflict between its narrower approach and the broader approach of the Sixth Circuit in *Parker*. See *id.* at 702 n.8.

Critically, and despite recognizing that protecting the independence of state-court *adjudications* is the reason for abstention under *O'Shea*, see 414 U.S. at 500, the panel did not find that exercising federal court jurisdiction here would limit the ability of any

state court judge to rule on any matter, now or in the future.

The Ninth Circuit subsequently denied a petition for rehearing or rehearing en banc and issued a modified opinion that did not materially change its reasoning. (Pet. 1a-10a.)

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is the latest manifestation of a mature and deep conflict among the circuits on federal-court abstention under this Court's decision in *O'Shea*. Under the plain terms of that decision, to be the subject of abstention a plaintiff must be seeking relief "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state * * * trials," and that would require the federal court to monitor and supervise actual state-court proceedings. *O'Shea*, 414 U.S. at 500-01. Some circuits—including the D.C., First, Fourth and Eleventh Circuits—have adhered to this bedrock requirement for *O'Shea* abstention.

Other circuits, including Ninth Circuit in the decision below, have strayed from this guiding principle. As a result of the Ninth Circuit's decision, for example, the abstention inquiry under *O'Shea* now turns on whether relief "might" "intrude" in any manner into the policies or administration governing state courts. (Pet. 7a.) The decision below thus unmoors *O'Shea* abstention from its foundation, instead requiring abstention when a federal remedy might intrude on state-court administration, even outside the courtroom. This expands the doctrine beyond the "extraordinary and narrow exception" it was meant to be and, in the process, improperly restricts the congressional grant of jurisdiction under § 1983. By contrast, as noted, other circuits apply *O'Shea* narrowly, ab-

staining only when federal relief would direct specific events in state court or require particular rulings or outcomes.

As in *Marshall* v. *Marshall, supra,* review is needed to untangle this conflict and to curtail the unduly broad application of the *O'Shea* exception to federal jurisdiction. And this case provides an excellent vehicle with which to do so.

I. The Ninth Circuit's decision conflicts with decisions in other circuits and reflects the lower courts' confusion about how to apply this Court's decision in *O'Shea*.

The conflict among the circuit courts stems from a fundamental disagreement about how to apply this Court's abstention decision in *O'Shea*.

1. In 1974, this Court decided *O'Shea* as a narrow application of the federalism-based abstention doctrine first announced in *Younger* v. *Harris*, 401 U.S. 37 (1971). When there is an ongoing state judicial proceeding, *Younger* established that a federal court should not exercise jurisdiction if adequate relief is available in state court and if, were the court to abstain, irreparable injury would not result. Abstention under *Younger* is appropriate, however, only when the federal plaintiff seeks to enjoin ongoing state proceedings, or if federal relief would have that effect. See, e.g., *Wooley* v. *Maynard*, 430 U.S. 705, 711 (1977) (*Younger* does not bar jurisdiction where "relief sought is wholly prospective" and not "designed to annul the results of a state trial").

Like *Younger*, *O'Shea* is still, at its core, concerned with preserving the ability of state courts to adjudicate cases as co-equal judicial forums in our federal system. In *O'Shea*, plaintiffs sued two state judges

who had allegedly deprived plaintiffs of their civil rights through illegal bond-setting, sentencing, and jury-fee practices. 414 U.S. at 488. Those plaintiffs sought "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." *Id.* at 500. In this Court's view, that relief contemplated "interruption" of actual state-court proceedings, and its enforcement would require "the continuous supervision by the federal court over the *conduct* of the [judges] in the course of future criminal trial proceedings." *Id.* at 501 (emphasis added). The Court concluded that granting the requested relief would require the federal court to monitor and supervise actual state-court proceedings to ensure that "specific events" did not occur in violation of the federal court order. *Id.* at 500-01. That, in turn, "would disrupt the normal course of proceedings in the state courts" and seemed "nothing less than an ongoing audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* * * * sought to prevent." *Id.* Abstention was required, the Court held, because "a major continuing intrusion of the equitable power of the federal courts into the *daily conduct of state * * * proceedings* is in sharp conflict with the principles of equitable restraint which this Court had recognized." *Id.* at 502 (emphasis added).

