

Appeal No. 10-15248

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

Plaintiffs-Appellants,

vs.

**TANI CANTIL-SAKAUYE, JUDGE, CHAIR OF THE JUDICIAL COUNCIL OF
CALIFORNIA, IN HIS 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,**

Defendants-Appellees.

On Appeal From the United States District Court
for the Eastern District of California
Hon. Frank C. Damrell, Jr.
Case No. 2:09-cv-01950-FCD-DAD

**Brief for *Amici Curiae* Voices for America's Children, National
Association of Counsel for Children, Juvenile Law Society, First Star
and Associate Professor Daniel L. Hatcher in Support of Appellants'
Petition for Rehearing and Rehearing En Banc**

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I. STATEMENT OF INTERESTS

This brief is filed on behalf of five *amici curiae*: Voices for America's Children, National Association of Counsel for Children, Juvenile Law Society, First Star and Associate Professor Daniel L. Hatcher of the University of Baltimore, in support of Appellants' Petition for Rehearing and Rehearing En Banc (Dkt. No. 45).

These *amici curiae* are all child advocates with extensive and varied experience representing children within legal and foster-care systems, and file this brief to underscore the importance of certain matters they deem not adequately considered by the District Court or by this Court in its per curiam decision in *E.T. v. Cantil-Sakauye*, No. 10-15248, 2011 U.S. Dist. LEXIS 18867 (9th Cir. Sept. 13, 2011) ("*E.T.*").

These *amici curiae* have the specialized knowledge and experience to describe the unique qualities of child protection dependency courts, as well as the impact of the Court's decision on the abused and neglected children seeking a federal forum through Appellants.

A. Voices for America's Children

Voices for America's Children (Voices) is the nation's largest network of multi-issue, child-advocacy organizations. With 60 member organizations located in nearly every state, its nationwide nonpartisan, nonprofit network leads advocacy

efforts at the community, state, and federal levels to improve the lives of all children. The Voices' network makes up the most extensive advocacy group in the nation representing only the interests of children. Voices has included a child welfare working group among its activities for many years.

B. National Association of Counsel for Children

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association that works to improve the delivery of legal services to children, families and agencies; advance the rights of children, develop the practice of law for children and families; and educate public officials about their needs. The NACC's 2,200 members include attorneys who represent children before family and juvenile courts of the nation, judges, physicians, psychologists, social workers, law professors and other professionals concerned about children. The NACC works with the American Bar Association, the National Council for Juvenile and Family Court Judges, and others. The NACC Amicus Committee has contributed numerous *amicus curiae* briefs involving the legal interests of children.¹

¹ Board members Robert Fellmeth, who is one of the counsel for plaintiffs, and Chris Wu, who is employed by defendant Administrative Office of the Court of the Judicial Council, have recused themselves from voting on the matter of this amicus.

C. Juvenile Law Society

The Juvenile Law Society (JLS) is a national not-for-profit agency dedicated to the principle of access to justice for juveniles. JLS was founded and is directed by Marvin Ventrell, JD, a veteran of the child welfare and juvenile justice systems who previously served as a trial lawyer, child welfare court lawyer, juvenile public defender, and CEO of the National Association of Counsel for Children. JLS works to ensure that court-involved children and youth receive system-wide due process and the full benefit of legal counsel as provided for in landmark rulings like *In re Gault*, 387 U.S. 1 (1967).

D. First Star

First Star is a 501(c)(3) child advocacy organization that promotes practices to improve life for abused and neglected children in the United States. First Star's advocacy promotes and supports these children's basic rights, and it has provided information to lawmakers and filed numerous legal briefs as *amicus curiae* regarding issues affecting children in foster care. Its programs examine the right to counsel and other issues of children in dependency cases.

