No. 18-1245

In the
Supreme Court of the United States

OGLALA SIOUX TRIBE, *et al.*,
Petitioners,
v.

LISA FLEMING, in Her Official Capacity, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit was correct in applying *Younger* abstention when it held that Petitioners have an adequate opportunity to challenge the hearing procedures by direct apply within the abuse and neglect proceedings, intermediate and final appellate review, and also by seeking South Dakota Supreme Court review through mandamus?

2. Whether the Eighth Circuit was correct in determining that the manner in which informal emergency child removal hearings were conducted when the right to counsel, right to subpoena witnesses, right to confront and cross examine witnesses were not provided within 48 hours of an emergency custody removal, was not "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it"?

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INTRODUCTION

The decision below is unremarkable. It holds that the district court should have abstained pursuant to *Younger v. Harris*, 401 U.S. 37 (1971) from exercising jurisdiction over challenges to alleged policies of Pennington County, South Dakota officials regarding emergency temporary custody removals of endangered Indian children. The Eighth Circuit correctly held that Petitioners failed to meet their burden of showing they lacked an adequate opportunity to raise their federal claims in the state proceeding and relied on well-established Supreme Court precedent that when a litigant has not even attempted to press his federal claims in the on-going state proceeding, it is presumed that the state proceedings will provide an adequate remedy. The Eighth Circuit also correctly determined that Petitioners failed to establish great and immediate irreparable loss and that the exception for "flagrantly and patently unconstitutional" statutes is extremely narrow and did not apply. Petitioners' contention that these unexceptional conclusions warrant review lacks merit.

First, the Eighth Circuit did not hold, as Petitioners suggest, that the ability to bring a separate state action, in and of itself, satisfies the adequate opportunity factor set forth in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). The Eighth Circuit held Petitioners *failed to meet their burden* of establishing they lacked an adequate opportunity to press their constitutional claims in the on-going state proceedings because they never attempted to bring their claims and failed to

present unambiguous authority that they could not. This holding was supported by the fact that South Dakota state courts are courts of general jurisdiction, the availability of direct and intermediate appeal, and the presumption that state courts will provide an adequate remedy when litigants have not attempted to press their claims. The holding was further supported by the additional remedy of mandamus as recognized in *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012) in which the South Dakota Supreme Court decided a petition for writ of mandamus regarding 48-hour hearings and the application of the Indian Child Welfare Act. The opportunity to pursue constitutional claims also exists in the on-going abuse and neglect proceedings themselves and can be raised at subsequent hearings during the process. The Eighth Circuit's decision follows established Supreme Court precedent and Petitioners simply disagree with the application of the properly stated rule of law.

Nor is there a circuit split worthy of review on this issue. Even if the Eighth Circuit held as Petitioners' claim, that the ability to bring a separate state action to litigate federal claims satisfies *Middlesex*, it appears to be the only decision that has ever held so. Petitioners cite three other circuits in an attempt to show some deep split among the circuits, but on Petitioners' best day, it is a 3 v. 1 "split", hardly warranting review by this Court. But there actually is no circuit split to even review because the Eighth Circuit did not hold that an adequate opportunity to press constitutional claims is present when the *only* option is to bring a separate, stand alone state action.

Second, Petitioners are dissatisfied that the Eighth Circuit did not exercise jurisdiction notwithstanding *Younger* abstention pursuant to extraordinary circumstances, such as when "a statute is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. at 53-53 (quotation omitted). The Eighth Circuit correctly noted Petitioners did not challenge the constitutionality of any statute at all making the extremely narrow exception inapplicable. Petitioners seek review because other circuits have examined whether a "rule" or "policy" was "flagrantly and patently unconstitutional". But no circuit has ever made any distinction between policies or statutes in relation to the exception so there are no actual holdings that conflict.

Moreover, none of the cases cited by Petitioners actually held that the rule or policy being challenged was "flagrantly and patently unconstitutional" recognizing instead the exception is an exceedingly high bar to hurdle. There is no conflict among the circuits concerning this exception. In fact, the exception itself is simply one example of extraordinary circumstances that might warrant an exercise of federal jurisdiction despite *Younger*. Petitioners failed to convince the Eighth Circuit such extraordinary circumstances exist in their case which is not a sufficient reason for review.