In the nearly 40 years since *O'Shea*, this Court has not expanded further on the standard required for abstention when federal relief threatens a "major continuing intrusion * * * into the daily conduct" of state-court proceedings.

2. Without guidance from this Court establishing clear criteria defining when federal relief would amount to a "major continuing intrusion" into the

conduct of state-court cases, the circuit courts have not been consistent in applying this standard.

Here, the Ninth Circuit took an expansive view. Relying upon several decisions in other circuits, the court below ignored *O'Shea*'s requirement that for abstention to be warranted, federal intrusion must be directed to the conduct of state proceedings—i.e., "specific events" in court proceedings and/or the rulings of state judges. The court replaced that limitation with a broad inquiry into whether federal relief in any manner "intrude[s] upon the state's administration of its government." (Pet. 7a.) Also gone is the *O'Shea* Court's concern over ongoing federal audits that would indirectly accomplish *Younger*-like interference—that is, an injunction against ongoing state cases, or relief having that effect. Indeed, under the decision below, "intrusion" sufficient to warrant abstention no longer requires an existing state-court proceeding or a potential federal court order directing how a state court must decide issues before it. Instead, the Ninth Circuit found "intrusion" based solely on the evidence that Petitioners would need to gather to prove their case—what it recognized would be a "generalized inquiry"—and a belief that remediation "might" involve *examining*—not directing—some individual cases. (Pet. 7a-8a.)

Like the Ninth Circuit, the Second Circuit has ruled that abstention is required whenever the federal court is asked to do something that would be "intrusive in the *administration of the [state] court system*." *Kaufman* v. *Kaye*, 466 F.3d 83, 86 (2d Cir. 2006) (internal quotation marks omitted) (emphasis added). In *Kaufman*, the Second Circuit rejected a constitutional challenge to the "non-transparent, non-random" way in which state appeals courts assigned

panels of judges to cases, an issue with no connection to courtroom decision-making.

As indicated by the decisions cited in the opinion below, additional circuits appear to follow this broad approach to abstention. For example, the Tenth Circuit has stated that the "reasoning of *O'Shea* and its progeny suggests that federal court *oversight of state court operations*, even if not framed as a direct review of state court judgments, may nonetheless be problematic * * * ." *Joseph A.* v. *Ingram*, 275 F.3d 1253, 1271 (10th Cir. 2002) (emphasis added). The *Joseph A.* case was brought to enforce a consent decree governing conduct of a state's *executive* department management of foster children, not against the dependency court system per se. The Tenth Circuit nevertheless concluded that, because the requested judgment would "have a discernible impact on juvenile court proceeding[s]," abstention was appropriate. *Id.* at 1270-72. Though the court abstained under *Younger*, it found that *O'Shea* "is at least indirectly supportive" of its holding. *Id.* at 1270.

Similarly, the Fifth Circuit abstained in a suit against state public defender offices based on constitutionally deficient representation growing out of inadequate funding and excessive caseloads. See *Gardner* v. *Luckey*, 500 F.2d 712, 713, 715 (5th Cir. 1974). Although the suit challenged only the operation of the public defender offices—not the courts, nor any court proceeding, much less "specific events" that may occur at trial—the court found *O'Shea* applicable because the suit, in the Fifth Circuit's view, would result in "intrusive and unworkable supervision of state judicial processes." *Id.* at 715.