E. Associate Professor Daniel L. Hatcher (University of Baltimore)

Daniel L. Hatcher is an associate professor of law and is a co-instructor of the University of Baltimore School of Law's Civil Advocacy Clinic. Professor Hatcher has significant prior experience in civil legal aid work, including advocacy for children in foster-care proceedings. He was a statewide assistant director of

advocacy for legal aid offices in Maryland, and he has also worked for a national child-advocacy organization. He has testified before Congress and before state-level legislative committees on a host of issues affecting children and low-income individuals and families and has written extensively in these areas. *See, e.g., Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797 (2006); *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333 (2009).

II. ARGUMENT

Appellants have petitioned this Court for rehearing and rehearing en banc regarding the decision in *E.T.* In that decision, this Court affirmed the District Court's dismissal of the complaint on the basis of abstention principles espoused in *O'Shea v. Littleton*, 414 U.S. 488 (1974) and *Younger v. Harris*, 401 U.S. 37 (1971). We believe the Court did not adequately consider the distinctive nature of child protection dependency proceedings or the impact on children in the foster care system in erroneously applying *O'Shea* and *Younger* to this case.²

A. The Distinctive Nature of Child Protection Dependency Proceedings Makes a Federal Forum Addressing Egregious Caseload Policies Critical.

Child protection dependency proceedings differ dramatically and in critical

² *Amici curiae* join the briefs filed by other *amici curiae* in support of Appellants' petition, which address the body of abstention law more directly. (Dkt. Nos. 43-1 and 46-2) This brief provides the unique context of the dependency court proceedings against which this Court considers the abstention doctrine vis-à-vis Appellants' petition.

respects from other courts of American jurisprudence, including those considered in *O'Shea* and *Younger*. The fact that dependency proceedings are child protection cases gives rise to a purpose, complexity and breadth in these proceedings that simply has no match in other cases.

At the outset, children appear as parties in dependency proceedings involuntarily and through no wrongdoing of their own. They are parties only because they have been victimized by people who are supposed to care for and protect them. Yet they are parties to the legal proceedings. CAL. WELF. & INST. CODE § 317.5(b). And their rights and interests are to be protected. CAL. WELF. & INST. CODE § 317(c).

The statutory purpose of California's dependency court system accords with the uniqueness of the proceedings' parties: to protect the best interest of the child. It is not a neutral forum for the dispassionate resolution of civil disputes between opposing parties. The dependency court itself has a statutorily imposed agenda "to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." CAL. WELF. & INST. CODE § 300.2. *See* Barbara Flicker, *Best Practices in Child Protection Courts*, AMERICAN BAR ASSOCIATION, 13 (May 24, 2005),

<http://www.abanet.org/child/rcj/bestpractices.doc> (explaining that for this reason, dependency-court judges must have experience in “[c]hild development, parenting skills, the physiology of drug and alcohol exposure for fetuses, child psychology, family systems and other areas of behavioral sciences”)

The dependency attorney also is vested with a unique mandate. Under California law, a “primary responsibility of any counsel appointed to represent a child pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child.” CAL. WELF. & INST. CODE § 317(c). Counsel for children in dependency court accordingly are statutorily required to “investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child.” CAL. WELF. & INST. CODE § 317(e).

Moreover, dependency proceedings follow a statutorily prescribed, highly specialized process with specific times required for hearings that must consider specific issues.

Initial Hearing. A social worker typically initiates a dependency case after determining that a child must be removed from the home. Within days, the court must conduct an initial hearing, where it appoints counsel, advises parents of rights, explains the court process, orders any visitation, and inquires as to relatives as possible caretakers. CAL. WELF. & INST. CODE § 315; Cal. R. Ct. 5.670. With

the core purpose of the hearing being the child's initial safety plan, the initial detention hearing is not amenable to litigating complex class actions.

Jurisdictional Hearing. The court must determine whether the child has suffered harm in a manner conferring jurisdiction on the dependency court and warranting state intervention. This stage "is the trial" of a dependency case. Publication Development Committee, Victims of Child Abuse Project, *Resource Guidelines, Improving Court Practice in Child Abuse & Neglect Cases*, 46 (1995), <http://www.ncjrs.gov/pdffiles/resguid.pdf>. Counsel argue whether past events satisfy the jurisdictional standards, and examination and cross-examination witnesses on occasion. This is the stage that most resembles a typical non-dependency court proceeding. However, the judge's ruling that the jurisdictional standard is satisfied, is effectively a beginning. From this point forward, the court plans for the child's future well-being. Jurisdiction in a dependency case is based on a finding of specific harms or risks of harm to an individual child and typically ends when a child is no longer at risk. It is very different from the personal and subject matter jurisdiction exercised in typical state court.

