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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Respondents forcibly removed children from their families pursuant to a policy that afforded a hearing within 48 hours of removal, but provided parents with no notice, no opportunity to be heard, no right to confront the welfare worker whose affidavit formed the basis of the state's case, and no decision based on evidence introduced in open court. These hearings, which are the only opportunity parents have to challenge the removal of their children for up to sixty days, generally lasted less than five minutes. No parent ever prevailed. Yet the court below maintained that the federal court could not intercede to assure parents these basic protections because it speculated that the parents could in theory have filed a separate state mandamus action to challenge the procedures. That decision is in direct conflict with decisions of three other courts of appeals, and with this Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), a case Respondents do not even mention, much less try to distinguish.

Respondents' principal response to the circuit split Petitioners identified is to point to two other avenues to pursue claims in state court—an appeal from a final disposition order based on a determination of abuse and neglect, and an interlocutory appeal from an "intermediate order." But the first option comes far too late in the day, when the parents have already lost custody of their children for extended periods, and when any issue concerning the procedures provided at the 48-hour hearing will be moot. And the second option is by its terms not available to appeal Temporary Custody Orders issued at the 48-hour hearings. Accordingly,

the only state court option Plaintiffs even theoretically had was to file a separate state mandamus proceeding. But as this Court and three circuits have held, *Younger v. Harris*, 401 U.S. 37 (1971) requires federal court deference only to *ongoing* state proceedings, and does not require individuals to file new state proceedings in lieu of seeking redress in federal court to vindicate federal rights.

Respondents effectively concede that the challenged policy was flagrantly unconstitutional. Their only response is to contend that parents are afforded rights at the subsequent abuse and neglect adjudication. But just as the provision of a fair criminal trial did nothing to remedy the objection in *Gerstein* to the absence of a prompt probable cause hearing upon arrest, so, too, providing process at a final determination of abuse and neglect and disposition of custody, long after the children have been separated from their parents, does nothing to remedy the absence of process at the point of initial removal. The 48-hour hearing is the point at which there is a deprivation triggering due process—and one that will often last for sixty days, as it did in hundreds of cases in the four years examined here.[1]

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[1] Respondents correctly point out that not all of the 823 Indian children involved in 48-hour hearings were removed for the full two months. Opp. 6 n.1. The record shows, in fact, that 260 of those children remained in state custody the full 60 days (31%) and 468 of those children (56%) remained in state custody at least 15 days. *Id.* But the critical point for constitutional purposes is that *all* of the children were removed without rudimentary due process. While Respondents dispute the number, they do not dispute the omnipresent procedural infirmities.

I. PETITIONERS HAD NO ADEQUATE OPPORTUNITY TO RAISE THEIR CONSTITUTIONAL CLAIMS IN THE ONGOING STATE COURT PROCEEDINGS.

The Eighth Circuit held that "[t]he availability of mandamus relief *is sufficient* to show that state proceedings provide an adequate opportunity to litigate federal claims." Pet. App. 20a (emphasis added). For the reasons stated in the Petition, this holding conflicts with the holdings of the First, Third, and Sixth Circuits. Pet. 16-19.[2]

As noted in our Petition, the First, Third, and Sixth Circuits have all held that the availability of a separate state lawsuit does *not* require *Younger* abstention where there is not an adequate opportunity to raise federal claims in the ongoing state proceedings. *See Fernandez v. Trias Monge*, 586 F.2d 848, 851-53 (1st Cir. 1978) (explaining that

[2] Respondents argue, without citation to any authority, that Petitioners waived their objection to *Younger* abstention by not raising it in their petition for rehearing. But a party can seek certiorari without seeking rehearing at all, so there is no basis for such a rule. In any event, Petitioners *did* raise in their petition for rehearing the issues on which they now seek certiorari. *See* Br. of Plaintiffs-Appellees at 2, *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018) (No. 17-1135) ("I. Plaintiffs Did Not Have an Adequate Opportunity"); *id.* at 12 ("III. Defendants' Policies were Flagrantly and Patently Unconstitutional"). Moreover, it is well established that parties do not waive arguments, provided that the legal claim was raised below. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (allowing party to make a different argument in the Supreme Court than in the courts below because the argument was in "support [of] what has been [a] consistent claim[.]" (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)).

the plaintiff had no adequate opportunity to raise federal claims in the ongoing proceeding, and the fact that plaintiff could have filed a separate state injunctive action "is of no consequence"); *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 412-13 (3d Cir. 2005) (explaining that where the "availability of a claim in state court is questionable" there is not an adequate opportunity, and the fact that "the party may then file a separate mandamus action" to raise that claim is not sufficient); *Habich v. City of Dearborn*, 331 F.3d 524, 531-32 (6th Cir. 2003) (holding that where the defendant conceded the plaintiff's "due process and equal protection claims would not have arisen in the state proceedings as those proceedings existed," the fact that "plaintiff could file a new complaint in state court that alleged her federal claims" did "not provide the 'opportunity' for review that *Younger* requires").[3]

Respondents seek to avoid this conflict by arguing that the Eighth Circuit also cited two other possible avenues for Petitioners to raise their claims: (1) an appeal from a final order of disposition of the child; and (2) an interlocutory appeal from an "intermediate order." Opp. 14-15. But neither of these opportunities could even possibly redress Petitioners' injuries.