The Sixth Circuit also applies *O'Shea* abstention broadly. In *Parker* v. *Turner*, 626 F.2d 1 (6th Cir. 1980), the Sixth Circuit considered a constitutional

challenge to the manner in which state court judges conducted civil contempt proceedings involving indigent fathers behind in support payments. *Id.* at 2. The plaintiffs sought declaratory and injunctive relief to ensure that the juvenile courts follow basic due process in these hearings, as well as a declaration that every father cited for contempt had the right to appointed counsel if he could not afford one. *Id.* The Sixth Circuit viewed the issue as one involving "federal interference with state court practices." *Id.* at 6. Interpreting *O'Shea*, the court drew the sweeping conclusion that, when contemplating injunctive relief against a state court, "the equitable restraint considerations appear to be nearly absolute" against exercising federal power. *Id.* at 7. Finding the attack on the state courts' manner of conducting contempt hearings indistinguishable from the attack on the bail and sentencing practices in *O'Shea*, the Sixth Circuit abstained.

The *Parker* decision stretched well beyond *O'Shea*, however—specifically, in treating the plaintiffs' right-to-counsel claims in the same manner as the challenge to particular courtroom practices. Adjudicating the right-to-counsel claims at issue there would not have required the federal court to monitor or supervise "specific events" at trial. And in that respect at least, the Sixth Circuit's decision rested on the same broad view of *O'Shea* abstention as that adopted by the Ninth Circuit below.

In fact, the D.C. Circuit has acknowledged the circuit split that arose from the Sixth Circuit's expansive interpretation of *O'Shea*:

> We believe *Parker* stretches beyond *O'Shea*, however, in refusing to consider constitutional challenges to regularized local court practices like failure to appoint counsel whose relief would not

> require the kind of oversight of inherently discretionary decision-making practices, like setting bail and parole, involved in *O'Shea*.

Family Div. Trial Lawyers of the Superior Court-D.C., Inc. v. *Moultrie*, 725 F.2d 695, 702 n.8 (D.C. Cir. 1984).

The approach of the Second, Fifth and Sixth Circuits, like that of the Ninth Circuit here, removes any requirement from *O'Shea* that federal relief be directed to state-court decision-making. The decisions thus relax *O'Shea*'s tight definition of "intrusion" while at the same time broadening the category of state institutions that are protected from federal court scrutiny. In these circuits, as a result, it would seem that *any* challenge to a generally applicable state law, regulation, rule, or policy is beyond the jurisdiction of federal courts if that policy is implemented in state court or is promulgated by an administrative arm of the state court.

3. In contrast, four other circuits maintain a substantially stricter abstention standard that is consistent with *O'Shea*.

The D.C. Circuit's decision in *Family Division* exemplifies the conflict with the Ninth Circuit's approach—and, as noted, expressly acknowledges a split with the earlier-decided Sixth Circuit decision in *Parker*. In *Family Division*, plaintiffs—attorneys who accepted appointments to represent indigent parents in state-court family matters—challenged the manner in which the state court made appointments without providing adequate compensation. 725 F.2d at 697. Defendants urged the federal court to equitably abstain. But the court declined, recognizing that "local judicial administration is not immune from attacks in federal court on the ground that some of its

practices violate federal constitutional rights." *Id.* at 701 (citing *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983)).

The *Family Division* court specifically rejected any comparison to *O'Shea*, concluding the cases were "very different." *Id.* at 703. The court's distinction of *O'Shea* is instructive:

> In this case, the appellants challenge a non-discretionary method of appointing uncompensated counsel * * * . Although the challenged method is established by neither statute nor written rule, it indisputably operates more like a rule … than a decision left to the local judiciary's discretion to be exercised on a case-by-case basis. It follows that if the rule is adjudicated to be unconstitutional, relief can be effected by requiring the superior court to adopt another "rule" which more equitably divides the financial burdens * * * . There is no foreseeable need for any "monitoring " of its day-to-day operations.

Id. at 703-04.

The D.C. Circuit therefore drew a distinction between challenges to judicial statutes or "rules," where abstention is not required, and discretionary judicial decisions in particular cases, where it is. And the court adopted a two-prong approach to determining when relief would result in "day-to-day monitoring requiring abstention: (1) whether the adjudication of federal right would normally arise in the course of pending state-court proceedings (*id.* at 701); and (2) whether the state court can effectuate relief by adopting a new rule that does not require local judiciary to exercise discretion case-by-case (*id.* at 704).