Disposition Hearing. Within ten days after the jurisdiction hearing, the court conducts a hearing to decide "whether to dismiss the case, order informal services for the family without making the child a dependent, appoint a guardian with the consent of the parties, or declare the child a dependent of the court." Cal.

Admin. Office of the Courts, *California Juvenile Dependency Court Improvement Program Reassessment*, 2-4 (November 2005),

<http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/CIPReassessmentReport.pdf>;

Cal. R. Ct. 5.695(a). Where the court deems the parents' residence proper for the child, the child welfare agency provides "family maintenance" services. If the court determines that the child cannot remain with the parents, the social worker assigned to the case will prepare a "reunification plan" addressing the parental problems and specifying how the parents can earn back custody over the child. The goal of the dispositional hearing is to create a plan in the best interests of the child.

Review Hearings. In maintenance cases, the court reviews the parents' progress at periodic review hearings. The court, in its discretion, may choose to extend the child welfare services for another six months at these hearings. In reunification cases, the court must hold a review hearing no less frequently than every six months. If the child is not returned to the parents during a review hearing, the court must have found that return would have created a substantial risk to the child's well-being. CAL. WELF. & INST. CODE § 366.21(e). Within 12 months of the disposition hearing, if the parental environment remains too dangerous, the court must hold a permanency hearing at which it specifies a permanent plan for the child. The court also may extend the reunification plan for

another six months if the parent is making progress but has yet to satisfy the reunification requirements. At the review hearings, the court must consider issues such as the services that have been offered to the parent, efforts of the social worker to maintain relationships between a child and individuals important to the child, and the child's relationship with his sibling group. CAL. WELF. & INST. CODE § 366.21(e).

Termination hearing. Once the time for reunification has expired, the court must set a "366.26," or termination of parental rights, hearing. At this hearing, all parties, including the parents who have failed their child, may present evidence to be considered as the court creates a permanent plan serving the child's best interests. There must be a compelling reason for the court not to find adoption to be in the child's best interests. CAL. WELF. & INST. CODE § 366.26. Here, again, the focus is on the child's best interests—this hearing is not structured nor equipped to include litigation of the types of violations alleged in the Complaint filed in this case.

Each case involves at least these proceedings listed. The conclusion of the "trial," (the adjudication hearing) which in other cases would end the court process, simply establishes the legitimacy of state intervention and augers a lengthy period where the court makes all of the significant decisions that flow from the removal of the parents as the decision-makers for the child. The dependency

case then can, and often does, encompass many, many years in which the court determines where the children will live, with whom, as well as all significant medical and psychological treatment and educational issues. Until the court makes a final determination with respect to the child, this court oversight and decision-making continues. Hence decisions about all of the significant issues with respect to the child can be, and routinely are, made many times over as placements and other circumstances change.

Collectively, the unique position of the parties and statutory mandates of the dependency court system as a whole render these proceedings barely cognizable to attorneys who have appeared only in ordinary civil and criminal matters.

Aside from the narrow fact finding hearings in the initial dependency and [termination of parental rights] stages, dependency proceedings tend to focus less on past facts and more on the current social, emotional, and medical well-being of children. While there is a body of law that governs these proceedings, the obligations of the agency, and the power of the dependency court to make certain types of orders, advocacy in dispositional and permanency hearings is, for the most part, less about the law and more about the people involved. It is less about standards and more about needs; less about burdens of proof and more about emotional suasion.

Erik S. Pitchal, *Where are all the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 1, 10–11 (2008).