Petitioners seek review of a decision that is fully in accordance with this Court's precedent and does not present a circuit split. The petition should be denied.

STATEMENT OF THE CASE

1. The Child Protection Process

South Dakota, like most states, has established laws to protect children from abuse and neglect. The statutory scheme allows for the emergency removal of children from dangerous situations, with and without a court order. SDCL §§ 26-7A-12, -13. The process of protected abused and neglected children has three phases: emergency removal, adjudication, and disposition. Each phase has its own hearings but all phases are part of one proceeding. The process begins when law enforcement takes a child into emergency protective custody. SDCL § 26-7A-14. That can happen without prior court approval, or law enforcement can obtain prior approval by a circuit court judge or authorized intake officer, who may approve the child's out-of-home placement and issue a temporary custody directive. SDCL §§ 26-7A-12, -13.

If law enforcement or the South Dakota Department of Social Services ("DSS") determines the child is presently in danger, and that a Present Danger Plan cannot be implemented to manage that danger, law enforcement removes the child from the dangerous environment and takes temporary custody of the child. Law enforcement then places the child in temporary emergency custody with Child Protective Services. When law enforcement has taken custody of a child, custody is transferred to DSS and a circuit judge is

contacted for approval of an out-of-home placement. Pursuant to SDCL § 26-7A-15, when law enforcement takes temporary custody, notification to the parent, guardian, or custodian is given by law enforcement. *See also*, SDCL § 26-7A-15.2.

South Dakota law prohibits temporary custody longer than 48 hours, excluding weekends and holidays, unless a petition is filed and a court orders longer custody "during a noticed hearing or a telephonic hearing." SDCL § 26-7A-14. These hearings are commonly referred to as "48-hour hearings" and are one component of the entire abuse and neglect process in South Dakota. Petitioners challenged the manner in which 48-hour hearings were conducted in Pennington County, South Dakota. The 48-hour hearing is an informal proceeding to determine whether temporary custody should be continued. The hearing can be held telephonically and is not subject to the South Dakota Rules of Civil Procedure or Rules of Evidence. SDCL §§ 26-7A-18, -34, -56. The state's attorney notifies the parents and any relevant tribe of the time and place for the hearing. SDCL § 26-7A-15. DSS obtains information pertaining to the need for emergency temporary custody, and provides that information to the court at the 48-hour hearing, in an Affidavit of the Department and ICWA Affidavit.

If temporary custody is continued, the judge issues a Temporary Custody Order. If the judge who is presiding over the hearing deems it appropriate, he or she may authorize DSS to return the children without

further court order when it determines that the risk to the children has abated.[1]

The next hearing in the emergency removal phase is an advisory hearing, which informs all interested parties (parents/child/Indian custodian) of their rights, including the right to court appointed counsel, to confront and cross-examine witnesses, and to remain silent. SDCL § 26-7A-54. The 48-hour hearing focuses just on the safety of the child, without attempting to affix blame. It is at the advisory hearing that the state advises the parties of any allegations of abuse and neglect in the petition, the applicable burden of proof, and the respective statutory and constitutional rights of the parties. *Id.* Like the 48-hour hearing, this initial hearing is part of the emergency removal phase and not conducted according to the South Dakota Rules of Civil Procedure, or the Rules of Evidence. SDCL § 26-7A-34.

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[1] Petitioners allege "more than 800 Indian children were forcibly removed from their homes for two months . . ." (Petition at p. 2) (emphasis added). This is a misrepresentation. Of the 823 Indian children involved in 48-hour hearings reviewed in this case, 87 children were discharged from DSS custody the day of the 48-hour hearing; 268 children were discharged from DSS custody within 1 to 15 days after the 48-hour hearing; 114 were discharged from DSS custody within 16 to 30 days after the 48-hour hearing; 44 children were discharged from DSS custody within 31 to 45 days after the 48-hour hearing; 50 children were discharged from DSS custody within 46 to 60 days after the 48-hour hearing; and 260 children remained in DSS court ordered custody for more than 60 days after the 48-hour hearing. (Pet. App. 112a-113a.)