This approach echoes this Court's decision in *New Orleans Public Service, Inc.* v. *City Council*, 491 U.S.

350 (1989) ("*NOPSI*"), in which this Court distinguished between judicial proceedings and legislative or executive action, refusing to abstain in "proceedings that are not 'judicial in nature.'" *Id.* at 370; see also *Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.9 (1975) (refusing to abstain, though state judges were named as defendants, when injunctive relief was directed to legality of pretrial detention without a hearing, "an issue that could not be raised in defense of the criminal prosecution").

Like the D.C. Circuit, the First Circuit has also interpreted *O'Shea* narrowly based on a distinction in the type of state rule or conduct being challenged. In *Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459 (1st Cir. 1989), the court reversed a district court's dismissal, on abstention grounds, of an as-applied challenge to a state's judicial procedures by which a minor could obtain an abortion. Though state judicial officers were defendants in the suit and argued that the complaint asked the federal court to "sit in judgment on the manner in which individual state judges" were deciding cases under the statute, *id.* at 461-62, the appeals court disagreed. According to the court, "what will occur is not an ongoing intermeddling with the state judiciary but a prohibition of an unconstitutional process." *Id.* at 465. In short, because the "acceptable remedy of invalidating the statute" was available, there was no "threaten[ed] interference with ongoing state proceedings or practices." *Id.* at 467.

The Eleventh and Fourth Circuits also appear to apply a stricter standard that is more closely linked to the rule that this Court expressed in *O'Shea*—namely, abstaining only when federal relief would direct state-court action, requiring supervision over the conduct of judges or "specific events" in the state pro-

ceedings. See *31 Foster Children* v. *Bush*, 329 F.3d 1255, 1278 (11th Cir. 2003) (abstaining when relief would "plac[e] decisions that are now in the hands of the state courts under the direction of the federal district court"); *Pompey* v. *Broward County*, 95 F.3d 1543, 1549-50 (11th Cir. 1996) (abstaining when plaintiff sought orders directing state court how to manage contempt hearings, which "would ensnare the federal district court in relitigation" of the issues, "the kind of mischief *O'Shea* warned against"); *Suggs* v. *Brannon*, 804 F.2d 274, 278-79 (4th Cir. 1986) (abstaining when relief sought injunction against particular state-court orders and fixing excessive bail).

Despite minor differences in reasoning, all of these circuits agree, contrary to those discussed above, that this Court's decision in *O'Shea* should be applied narrowly. This conflict, which is ultimately a conflict over the proper interpretation of this Court's decision, could hardly be more stark. Indeed, if the present suit had been brought within the D.C. or First Circuits, it is certain that a court fairly applying the approach articulated in *Family Division* and *Belotti* would *not* have abstained. And it is highly likely that a court applying the decisions of the Fourth and Eleventh Circuits would not have abstained, either.

II. The Ninth Circuit's approach is wrong as a matter of doctrine, equity, and policy.

The Ninth Circuit's approach to *O'Shea* abstention is also wrong as a matter of both statutory construction and judicial interpretation.

1. For one thing, nothing in the text of § 1983 authorizes the sweeping abstention required by the decision below and those on which it relied. The only "abstention" authorized by the statute is where "injunctive relief" is sought "against a judicial officer for

an act or omission *taken in such officer's judicial capacity*"—and with an exception for situations where "a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. Consistent with this provision, Petitioners abandoned their claims for injunctive relief below, preserving only their claims for declaratory relief. Yet the Ninth Circuit held that even those claims—which are plainly contemplated by the text of § 1983—could not proceed under *O'Shea*. The Ninth Circuit thus interpreted *O'Shea* in a manner that places that decision at odds with the plain statutory text.

The decision below is also contrary to *O'Shea* itself, which required far more to justify abstention. The relief sought in *O'Shea* was of a wholly different scope and character than that at issue here:

> [Plaintiffs seek] an *injunction* aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials * * * This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that [*Younger*] and related cases sought to prevent.