Nor will the children individually assert their rights in the individual dependency proceedings. “Children are, by dint of their minority, typically seen as

incompetent under the law.” Erik Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 684 (2006). No one expects that these children will recognize and assert their rights to adequate legal representation. The idea that any child will assert a deprivation of her or his rights in this context is highly improbable, and the idea that all children deprived of their rights will do so is incomprehensible.

Given this context, if funding shortages prevent the children’s advocates from discharging their statutory and constitutional duties, as the complaint in this case alleges, these abused and neglected children will not as a practical matter have any forum in which to challenge the resulting deprivation of their rights. As noted, the dependency courts themselves simply are not structured to adjudicate the type of dispute at issue in this case. And no other state judicial forum exists which would allow these issues to be meaningfully heard. Plaintiffs’ lawsuit challenges the funding decisions by the Administrative Office of Courts, an arm of the California Supreme Court. With federal court abstention, plaintiffs would have to file, seeking an order from a California Superior Court judge that his or her superior, the Chief Justice, who is in charge of the Administrative Office of Courts, has violated the plaintiffs’ rights by failing to adequately fund the dependency courts. To state the obvious, there is no constitutionally impartial jurist in California who can decide this lawsuit. *Cf.*, *Caperton v. A.T. Massey Coal Co.*,

Inc., 129 S.Ct. 2252, 2263 (2009) (in assessing the risk of actual bias or prejudgment of a jurist, due process guarantees require “a realistic appraisal of psychological tendencies and human weakness....”).

Federal courts should not abstain when it leaves a party without a remedy or where the state court is not impartial. *Kugler v. Helfant*, 421 U.S. 117, 124-125 (1975) (relaxing deference to abstention principles when the state court is “incapable of fairly and fully adjudicating” the matter); *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (ruling that abstention “presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved,” which was unavailable where the state tribunal was impermissibly biased).

B. The Impact on Foster Children

The impact on foster children of the Court’s decision whether to permit a rehearing on the availability of a federal forum for this dispute is extraordinary. Consistent with the dependency court’s mandate “to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm,” CAL. WELF. & INST. CODE § 300.2, the legal system determines where and with whom these children live and each and every significant aspect of their lives, including educational, medical and psychological treatment. Administrative

policies that establish staggering caseloads for attorneys for foster children severely undermine the attorneys' functioning and greatly reduce, if not eliminate, advocacy for most of these children about most of these issues. Given the breadth of the advocacy role and an overburdened and unresponsive social service system, the effects are catastrophic for these children. In simple terms, the children do not get what they need and their lawyers are too busy themselves to even know about it.

The District Court accepted the overburdened nature of the system, but neither that Court, nor this Court in *E.T.* adequately considered the effects on the abused and neglected children. As noted above, to foreclose a federal forum in which to challenge the excessive caseloads policy is tantamount to stalling effective advocacy of this issue. This in turn will play out for child after child in terms of untold continuing hardship.

III. CONCLUSION

Amici curiae support and concur in the views of Appellants and other *amici curiae* that “close inquiry into the equities of a case and the ‘carefully defined’ boundaries of abstention is necessary before a federal forum is denied.”³ For the reasons outlined above -- the unique nature of dependency proceedings that effectively limits other avenues for redress, and the catastrophic impact on already

³ Brief of *Amici Curiae* Dean Erwin Chemerinsky et al. Supporting Petition for Rehearing or Rehearing en Banc (Dkt. No. 46-2) at 2, citing *New Orleans Pub. Serv. Inc. v. New Orleans*, 491 U.S. 350, 359 (1989).

vulnerable foster children, *Younger* and *O'Shea* must not be read to foreclose a federal forum for abused and neglected children asserting federal constitutional and statutory claims.

Voices for America's Children, National Association of Counsel for Children, Juvenile Law Society, First Star and Associate Professor Daniel L. Hatcher support the Petition for Rehearing and Rehearing En Banc and submit that this Court should reverse the district court's judgment and remand the case for further proceedings.

October 7, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and 9th Cir. Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points in Times New Roman font and contains 2,978 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as counted by Microsoft Word 2003.

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