Then, the second phase begins with scheduling the adjudicatory hearing. The adjudicatory hearing determines by clear and convincing evidence whether the child was an abused or neglected child as defined in SDCL § 26-8A-2. The adjudicatory hearing is a full evidentiary hearing which follows the South Dakota Rules of Evidence and Civil Procedure. SDCL §§ 26-7A-56; 26-7A-83. After adjudication, the parties may petition for an intermediate appeal to the South Dakota Supreme Court. SDCL § 26-7A-87. Review hearings are held approximately every 45 days after an adjudication to monitor the necessity for continued custody.

A final dispositional hearing is scheduled for not more than twelve months after the child was taken into custody. SDCL § 26-7A-90. At this hearing the court determines whether to terminate parental rights and the child's permanent placement goal (reunification, permanent foster care, guardianship, adoption). After a final dispositional order is entered the parties may appeal both the adjudication and final dispositional orders to the South Dakota Supreme Court.

2. Procedural History

Petitioners brought suit challenging the manner in which 48-hour hearings were conducted in Pennington County, South Dakota alleging violations of the Indian Child Welfare Act and the Due Process Clause of the 14th Amendment. They did not challenge the South Dakota abuse and neglect procedure as a whole or any of the South Dakota abuse and neglect statutes. Nor did they challenge the procedures at 48-hour hearings, which are prescribed by South Dakota statute. (Pet.

App. 168a.) Respondents moved to dismiss arguing, *inter alia*, *Younger* abstention. The district court declined to abstain under *Younger* concluding child abuse and neglect proceedings did not fit into any of the three categories of cases outlined by *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013). (Pet. App. 156a.) It went on to address the *Middlesex* factors and determined Petitioners did not have an adequate opportunity to press *all* their constitutional claims in state court suggesting South Dakota state courts were not equipped to hear their claims despite being courts of general jurisdiction. (Pet. App. 160a.)

Petitioners made two partial motions for summary judgment seeking judgment as a matter of law that the Respondents' policies, practices and customs regarding the manner in which 48-hour hearings were conducted violated the Indian Child Welfare Act and the Due Process Clause of the 14th Amendment. The district court granted summary judgment on both motions concluding as a matter of law that Judge Davis was a "policymaker" who had instituted six of his own policies, practices and customs regarding the manner in which 48-hour hearings were conducted which violated the Indian Child Welfare Act and the Due Process Clause of the 14th Amendment. (Pet. App. 126a-128a.) It further ruled that DSS officials and the State's Attorney acquiesced to Judge Davis' policies, thereby exposing themselves to liability. (Pet. App. 129a.)

Motions to reconsider were denied and the district court entered declaratory and injunctive relief detailing exactly how 48-hour hearings must be conducted and

what must be contained in the petition for temporary custody. (Pet. App. 78a, 33a, 62a, 70a.) The district court also retained jurisdiction for the purpose of enforcing and modifying the declaratory judgment and granting additional relief as may be necessary and appropriate. (Pet. App. 77a.) The district court ordered 48-hour hearings to be conducted as full evidentiary hearings allowing the parents to: (1) contest the allegations in the petition; (2) require the State to present sworn testimony; (3) cross-examine the State's witnesses; and (4) subpoena and present witnesses and other evidence. (Pet. App. 62a, 70a.) The district court ordered that parents must be appointed counsel and could continue the hearing for 24 hours to confer with counsel. (Pet. App. 75a-76a.)

The Eighth Circuit vacated the orders and remanded with instructions to dismiss the claims holding that the district court should have abstained pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). (Pet. App. 1a.) The Eighth Circuit correctly held that Petitioners failed to meet their burden of showing they lacked an adequate opportunity to raise their federal claims in the state proceeding and relied on well-established Supreme Court authority that when a litigant has not even attempted to press his federal claims in the on-going state proceeding, it is presumed that the state proceedings will provide an adequate remedy. (Pet. App. 19a-21a.) It recognized South Dakota courts hearing abuse and neglect proceedings are courts of general jurisdiction with the ability to hear constitutional claims and that even the South Dakota Supreme Court has adjudicated claims "[i]n this very context" via a petition for writ of mandamus

in *Cheyenne River*, 822 N.W.2d 62. (Pet. App. 20a.) The Eighth Circuit also noted the right to appellate review, which is a factor that must be considered when determining whether state proceedings provide an adequate opportunity to raise constitutional claims. (Pet. App. 20a.) Petitioners ignore the entire holding by the Eighth Circuit and instead misread the decision suggesting it concluded simply that the ability to bring a separate mandamus action, with nothing more, satisfies the adequate opportunity prong.