414 U.S. at 500 (emphasis added). To be subject to *O'Shea* abstention, then, a plaintiff must be seeking relief "aimed at controlling or preventing the occurrence of specific events that might take place" during state-court cases, which would thus require the federal court to monitor and supervise the state courts and their decision-making. *Id.* at 500-01; see also *Lyons* v. *City of Los Angeles*, 615 F.2d 1243, 1247 (9th Cir. 1980) ("plaintiff's 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").

This type of remedy, nor anything similar, is not sought here. The decision below does not hold that it is. Instead, the court seems to reason that the nature of Petitioners' facial challenge will require "remediation" (Pet. 8a) that falls within *O'Shea*. Not so. Any remedial requirements would be undertaken by, and potentially directed to, the quasi-executive office that administers California's courts, not to the courts themselves. Moreover, resolution of this case would not threaten the ability of state judicial officers to adjudicate cases independently, free from federal court restraint or intrusion. This is shown by another case in another jurisdiction, involving similar issues of high average caseloads of dependency attorneys, that was litigated to completion without the disruptions that the Ninth Circuit anticipated here. *Kenny A.* v. *Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003).

After the decision below, the guiding principle for determining whether *O'Shea* abstention is required is no longer whether the relief sought is "aimed at controlling or preventing the occurrence of specific events" in the course of state-court cases (*O'Shea*, 414 U.S. at 500). Instead, the abstention inquiry now turns on whether relief would "intrude" into the policies or administration governing all state courts (Pet. 7a). This is a flat misinterpretation of *O'Shea*.

2. The decision below also conflicts with the congressional grant of jurisdiction in § 1983, and with this Court's repeated admonition that, absent a constitutional restraint, federal courts are obliged to exercise the jurisdiction that Congress gives them. Section 1983 created a federal claim for relief against

state officials who, "under color of any statute, ordinance, regulation, custom, or usage" of the State, cause "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The statute's purpose is two-fold: The first is substantive—"to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt* v. *Cole*, 504 U.S. 158, 161 (1992) (citing *Carey* v. *Piphus*, 435 U.S. 247, 254-57 (1978)); see also *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (statute was designed "to interpose the federal courts between the States and the people, as guardians of the people's federal rights"); *McNeese* v. *Bd. of Educ. for Community Unit School Dist. 187*, 373 U.S. 668, 672 (1963). The second is procedural—to provide a receptive forum for the resolution of claims alleging that state policies violate federal rights. E.g., *Allen* v. *McCurry*, 449 U.S. 90, 98-99 (1980) ("strong motive" behind § 1983 "was grave congressional concern that the state courts had been deficient in protecting federal rights").

As *O'Shea* itself recognized, these policies and purposes require an extremely selective application of the abstention doctrine. Indeed, as this Court recognized in *NOPSI* "the federal courts' obligation to adjudicate claims within their jurisdiction [is] 'virtually unflagging.'" 491 U.S. at 359 (quoting *Deakins* v. *Monaghan*, 484 U.S. 193, 203 (1988)). Thus, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule," *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976), and "an extraordinary and narrow exception" at that. *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188 (1959).

Since the earliest days of the federal judiciary, moreover, this Court has repeatedly admonished lower courts that they "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821), *quoted in Marshall* v. *Marshall*, 547 U.S. 293, 298-99 (2006). And from time to time the Court has found it necessary to correct expansive interpretations of judicially created exceptions to jurisdiction, reining in the "domestic relations exception" in *Ankenbrandt* v. *Richards*, 504 U.S. 689 (1992), and the "domestic relations exception" in *Markham* v. *Allen*, 326 U.S. 490 (1946), and again in *Marshall*. Equitable abstention under *O'Shea* is another judicially created exception to jurisdiction. After the decision below, and other, similarly expansive decisions in other circuits, that doctrine too needs to be curtailed—or at least restored to the limits recognized in *O'Shea* itself.