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[3] *See also Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1008 (10th Cir. 2015) (Gorsuch, J.) ("[F]or *Younger* abstention to apply, there must be an ongoing state judicial . . . proceeding, the presence of an important state interest, and an adequate opportunity to raise federal claims *in the state proceedings*." (emphasis added) (quoting *Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 711 (10th Cir. 1989)).

An appeal from final disposition of an abuse and neglect proceeding affords no opportunity to redress deficiencies in the 48-hour hearing. At that stage, the appeal concerns the determination of abuse and neglect and the custody disposition. The appeal can provide no relief to the parents who lost custody of their child at the 48-hour hearing, as the Temporary Custody Order is no longer effective, and the family separation without due process has already occurred. Any procedural issues relating to the 48-hour proceeding will be moot, and the South Dakota Supreme Court can provide no redress for the irreparable injury already suffered.

Nor is an intermediate appeal available. Respondents cite no authority for their assertion that the "Temporary Custody Order" issued in a 48-hour hearing is subject to interlocutory appeal, and there is none. The only statute Respondents cite authorizing an appeal of an "intermediate order" is S.D. Codified Laws § 26-7A-87, Opp. 14-15, and that provision has nothing to do with 48-hour hearings. It states only that *"[t]he order of adjudication* is an intermediate order and is subject to intermediate appeal with the permission of the court." (emphasis added). But a Temporary Custody Order issued at a 48-hour hearing is not an order of adjudication. Rather, as Respondents concede, Opp. 7, the "order of adjudication" in an abuse and neglect proceeding follows the "adjudicatory hearing," which takes place *after* the advisory hearing, which in turn is held approximately 60 days *after* the 48-hour hearing. *See* Pet. 6-8.[4] The statutes governing the 48-hour

[4] The order of adjudication is non-final because it is followed by a final decree of disposition. "After adjudication, the court shall conduct dispositional hearings . . . . Following the

hearing, by contrast, do not identify the "Temporary Custody Order" as an "intermediate order" nor do they authorize an "intermediate appeal." S.D. Codified Laws § 26-7A-14 through -21. Respondents have cited not a single case in which the South Dakota Supreme Court has granted an intermediate appeal from a 48-hour hearing, and Petitioners are aware of none. This option is by the statute's terms limited to "orders of adjudication" and affords no opportunity to challenge the procedures in a 48-hour hearing.

The two South Dakota Supreme Court cases cited by Respondents are inapposite. *See* Opp. 15. Both are appeals from decisions regarding motions to transfer a case to tribal authority. Under the Indian Child Welfare Act, a tribe has a right at any time during the state proceeding to request that a custody case be transferred to the tribal court. *See* 25 U.S.C. 1911(b). A court's decision on a motion to transfer to tribal authority is final as to that issue. In contrast, the 48-hour hearing order, which ceases to have legal effect as of the next hearing, is not a final or intermediate order on *any* issue.

This is not a case in which "a litigant has not attempted to present his federal claims in state-court proceedings." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987). Parents repeatedly *did* object to the absence of process during the 48-hour hearings and

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dispositional hearing, the court shall issue an interim decree of disposition. . . . On completion of the final dispositional hearing the court shall issue findings of fact, conclusions of law, and a final decree of disposition. The decree shall be the final order of the court for the purpose of an appeal." S.D. Codified Laws § 26-7A-90; *see* S.D. Codified Laws § 26-8A-22; *see also* Pet. 8; Opp. 7.

in no case did the court do anything to remedy it. *See* Pet. App. 114a-115a. Even after the federal district court ruled on summary judgment that the 48-hour hearing procedures were constitutionally infirm, the state court refused to provide all of the procedures the district court held were minimally necessary. *See* Pet. App. 57a, 50a-51a. Thus, Petitioners have provided "unambiguous authority" that the state court procedures are inadequate. *Pennzoil Co.*, 481 U.S. at 15.

In short, the only conceivable state "remedy" available to Petitioners was to file an entirely separate mandamus proceeding. The court of appeals deemed that opportunity "sufficient" to require abstention, in direct conflict with three other circuits. This Court should grant certiorari and make clear that *Younger* requires abstention only when individuals can pursue their federal claims in the ordinary course of the ongoing state proceeding.