The Eighth Circuit also correctly rejected Petitioners invocation of the "flagrantly and patently unconstitutional" exception to *Younger* abstention that applies only in extraordinary circumstances and correctly concluded that Petitioners failed to establish great and immediate irreparable loss. The Eighth Circuit followed Supreme Court precedent that even though child custody proceedings involve interests of great importance, that does not mean abstention is inappropriate and such proceedings are a traditional area of state concern. (Pet. App. 21a-22a.)

Petitioners petitioned for rehearing and rehearing *en banc* but failed to identify either issue argued in their Petition for Writ of Certiorari as required by Fed. R. App. P. 40(a)(2) and 35(b)(1). Instead, they merely argued why they did not think *Younger* abstention applied. The petitions were denied.

REASONS FOR DENYING THE PETITION

I. PETITIONERS FAILED TO PRESERVE THE ISSUES

The petition should be denied because Petitioners failed to raise their questions presented to the lower courts. Petitioners complain the Eighth Circuit Court of Appeals' panel decision is at odds with other circuits because (1) it identified the ability to file a separate mandamus action in state court as an adequate opportunity to raise constitutional issues; and (2) noted Petitioners were not challenging a *statute* as "flagrantly and patently violative of express constitutional prohibitions" to invoke the "patently unconstitutional" extraordinary circumstances exception to *Younger* abstention. However, Petitioners never provided the Eighth Circuit (or the district court) the opportunity to address their concerns or alleged circuit split. Petitioners never argued to the district court or the Eighth Circuit that a petition for writ of mandamus could not meet the "adequate opportunity" factor of *Middlesex* because it was an action separate from the on-going abuse and neglect proceedings. Petitioners *did* petition for rehearing and rehearing *en banc* but failed to make these arguments despite Fed. R. App. P. 40(a)(2)'s requirement that the petition for rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended". Likewise, Fed. R. App. P. 35(b)(1) provides:

The petition must begin with a statement that either:

> (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
>
> (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

Instead of alerting the Eighth Circuit that, according to Petitioners, the panel decision overlooked or misapprehended a point or law or that it conflicted with decisions of the United States Supreme Court or other courts of appeal, Petitioners simply re-argued why they did not agree *Younger* abstention was warranted. Petitioners failed to raise or preserve the issues. Such a procedural defect justifies denial of the petition for writ of certiorari.

II. THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH "ADEQUATE OPPORTUNITY" PRECEDENT

1. The Eighth Circuit Did Not Hold The Possibility of Filing a Separate Mandamus Action Was Sufficient In and Of Itself to Provide an Adequate Opportunity

Petitioners argue the Eighth Circuit concluded that the ability to bring an independent state mandamus action constitutes an adequate opportunity to press their claims in state court pursuant to the third factor set forth in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). This is not what the Eighth Circuit held. In response to Petitioners' complaint that state court proceedings do not afford an adequate opportunity to raise broad constitutional claims, the Eighth Circuit held Petitioners "have not established that South Dakota courts are unwilling or unable to adjudicate their federal claims." (Pet. App. 19a.) The Eighth Circuit followed this Court's directive in *Moore v. Sims*, 442 U.S. 415, 430 (1979) that "[s]tate courts are competent to adjudicate federal constitutional claims" and that "'when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.'" (Pet. App. 19a-20a) (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)).

To demonstrate that there is no procedural bar to review within the abuse and neglect proceedings, and

that South Dakota courts *are willing* to adjudicate Petitioners' federal claims, the Eighth Circuit recognized that the types of claims raised by Petitioners were examined and decided by the South Dakota Supreme Court through a petition for writ of mandamus in *Cheyenne River*, 822 N.W.2d 62. (Pet. App. 20a.) This directly contradicts the district court's ruling on the "adequate opportunity" *Middlesex* factor that "a state court challenge would preclude plaintiffs from raising *all* the claims in their federal complaint." (Pet. App. 160a) (emphasis added).