3. The Ninth Circuit's approach is also wrong as a matter of equity and policy. It turns abstention jurisprudence on its head, particularly in cases involving challenges to state policy involving judicial administration. As this Court has often noted, "[a]bstention from the exercise of federal jurisdiction" is supposed to be "the exception, not the rule." *Colorado River*, 424 U.S. at 813. But the decision below, and those on which it relies, alters that balance, expanding this previously "extraordinary and narrow exception" (*id.*) so broadly that it nearly swallows the rule.

This is a sea change in federal court abstention principles. All § 1983 challenges (facial or not) to state-court rules, practices, statutes, and procedures could easily fall within the rubric of "intrusions" into state-court processes: jury selection (including *Batson*

challenges); sentencing; the right to or adequacy of counsel; hiring, firing, and promotion practices; Americans With Disabilities Act compliance; state criminal and civil procedure rules; First Amendment challenges; even the lawfulness of local rules and internal operating procedures. Indeed, The Ninth Circuit's decision is at odds with many decisions of this Court involving some federal court "intrusion" into policies implemented in state courts. E.g., *District of Columbia 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)..

Abstention should be narrowly applied, not broadly as in the decision below. This Court has "carefully defined * * * the areas in which * * * 'abstention' is permissible, and it remains 'the exception, not the rule.'" *NOPSI*, 491 U.S. at 359 (quoting *Colorado River*, 424 U.S. at 813). Indeed, the Court in *NOPSI* recognized the importance of this principle, stating "the rule [is] that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *Id.* at 368. This Court has thus "never extended it to proceedings that are not 'judicial in nature.'" *Id.* at 369. Yet here, the Ninth Circuit has extended abstention to "procedures" that are purely executive in nature—namely, execution of administrative contracts as a function of budgetary decision-making and resource allocation.

4. Applied to its full extent, moreover, the decision below would seem to exempt from federal jurisdiction *any* civil rights suit by one class of claimants—abused and neglected foster children. In dependency cases,

state judges step into the role of parents for foster children, making every key decision about their lives. So any constitutional challenge to state administration of these courts, no matter how far removed from the actual courtroom—as here, *a purely bureaucratic decision on how much to spend to provide them representation*—would under the Ninth Circuit's rubric "intrude" upon state court administration, requiring abstention.

Underscoring this concern, across the nation there are more than fifteen federal cases adjudicating challenges to child-welfare-agency practices, some with court orders in effect governing such practices.[2] Al-

---

[2] *Juan F.* v. *Rell*, No. H-89-859 (AHN) (D. Conn., filed Dec. 19, 1989); *Kenny A.* v. *Perdue*, No. 1:02-cv-1686 (N.D. Ga., filed June 6, 2002); *Connor B.* v. *Patrick*, No. 3:10-cv-30073 (D. Mass., filed Apr. 15, 2010); *Dwayne B.* v. *Granholm*, No. 2:06-cv-13548 (E.D. Mich., filed Aug. 8, 2006); *E.C.* v. *Sherman*, No. 05-0762-CV-W-SOW (W.D. Mo., filed Aug. 15, 2005); *G.L.* v. *Sherman*, No. 77-0242-CV (W.D. Mo., filed Mar. 28, 1977); *Olivia Y.* v. *Barbour*, No. 3:04-cv-251-LN (S.D. Miss., filed Mar. 30, 2004); *Charlie & Nadine H.* v. *Corzine*, No. 99-3678 (D.N.J., filed Aug. 4, 1999); *Joseph & Josephine A.* v. *Bolson*, No. 80-0623 (D.N.M., filed July 25, 1980) (closed); *Marisol* v. *Pataki*, No. 95-Civ.-10533 (S.D.N.Y., filed Dec. 13, 1995); *D.G.* v. *Henry*, No. 4:08-cv-00074-GKF-FHM (N.D. Okla., filed Feb. 13, 2008); *Sam & Tony M.* v. *Carcieri*, No. 1:07-cv-00241-L-LDA (D.R.I., filed June 28, 2007); *Brian A.* v. *Bredesen*, No. 3-00-0445 (M.D. Tenn., filed May 10, 2000); *LaShawn A.* v. *Fenty*, C.A. No. 89-1754 (D.D.C., filed June 20, 1989); *Jeanine B.* v. *Doyle*, No. 2:93-cv-00547 (E.D. Wis., filed June 1, 1993). Additional class actions have been filed in Kansas, Kentucky, and Pennsylvania. For more information, see http://www.childrensrights.org/reform-campaigns/legal-cases/.