II. *GERSTEIN V. PUGH* DEMONSTRATES THE PROPRIETY AND NECESSITY OF FEDERAL JUDICIAL INTERVENTION HERE.

As Petitioners argued in their Petition, this case is on all fours with *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975), for purposes of *Younger* abstention. Pet. 20. There, as here, plaintiffs challenged the adequacy of an initial hearing to test the validity of a deprivation of liberty—a warrantless arrest in *Gerstein*, the removal of children here. This Court held in *Gerstein* that *Younger* abstention was not required because the legality of pretrial detention without a judicial hearing "could not be raised in defense of the criminal prosecution." *Id.* The same

holds true here, as the legality of the procedures in the 48-hour hearing are not reviewed at any subsequent stage of the abuse and neglect proceeding, which is instead focused on whether a final order of abuse and neglect is warranted.

The state procedures in *Gerstein* were inadequate because they would either come too late to remedy the deficiency, as was the case with the "special statute allowing a preliminary hearing after 30 days;" or were available only in theory, as was the case with "arraignment," which could provide a judicial determination of probable cause, but "was often delayed a month or more after arrest." 420 U.S. at 106. In *Gerstein*, as here, the individual in theory could file a separate state action—there, a habeas petition, here, a mandamus petition. But such a filing would not be in the ordinary course of the state court proceeding, and the availability of a separate state proceeding did not relieve the federal court of its unflagging obligation to decide federal claims.

III. CERTIORARI IS ALSO WARRANTED BECAUSE THE COURT OF APPEALS ERRED IN LIMITING THE "FLAGRANTLY AND PATENTLY UNCONSTITUTIONAL" EXCEPTION TO CASES CHALLENGING STATE STATUTES, NOT STATE POLICIES, IN CONFLICT WITH THREE OTHER CIRCUITS.

Respondents concede that the court below declined to apply the exception to *Younger* abstention for "flagrantly and patently . . . unconstitutional" state action because the state action here took the

form of a policy rather than a statute. *See* Opp. 3 ("The Eighth Circuit correctly noted Petitioners did not challenge the constitutionality of any statute at all making the extremely narrow exception inapplicable."). As Petitioners pointed out, Pet. 26-28, three other circuits have properly recognized, in conflict with the court below, that the "flagrantly and patently . . . unconstitutional" exception encompasses state action other than statutes, including flagrantly unconstitutional policies.[5] As this Court has explained, *Younger*'s reference to a statute was simply "one example of the type of circumstances that could justify federal intervention." *Kugler v. Helfant*, 421 U.S. 117, 125 n.4 (1975). The comity principles that underlie *Younger* abstention provide no basis for distinguishing flagrantly unconstitutional state *statutes* from equally unconstitutional state *policies*. Nor do Respondents.

In fact, Respondents effectively concede that the 48-hour procedures are flagrantly unconstitutional. Their only rejoinder to the argument that removing children without meeting the bedrock principles of due process is unconstitutional is to claim that it is sufficient that the parents will be provided due process *later*. But that is like saying that as long as a defendant gets a

[5] Respondents accuse Petitioners of misrepresenting the Seventh Circuit's holding in *Mulholland v. Marion County Election Board*, 746 F.3d 811 (7th Cir. 2014) because that case "[d]eals *[o]nly* with a [s]tatute." Opp. 24 (emphasis added). But the Seventh Circuit's application of the exception turned not on the text of the statute, but on the "the Election Board's attempt to enforce a law that a federal court has already told the Board in a final judgment is unconstitutional." *Id.* at 819. In other words, plaintiffs challenged the policy of the Election Board to enforce a statute already declared invalid.

fair trial it does not matter if he or she is denied a prompt and fair probable cause or bail hearing. *But see Gerstein*, 420 U.S. 103. This Court has repeatedly rejected the notion that a failure to provide timely notice and hearing can be "cured" by providing those mandated procedures later. *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). As a unanimous Court explained in a related context, the failure to provide adequate notice at the outset "violates 'the most rudimentary demands of due process of law'" and the notion that procedural shortcomings at the outset can be justified by subsequent events "is untenable." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84, 85 (1988) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)). The purpose of process at the 48-hour hearing is to ensure that the parent does not lose custody of her child *at that point* without a meaningful opportunity to be heard, just as the purpose of a meaningful hearing on probable cause or bail is to ensure that an arrestee is not detained without a meaningful opportunity to challenge his detention *at that point*. Providing an opportunity to be heard two months later does not redress the fundamental constitutional problem, which is that the state is taking children from their parents without affording the parents a prompt and meaningful opportunity to be heard after the child's initial removal and before the child is taken away for an extended period of time.

Child custody "is perhaps the oldest of the fundamental liberty interests recognized by this Court" and deserves "heightened protection against governmental interference" under the Due Process

Clause. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). Faced with flagrant, blatant, and virtually weekly violations of fundamental rights, the district court appropriately denied the motion to abstain. The court of appeals' decision is contrary to *Gerstein* and the decisions of multiple other courts of appeals, and should be reversed.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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Date: July 22, 2019