No. _____

In the
Supreme Court of the United States

HAMILTON COUNTY JOB AND FAMILY SERVICES, ET AL.,
Petitioners,

v.

JOSEPH AND MELISSA SIEFERT,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the Sixth Circuit err when it failed to conduct an individualized analysis of Petitioners' actions before blanketly rejecting their asserted defense of qualified immunity?

B. Did the Sixth Circuit err when it determined that, through a footnote, it was clearly established that a children's services caseworker has an affirmative duty to protect parental due process rights when a child is hospitalized and no child custody proceedings have been initiated?

C. Whether this Court should resolve the circuit conflict on the important federal question of whether a private, non-profit hospital and private healthcare providers, are state actors subject to claims under 42 U.S.C. § 1983 when they simply provide medical care and cooperate with a county Job and Family Services Department for the appropriate treatment of a suicidal minor.

PARTIES TO THE PROCEEDINGS

Petitioners Cincinnati Children's Hospital Medical Center ("CCHMC"), Jennifer Bowden, M.D., Kimberley Stephens, LISW, Ankita Zutshi, M.D., Daniel Almeida, M.D., Suzanne Sampang, M.D., and Lauren Heeney (collectively, "CCHMC Petitioners") were the Defendants in the District Court and the Defendant-Appellees in the Court of Appeals.

Petitioners Hamilton County, Board of Hamilton County Commissioners, Moira Weir, Eric Young, and Rachel Butler (collectively, "HCJFS Petitioners") were the Defendants in the District Court and the Defendant-Appellees in the Court of Appeals.

Respondents Joseph and Melissa Siefert ("Respondents") were the Plaintiffs in the District Court and the Plaintiff-Appellants in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, undersigned counsel state as follows:

None of the Petitioners are publicly traded companies or have parent entities that are publicly traded companies.

RELATED CASES

Apart from the proceedings directly on review in this case, there are no other directly related proceedings in any court.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals. The Sixth Circuit's decision in this case conflicts with other Circuit Court precedent and precedent from this Court on critically important questions of federal law.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Siefert v. Hamilton County*, 951 F.3d 753 (6th Cir. 2020). The Sixth Circuit affirmed in part and reversed in part the November 15, 2018 decision of the United States District Court for the Southern District of Ohio, which is reported at 354 F. Supp.3d 815 (S.D. Ohio 2018).

STATEMENT OF JURISDICTION

Petitioners seek a review from this Court of the Sixth Circuit's Opinion and Judgment, dated March 3, 2020, affirming in part and reversing in part the decision of the District Court. Petitioners timely sought a rehearing from the Sixth Circuit, which was denied by Order dated April 23, 2020. Pursuant to this Court's Order dated March 19, 2020, the deadline to file any petition for a writ of certiorari was extended to 150 days from the lower court order denying a timely petition for rehearing. Thus, September 21, 2020 is the deadline for this petition to be timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 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.

The 14th Amendment of the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code § 2151.421(A)(1) provides in relevant part:

> (a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age . . . has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division.
>
> (b) Division (A)(1)(a) of this section applies to any person who is a . . . health care professional . . . employee of a county department of job and family services who is a professional and who works with children and families.

Ohio Revised Code § 2151.421(D) provides in relevant part:

> (1) Any person, who is required by division (A) of this section to report child abuse or child neglect that is known or reasonably suspected or believed to have occurred, may take or cause to be taken color photographs of areas of trauma visible on

a child and, if medically necessary for the purpose of diagnosing or treating injuries that are suspected to have occurred as a result of child abuse or child neglect, perform or cause to be performed radiological examinations and any other medical examinations of, and tests or procedures on, the child.

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(3) If a health care professional provides health care services in a hospital, children's advocacy center, or emergency medical facility to a child about whom a report has been made under division (A) of this section, the health care professional may take any steps that are reasonably necessary for the release or discharge of the child to an appropriate environment. Before the child's release or discharge, the health care professional may obtain information, or consider information obtained, from other entities or individuals that have knowledge about the child. Nothing in division (D)(3) of this section shall be construed to alter the responsibilities of any person under sections 2151.27 and 2151.31 of the Revised Code.