lowing the decision below to stand will create uncertainty as to the status of these orders and future ones like them. The decision is a wholesale abandonment by the federal judiciary of this class of claimants. Indeed, without review and correction of the decision below, state court rules or policies that discriminate against foster children of a particular race, disability, ethnicity, tribe, sexual orientation, or religion can seemingly no longer be litigated in federal court. But this Court can prevent that result by ensuring that *O'Shea* abstention is confined within its original bounds.

III. The Court's resolution of this issue is vital and this case is an ideal vehicle for resolving it.

This Court's resolution of the question presented is important for several additional reasons. First, it will enable the Court to achieve and re-affirm the dual goals of § 1983—to deter state actors from depriving individuals of federally guaranteed rights, and providing both relief and a receptive forum if such deterrence fails. See *Wyatt* v. *Cole*, 504 U.S. 158, 161 (1992) (citing *Carey* v. *Piphus*, 435 U.S. 247, 254-57 (1978)); *Allen* v. *McCurry*, 449 U.S. 90, 98-99 (1980). Despite this congressional purpose, as noted the Ninth Circuit and several other circuits apply an abstention rule that will, in many cases and for many claimants, leave federal courts unavailable to vindicate important federal rights. This Court should act to prevent some lower federal courts from using abstention to undermine those policies.

At the same time, this case gives the Court an opportunity to "rein in" and "curtail" yet another "expansive[] interpret[ation]" of a judicially created ex-

ception to jurisdiction. *Marshall*, 547 U.S. at 299. Again, § 1983 exists to serve the legislative aim of providing a neutral, non-state court forum for the adjudication of civil rights cases against states. The need identified by Congress that caused it to enact § 1983 is at is zenith when those being sued are the state courts themselves. Because it is a judge-made limitation on the power of Congress to legislate, this Court has carefully restrained abstention doctrine. This case affords the opportunity to reaffirm that principle.

Second, the issues are clear and well developed and the conflict is wide, extensive, and mature. Most every circuit court has weighed in on the issue, each has taken a side, and there cannot be any doubt that this conflict is desperately in need of resolution. Indeed, the conflict was acknowledged as long ago as 1984. See *Family Division*, 725 F.2d at 702 n.8 (acknowledging split with Sixth Circuit *Parker* decision). And it has only grown deeper since. It does not appear that the conflict has been brought to the Court's attention before. But whatever the reasons for not addressing it earlier, this case presents a prime opportunity to do so.

This case is also a compelling vehicle for resolving and clarifying the appropriate analysis for determining when federal relief would impermissibly intrude, interrupt, or disrupt the normal, daily functioning of state court proceedings, thus requiring abstention. The Ninth Circuit's reasoning is plain and the issue is clearly defined. Accordingly, this case provides an ideal opportunity by which the Court can choose among the different approaches and, in so doing, resolve the circuit conflict outlined above.

For nearly four decades, judges have labored over the proper application of *O'Shea*, taking clearly differing paths. The issue has now crystallized to the point where cases with similar facts, advancing similar claims, are being decided in diametrically different ways, with some plaintiffs enjoying access to federal courts while others, though similarly situated, are denied a federal forum. Given the conflict among the circuits, there is no reason to let this issue remain unresolved any longer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

GENE SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000
gschaerr@winston.com

ROBERT C. FELLMETH
EDWARD HOWARD
CHRISTINA MCCLURG RIEHL
Children's Advocacy Institute
University of San Diego School of Law
5998 Alcala Park
San Diego, CA 92110
(619) 260-4806

PETER E. PERKOWSKI
NAVDEEP K. PUNIA
Winston & Strawn LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 615-1700
pperkowski@winston.com

LINDA COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com

Counsel for Petitioners

JULY 2012