The Eighth Circuit next observed that South Dakota circuit courts are courts of general jurisdiction so Petitioners were not prevented from raising their constitutional claims. (Pet. App. 20a.) "[T]he burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claim.'" *Pennzoil*, 481 U.S. at 14 (quoting *Moore*, 442 U.S. at 432). All that is required is the opportunity to present federal claims in the state proceedings. "No more is required to invoke *Younger* abstention." *Juidice v. Vail*, 430 U.S. 327, 337 (1977). "Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate." *Id.*

The Eighth Circuit also pointed out that "South Dakota law provides a right to appeal at the conclusion of the abuse and neglect proceedings, or after certain intermediate orders". (Pet. App. 20a) (citing SDCL

§§ 26-7A-30, -86, -87, and 90). *See e.g. People in Interest of A.O.*, 896 N.W.2d 652 (S.D. 2017) (final appeal of trial court procedures for determining timeliness of mother's request to transfer abuse and neglect proceeding to tribal jurisdiction); *People in Interest of E.T.*, 927 N.W.2d 111 (S.D. 2019) (intermediate appeal of procedures for ruling on transfer in abuse and neglect proceeding.) The consideration of these factors is consistent with United States Supreme Court *Younger* abstention jurisprudence. *See Juidice v. Vail*, 430 U.S. 327, 330 (1977) (*Younger* applies because plaintiffs' claims "could have been raised" in County Court, and "[h]ad the County Court ruled against these contentions, appellees could have appealed to the Appellate Division of the Supreme Court."); *Middlesex*, 457 U.S.at 436 (the right to appellate review must be considered in determining whether state proceedings provide an adequate opportunity for plaintiff to raise constitutional claims).

Finally, the Eighth Circuit concluded that "[t]he best evidence in South Dakota is that state procedures provide an adequate remedy for alleged violations of federal law at 48-hour custody hearings, *and the plaintiffs have not presented unambiguous authority to the contrary*." (Pet. App. 21a) (emphasis added). The Eighth Circuit's entire holding is that when a litigant fails to even press constitutional claims in a state court of general jurisdiction that provides the right to appellate review, the court will presume state procedures will afford an adequate remedy, unless the litigant provides unambiguous authority to the contrary. This is *in addition* to the ability to seek

mandamus relief with the highest court of the state. The Eighth Circuit's decision falls squarely within Supreme Court precedent and is consistent with the First, Third and Sixth Circuit cases cited by Petitioners.

2. There is No Circuit Split

A. First Circuit

In *Fernandez v. Trias Monge*, 586 F.2d 848 (1st Cir. 1978), a juvenile challenged the juvenile court procedure under Puerto Rico law that detained juveniles without a probable cause hearing. The First Circuit concluded the juvenile did not have an opportunity to raise his constitutional claim in the ordinary course of the criminal proceedings and that just because he *could* have sought an injunction "in a completely separate Commonwealth court proceeding outside the four corners of the pending state prosecution, is of no consequence". *Id.* at 853-54. It reiterated whether the state court proceeding provides an adequate opportunity to raise constitutional issues "must necessarily be limited to remedies, trial or appellate, that are provided in the ordinary course of the pending state proceedings." *Id.* at 853. This is precisely the law applied by the Eighth Circuit when it recognized the right to appellate review and presumed, in the absence of authority presented by Petitioners, that state abuse and neglect proceedings in South Dakota provide an adequate remedy for the alleged constitutional claims. *Fernandez* may have came to a different *conclusion* than the Eighth Circuit, but it applied the same law. That does not constitute a split between the First and Eighth Circuits.

B. Sixth Circuit

In *Habich v. City of Dearborn*, 331 F.3d 524 (6th Cir. 2003), the Sixth Circuit concluded the plaintiff did not have an adequate opportunity to raise her federal claims in a pending appeal to the county court because she had not even filed a complaint in that court, only an appeal from the Building Board of Appeals, and would have to initiate a separate action and move to consolidate it with the pending appeal. *Id.* at 531, n. 3. The Sixth Circuit concluded that whether a litigant has an adequate opportunity to press federal claims in state court "does not turn on whether the plaintiff could file a new complaint in state court" and that it was "aware of no case in which a federal plaintiff is deemed to have the 'opportunity' to have his or her federal claim heard in a state proceeding *solely* because the plaintiff could have amended an existing complaint or filed a new complaint in state court." *Id.* at 531 (emphasis added).