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(5) Medical examinations, tests, or procedures conducted under divisions (D)(1) and (4) of this section and decisions

> regarding the release or discharge of a child under division (D)(3) of this section do not constitute a law enforcement investigation or activity.

INTRODUCTION

With respect to the HCJFS Petitioners, the Sixth Circuit's decision subjects three public servants, sued in their individual capacities, to potential personal liability for actions taken in relation to the protection of a child. Qualified immunity in this context is a particularly important defense as children's services workers necessarily must champion the state's weighty interest in the protection and well-being of children within its jurisdiction, while also carefully avoiding actions which violate parental rights. When the Sixth Circuit reversed the District Court's decision on qualified immunity without conducting any analysis whatsoever of the HCJFS Petitioners' individual actions, it did so in violation of well-settled precedent. Moreover, the Sixth Circuit dangerously elected to declare a proposition of law as clearly-established when its only in-circuit appearance is in a footnote. While qualified immunity understandably should not be so broadly applied so as to make plaintiffs unable to pursue redress for official actions that violate their rights, courts should be careful not to let cases proceed without clearly-established precedent and without any individualized analysis of the alleged facts. This Court should accept jurisdiction in this case and reverse the Sixth Circuit's finding the Respondents asserted a claim that the HCJFS Petitioners violated clearly-established constitutional rights, and further reversing

the Sixth Circuit's wayward decision to make a judgment regarding qualified immunity without conducting any individualized analysis of Petitioners' alleged actions.

With respect to the CCHMC Petitioners, the Sixth Circuit's decision renders a private, non-profit hospital and its employees state actors subject to claims under 42 U.S.C. § 1983 when they simply provided medical care, complied with state child-abuse reporting statutes, and coordinated with a county Job and Family Services Department for the appropriate treatment of a suicidal minor. The Sixth Circuit's decision conflicts with precedent established by this Court and other Circuit Courts. Additionally, there does not appear to be any Sixth Circuit precedent finding a private, non-profit hospital to be a state actor under such circumstances. Thus, the Sixth Circuit's decision appears to be the first of its kind, further demonstrating that this case involves questions of exceptional public importance under federal law.

Indeed, the Sixth Circuit's decision allows a plaintiff to overcome the general rule that a private, non-profit hospital is not a state actor by simply pleading that the hospital and its employees cooperated with the HCJFS Petitioners for the appropriate treatment of a suicidal minor while the HCJFS Petitioners actively investigated suspected abuse by the child's parents. The Sixth Circuit's decision will expose private hospitals and physicians to liability under 42 U.S.C. § 1983 every time they collaborate with state agencies to meet their legal duties. Such exposure will have an inevitable chilling effect when cooperation between a

hospital and a state agency is necessary to care for a child in need of help, particularly from parents who are alleged to be abusive.

Moreover, the relevant Ohio statute specifically states that healthcare professionals may take any steps reasonably necessary for the release or discharge of a child to an appropriate environment, and that a healthcare professional's decisions related to the discharge of a minor patient do not constitute law enforcement investigation or activity (*i.e.* state action). *See* Ohio Revised Code § 2151.421(D). The District Court, in granting the CCHMC Petitioners' motion to dismiss, appropriately held that the CCHMC Petitioners' rendering of medical care and compliance with state reporting statutes did not transform them into state actors subject to claims under 42 U.S.C. § 1983. App. 71-73. This Court should accept jurisdiction and reverse the Sixth Circuit's Order finding the CCHMC Petitioners are state actors subject to claims under 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Minor Siefert Was Voluntarily Admitted to CCHMC After Reporting Abuse by Respondents.

Respondents in this case, Joseph and Melissa Siefert, alleged that their Fourteenth Amendment procedural and substantive due process rights in the custody and care of their child ("Minor Siefert") were violated by the Petitioners. The basis for federal jurisdiction in the first instance was that of federal question jurisdiction conferred by 28 U.S.C. § 1331. The

alleged violation occurred in relation to Minor Siefert's hospitalization and the Respondents' subsequent efforts to have Minor Siefert discharged from the hospital into their custody.