The Eighth Circuit's holding is in accord with the Sixth Circuit because it did not hold Petitioners had an adequate opportunity to have their constitutional claims heard *solely* on the ability to bring a separate mandamus action. Instead, it concluded the "adequate opportunity" *Middlesex* factor was met because Petitioners had not tried to press their claims and had not provided unambiguous authority that they could not or that state court relief would be inadequate.

C. Third Circuit

Finally, in *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399 (3d Cir. 2005), Pennsylvania law was unclear whether damages could be awarded for the application of an invalid land use ordinance in the action challenging the ordinance.

> Rather, there appears to be a two-step procedure for seeking damages arising from the unfavorable application of a zoning ordinance in Pennsylvania. The first step is to challenge the ordinance through a land use appeal, and if that challenge is successful, the party may then file a separate mandamus action to recover damages arising from the application of the now-invalid ordinance.

Addiction Specialists, 411 F.3d at 412. The Third Circuit exercised jurisdiction determining "*Younger* abstention is only appropriate where the precise claims raised in federal court *are available* in the ongoing state proceedings. Where the availability of a claim in state court is questionable, our abstention jurisprudence weighs in favor of retaining jurisdiction." *Id.* at 413 (emphasis in original). There is no confusion as to whether Petitioners' federal claims could be raised in the abuse and neglect court proceedings. The presumption is that they can and Petitioners have not presented evidence to the contrary. Petitioners simply failed to meet their burden of showing they did not have adequate opportunity. This is not at odds with the Third Circuit's holding in *Addiction Specialists*.

There is no circuit split on this issue and the petition should be denied.

3. The Eighth Circuit Set Forth Additional Bases to Support *Younger* Abstention

This case does not warrant review because the Eighth Circuit provided additional legal bases—not challenged by Petitioners—to support *Younger* abstention irrespective of Petitioners' question presented. The Eighth Circuit ruled that South Dakota procedures provide three, independent ways of seeking review of the trial court's decision—one of which was a writ of mandamus. Even if this Court agreed mandamus relief in a separate action is not an adequate opportunity to press the constitutional claims in the state court proceedings, it would have no affect on the decision below because the opportunity would still exist through the on-going abuse and neglect proceedings and intermediate or final appeal.

The Eighth Circuit relied on well-established Supreme Court precedent that places the burden squarely on Petitioners to show they did not have the opportunity to present their constitutional claims in the state proceedings. *Moore*, 442 U.S. at 425; *Pennzoil*, 481 U.S. at 15. The Eighth Circuit concluded that Petitioners did not establish this. While Petitioners may disagree with this conclusion and believe they *had* met this burden, the decision does not conflict with Supreme Court or Courts of Appeal precedent. There is no circuit split or conflict with the long-standing Supreme Court precedent that when a plaintiff has not attempted to present his federal claims in the state court proceedings, it is presumed

that he can, unless there is unambiguous authority to the contrary. *Pennzoil*, 481 U.S. at 15. Petitioners may *believe* the facts of the case lend themselves to a different conclusion when applied to this established legal principal, but that is not a reason to grant the petition.

III. THE EIGHTH CIRCUIT MADE NO MEANINGFUL DISTINCTION BETWEEN POLICIES AND STATUTES WHEN REJECTING THE "FLAGRANTLY AND PATENTLY UNCONSTITUTIONAL" EXCEPTION

Petitioners also disagree with the Eighth Circuit's conclusion that they failed to meet the "flagrantly and patently unconstitutional" narrow exception to *Younger* abstention. Petitioners claim that the Eighth Circuit's decision creates a conflict among the circuits warranting review by this court. Petitioners argue that the Eighth Circuit decision is contrary to the holdings of other circuits because it rejects the application of the "flagrant and patently violative" exception to a "policy," rather than "statutes."

First, Petitioners overstate the holding of the Eighth Circuit. There is nothing in the Eighth Circuit decision that suggests it found the "statute v. policy" distinction meaningful. The Eighth Circuit did NOT rule that the alleged policies were flagrantly and patently violative, but since that standard applied only to statutes, and not to mere policies, the exception did not apply.