Minor Siefert was born a biological girl, however, around the age of fifteen, Minor Siefert informed Respondents that she considered herself to be a transgender child. (RE 1, P. 3).[1] Minor Siefert also informed Respondents that she was suffering from depression, anxiety, and suicidal ideations. (RE 1, P. 3, 7).

On or about November 10, 2016, Minor Siefert sent an email to HCJFS stating that she was experiencing transgender thoughts and explaining that "her parents were not supportive and that their conduct towards her amounted to abuse." (RE 1, P. 7). As HCJFS initiated an investigation into the suspected abuse of Minor Siefert, on or about November 13, 2016, Respondents took Minor Siefert to CCHMC to "conduct a psychological evaluation regarding suicidal ideations," based upon a pediatrician's recommendation. (RE 1, P. 7-8). On or about November 14, 2016, Minor Siefert was transferred to a CCHMC psychiatric facility. (RE 1, P. 8).

While at CCHMC, Respondents allege Minor Siefert was treated by the CCHMC Petitioners as part of a multidisciplinary team, including physicians,

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[1] Respondents filed the Complaint under seal in the District Court due to the highly sensitive nature of the allegations in the Complaint, including details related to medical care received by a minor.

representatives of nursing staff, clinical pharmacy, and social workers. (RE 1, P. 10). As Respondents' allegations acknowledge, the CCHMC Petitioners held multiple family meetings with Respondents in order to discuss Minor Siefert's discharge to an appropriate environment. (RE 1, P. 11-14). HCJFS continued its child-abuse investigation throughout the time Minor Siefert was a patient at CCHMC. (RE 1, P. 11-17). As expected, a certain amount of communication about Minor Siefert took place between the CCHMC Petitioners and the HCJFS Petitioners.

On or about December 20, 2016, Respondents agreed to enter into a voluntary safety plan, in which Respondents agreed to allow Minor Siefert to temporarily stay with Minor Siefert's maternal grandparents to help ensure the child's safety. (RE 1, P. 17). After entering into the voluntary safety plan, which allowed Minor Siefert to be discharged to an appropriately safe environment, Minor Siefert was discharged on December 20, 2016. (*Id*.).

B. Allegations against HCJFS Petitioners Weir, Butler, and Young.

On August 1, 2017, Respondents filed the instant lawsuit against Petitioners. On August 2, 2018, the District Court dismissed this case on Petitioners' respective Rule 12(b)(6) motions. App. 74-75. Therefore, the facts material to the consideration of the questions presented herein are those alleged in the Complaint. Regarding HCJFS Petitioners Weir, Butler, and Young, who are seeking to appeal the rejection of their asserted defense of qualified immunity, the particular facts that are material are

those allegations of actions taken by each individual Petitioner.

Weir. Moira Weir is identified in paragraph 6 of the Complaint as the director of HCJFS and as having the authority to make official policy and custom in the agency and to train and supervise staff. (RE 1, P. 4). The Complaint alleges that Weir responded to an email that Minor Siefert had sent to HCJFS, telling Minor Siefert that she had forwarded the email to the Hamilton County Public Children's Services Agency. (RE 1, P. 8). In paragraph 134, the Complaint asserts that Weir, as director of HCJFS, had the duty to adopt rules for training caseworkers and supervisors. (RE 1, P. 23). Lastly, the Complaint demands relief against Weir in the demand for relief at the end of the Complaint.

Of these minimal references to Weir made in the Complaint, only one of them alleges an action taken by Weir – responding to an email sent to HCJFS by Minor Siefert.

Butler. Rachel Butler is identified in paragraph 8 of the Complaint as a HCJFS Children's Services caseworker. (RE 1, P. 4). The Complaint alleges a number of actions taken by Butler. Butler went to the Sieferts' home on November 10, 2016, which is the same day that Minor Siefert sent an email to HCJFS. (RE 1, P. 7). Butler spoke to Mrs. Siefert while she was there and asked several questions regarding the children in the home and the treatment of Minor Siefert. (RE 1, P. 8). Respondents consulted with HCJFS representatives, including Butler regarding Minor Siefert's treatment while hospitalized. (RE 1,

P. 9-10). During the first such conference, Butler allegedly explained the "custom and policy of HCJFS" regarding parents removing their children from the hospital, and stated that the hospital would not send Minor Siefert home without permission from HCJFS. (RE 1, P. 10). Butler is further alleged to have said that before Minor Siefert would be allowed to leave, HCJFS had to make sure they put Minor Siefert in the right place, and that if Respondents were unable to take care of Minor Siefert, HCJFS would do so. (*Id.)*.

Butler later failed to attend a family discharge meeting on November 22, 2016 which she was scheduled to attend. (RE 1, P. 11). It was represented to the Respondents that Butler was unavailable until November 28, 2016, but the Respondents learned that Butler was in contact with Ms. Stephens regularly during this time. (RE 1, P. 11-12). Butler also met with Minor Siefert on November 23, 2016. (RE 1, P. 12). During this time period, HCJFS reported that it was actively pursuing the case, yet the agency did not make any attempt to obtain a court order for custody. (*Id.*).

On November 23, 2016, while he was trying to have Minor Siefert discharged, Mr. Siefert left calls for HCJFS personnel, including Butler, but received no return calls. (*Id.*). Butler was in contact with Ms. Stephens during this time, and Butler allegedly told Ms. Stephens that the parents could not take Minor Siefert home. (RE 1, P. 13).

On November 28, 2016, Butler attended the scheduled meeting by telephone, only participating in part of the meeting and was distracted with other

matters during the call. (*Id.*). When asked what Respondents had to do to have their child discharged, Butler responded saying "it does not work that way" and stated that HCJFS must step in when parents are unable to care for their children. (RE 1, P. 14). Butler ended her call into the meeting without resolving the Respondents' concerns regarding discharge. (*Id.*).

On November 30, 2016, the morning after Mr. Siefert exchanged emails with County Administrator Jeff Aluotto, Butler called Mr. Siefert to set up a meeting between herself, the Respondents, and her supervisor Eric Young to discuss their case. (RE 1, P.15). Butler and Young met with the Respondents at HCJFS in a conference room. (RE 1, P. 16).

On December 7, 2016, Young and Butler told Ms. Stephens that Minor Siefert could not go home. (RE 1, P. 17).

Young. Eric Young is identified in paragraph 7 of the Complaint as a HCJFS Children's Services caseworker supervisor. (RE 1, P. 4). The Complaint alleges Young took part in the November 30, 2016 meeting with Respondents and Rachel Butler. (RE 1, P. 15). During the meeting, Young referred to HCJFS as "we." (RE 1, P. 16). Further, during the meeting, Young described HCJFS policies and procedures, including the agency's duty to investigate claims and to make judgment calls. (*Id.*). In particular, the Complaint alleges that Young explained:

> "the HCJFS policy of preventing parents from having custody or association of their children when Children's doctors and/or HCJFS officials

> do not approve of releasing the child to the parents, even without parents' consent or a court order. In Mr. Young's words, the policy amounted to: "we have to go by what the doctors say."

(*Id.*). Finally, Young informed Ms. Stephens on December 7, 2016 that Minor Siefert could not go home. (RE 1, P. 17).

REASONS FOR ALLOWING THE WRIT

A. Petitioners Weir, Young, and Butler, in their Individual Capacities, Have Asserted the Defense of Qualified Immunity, and well-settled Sixth Circuit Law Demands that they Receive an Evaluation of that Defense Based on their Individual Actions. These Petitioners Received No such Evaluation.