Second, even if the exception does apply to more than just statutes, the challenged action here does not fall within it. This Court has said that an exception to *Younger* abstention "might exist where a state statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" *Trainor v. Hernandez*, 431 U.S. 434, 446-47 (1977) (quoting *Younger* 401 U.S. at 53-54, quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). There is no "clause, sentence [or] paragraph" to even analyze. The challenged action is alleged policies by Judge Davis as to the manner of how 48-hour hearings are conducted and other officials' alleged policies of acquiescing to Judge Davis. To make a determination that these unwritten policies are unconstitutional requires a federal court to undergo an analysis to identify a policymaker and policies or customs, which is precisely what abstention prohibits the court from doing.

Third, Petitioners cite to cases that do not provide a conflict with the Eighth Circuit decision.

1. There is No Indication that the Sixth and Ninth Circuits Considered Whether There was a Distinction Between Policies and Statutes

A. Sixth Circuit

The Sixth Circuit affirmed the district court's decision to abstain. A student brought suit in a federal district court to enjoin a university disciplinary proceeding on the grounds that the disciplinary

proceeding violated his due process rights. The Sixth Circuit affirmed, and rejected the student's argument that the proceedings flagrantly and patently violated his rights.

> Even if abstention is warranted, however, a plaintiff still has the opportunity to show that an exception to *Younger* applies. These exceptions include bad faith, harassment, or flagrant unconstitutionality of the statute or rule at issue. *Fieger* [*v. Thomas*], 74 F.3d [740] at 750 [(6th Cir. 1996)]. For the flagrant unconstitutionality exception, "a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. at 53-54, 91 S.Ct. 746 (quoting *Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 85 L.Ed. 1416 (1941)). That is not the case here. Showing such flagrant unconstitutionality is a high bar, and the University's policy does not reach that level. Doe's argument that in practice the policy was applied in an unconstitutional manner fails as there must be facial unconstitutionality as well as in application. Furthermore, although the UAB did find that Doe was denied his due process rights, that was because Defendant Simpson was not following the policy, not because the policy itself was flagrantly unconstitutional. As such, Doe cannot meet this exception.

Doe v. Univ. of Kentucky, 860 F.3d 365, 371 (6th Cir. 2017). So, the Sixth Circuit found it a loser whether it applied to statutes, policies, or anything else.

B. Ninth Circuit

The same is true in the Ninth Circuit. The Ninth Circuit simply held that the results of the proceedings were not "flagrantly and patently violative." There is no indication that the Ninth Circuit considered or ruled upon a distinction between statutes and policies.

> The CPUC's actions in fining and temporarily suspending CTS from providing long-distance service serve the very purpose specified in § 253(b) of the Act and are not "flagrantly and patently" violative of the Constitution. The CPUC has the power to implement regulations that are "necessary" to "protect the public" against slamming, which reasonably may include fines or suspensions needed to prevent such unlawful activity. Under CTS' analysis of "necessary," a freeze on slamming would be the only action permitted. CTS ignores the reality that fines or suspensions may be required to prevent and deter illegal behavior. More crucially, as the CPUC points out, the suspension handed down against CTS need not be necessary to prevent CTS' slamming; rather, it need only be necessary to serve the interests recognized in § 253(b) of protecting the public welfare.

Communications Telesystems Int'l v. California Pub. Util. Comm'n, 196 F.3d 1011, 1017 (9th Cir. 1999).

Petitioners argue Supreme Court review is warranted because the Eighth Circuit decision creates a conflict. There is no indication that any of the Circuits—the Eighth, Sixth, or Ninth—actually addressed the issue that Petitioners say divide them.

2. Petitioners Misrepresent the Seventh Circuit's holding; It Deals Only with a Statute

Petitioners cite *Mulholland v. Marion County Election Board*, 746 F.3d 811 (7th Cir. 2014) for the proposition that the Seventh Circuit has held that the "flagrantly and patently violative" exception applies "even where the challenged procedures were the product of a policy" rather than a statue. It did no such thing. *Mulholland* is a statute case. The case dealt with an election board's attempt to enforce a statute that had already been ruled unconstitutional.

> If all this were not enough to defeat *Younger* abstention, the second independent reason for not abstaining is that the Election Board is attempting to enforce a statute that has already been held unconstitutional in a final judgment against the Board itself. *Younger* therefore would not apply even if the planned Board meeting were the sort of adjudicative proceeding that would otherwise call for abstention.

Mulholland, 746 F.3d at 818. The Seventh Circuit held that attempting to enforce a statute that was already found unconstitutional by a federal court "represents the sort of 'other unusual circumstance that would call

for equitable relief.'" *Mulholland*, 746 F.3d at 819 (quoting *Younger*, 401 U.S. at 54).

The Petition has the following explanation of *Mulholland*, "(holding that the reference to 'statute' 'is not the test. *Younger* quoted this language as a sufficient condition for rejecting abstention, not a necessary condition.')" That simply misrepresents what the Seventh Circuit said. The Seventh Circuit ruled that the test did not require that every part of a statute be flagrantly and patently unconstitutional.

> The Election Board contends that, although the law was found unconstitutional in *Ogden*, *Younger* abstention is appropriate because the law is not "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." See *Younger*, 401 U.S. at 53–54, 91 S.Ct. 746, quoting *Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 85 L.Ed. 1416 (1941). That is not the test. *Younger* quoted this language as a sufficient condition for rejecting abstention, not a necessary condition, and the Court was referring to a situation in which a law's unconstitutionality seems obvious but has not yet been decided by a court.

Mulholland, 746 F.3d at 818–19. *Mulholland* does not support Petitioners' argument.

3. Pennington County 48-Hour Hearings are not Flagrantly and Patently Violative of Express Constitutional Prohibitions

Even if this Court agreed that the "flagrantly and patently unconstitutional" exception applies equally to unwritten policies, it should deny review because the manner in which 48-hour hearings were conducted was not unconstitutional. Petitioners urge that parents are entitled to court-appointed counsel, to present evidence, to confront witnesses, to a clear statement of the purpose of the proceedings, its possible consequences, and the legal and factual basis for bringing it. Respondents have never disputed that. Indeed, all of those are provided to parents during the abuse and neglect proceedings, and no one disputes that.

The question presented by this lawsuit is whether all of those rights are constitutionally required within 48 hours of an emergency removal. No court – anywhere in the country – has ever so held. While Petitioners point to cases holding that each of those rights is required, at some point in the proceedings, none has ever held that they are constitutionally required no more than 48 hours after an emergency removal. Petitioners have never even referred to another single state that provides such a prompt hearing in emergency removal cases, much less sets out the requirements of that hearing.

What process is due is a flexible standard related to "time, place, and circumstances." *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981). When the state deprives an individual of a liberty

interest, that individual must have "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, (1976). Given the flexible, and context-specific, nature of due process, it cannot be said that not providing a full-blown adversarial evidentiary hearing within 48 hours of an emergency child removal is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. at 53-54.

4. Petitioners Failed to Show Irreparable Injury that is Both Immediate and Great

The Eighth Circuit correctly followed *Moore* when it concluded that Petitioners "have not established that the alleged procedural deficiencies at the 48-hour hearings threaten 'irreparable loss [that] is both great and immediate.'" (Pet. App. 16a) (quoting *Younger*, 401 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926))). Petitioners disagree with this conclusion, but provide no compelling reason as to why it merits review. Instead, they just insist that emergency removals of endangered children constitutes great and immediate irreparable loss despite this Court's direction in *Moore* that "[f]amily relations are a traditional area of state concern" and that a district court "inverts traditional abstention logic when it states that because the interests involved are important, abstention is inappropriate." 442 U.S. 434-35.

CONCLUSION

The Eighth Circuit decision below does not conflict with decisions of this Court or other circuits and did not decide an important question of federal law that has not already been settled by this Court. The Eighth Circuit held that when a federal court plaintiff fails to even attempt to present their claims in a state court of general jurisdiction that provides the right to appellate review, the district court will presume the state procedures will afford an adequate remedy, unless the federal plaintiff provides unambiguous authority to the contrary. Petitioners are simply dissatisfied with the application of the facts to this well-settled law. The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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