Petitioners Weir, Young, and Butler have each asserted the defense of qualified immunity in this case. The Sixth Circuit has well-settled case law explaining how a qualified immunity defense must be evaluated. Though counsel for the HCJFS Petitioners represent multiple defendants, "[i]n evaluating a qualified immunity defense, it is well established that '[e]ach defendant's liability *must be assessed individually based on his own actions*.'" *Booker v. LaPaglia*, 617 Fed.Appx. 520, 524 (6th Cir. 2015), *quoting Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010), *citing Dorsey v. Barber*, 517 F.3d 389, 399 n. 4 (6th Cir. 2008) (emphasis added); *Ghandi v. Police Dept. of City of Detroit*, 747 F.2d 338, 344 (6th Cir. 1984) (noting that where individual defendants played different roles in

the alleged factual circumstances, the conduct of each defendant must be examined to make a determination on qualified immunity). Such an individualized analysis is necessary "to ensure that a defendant's liability is assessed based on his own individual conduct and not the conduct of others." *Id.*, *quoting Pollard v. City of Columbus*, 780 F.3d 395, 402 (6th Cir. 2015). When the district court fails to conduct an individualized analysis (as happened in this case), an appellate court has the authority to review the record to evaluate the defense. *Id.*, *citing Johnson v. Jones*, 515 U.S. 304, 319, 115 S.Ct. 2151 (1995).

Moreover, decisions issued by the Courts of Appeals for the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits hold that each defendant's entitlement to qualified immunity must be considered separately. *See, e.g., Drimal v. Tai*, 786 F.3d 219, 226 (2d Cir. 2015); *Grant v. City of Pittsburgh*, 98 F.3d 116, 123 (3d Cir. 1996); *Meadours v. Ermel*, 483 F.3d 417, 422 (5th Cir. 2007); *Bakalis v. Golembeski*, 35 F.3d 318, 326-27 (7th Cir. 1994); *Manning v. Cotton*, 862 F.3d 663, 668 (8th Cir. 2017); *Stivers v. Pierce*, 71 F.3d 732, 750-51 (9th Cir. 1995); *Hicks v. City of Watonga, Okla.*, 942 F.2d 737, 747 (10th Cir. 1991); *Waldrop v. Evans*, 871 F.2d 1030, 1034 (11th Cir. 1989).

In this case, the District Court found no constitutional violation had been pled by the Respondents, therefore Judge Black did not proceed to conduct an individualized analysis of each defendant's conduct. App. 40-41; *see Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable

to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). The Sixth Circuit conducted its legal analysis while grouping HCJFS Petitioners together and never sought to evaluate each Petitioner's individual actions. While the opinion includes a recitation of facts alleged in the Complaint, the qualified immunity analysis only refers generally to the collective action of all Petitioners before concluding that the District Court's grant of qualified immunity was premature at this stage of the litigation. The resulting opinion, therefore, is out of step with well-established Sixth Circuit precedent, out-of-circuit precedent, and Supreme Court law.

With particular regard to HCJFS Petitioner Weir, the Sixth Circuit's opinion includes no reference to her whatsoever outside of the caption. Ostensibly, the appellate court determined that Weir's alleged actions may plausibly have amounted to a procedural due process violation. Without the individualized analysis from the appellate court, however, the District Court and the parties will be proceeding in a shadow of uncertainty. What further factual development is necessary to establish that Petitioners Weir, Butler, and Young are entitled to qualified immunity? Or, on the other hand, what factual development might the Respondents seek to establish to show that qualified immunity should not apply? As explained herein, the Complaint alleges a single action taken by Weir - a reply to an email from Minor Siefert. For understandable reasons, the Sixth Circuit saw no need to include reference to this in their recitation of facts.

It is not understandable, however, why Weir's individual assertion of qualified immunity received no attention in the appellate court's analysis, nor is it understandable why she should still be subjected to a possibility of individual liability in this matter.

Likewise, there is uncertainty with how to proceed as to Petitioners Butler and Young and the cases for and against their individual liability in this case. Which actions alleged in the Complaint are deserving of more attention during the prospective litigation?

A reasonable interpretation of the Sixth Circuit's Opinion is that the Complaint alleges a plausible case that the actions of the individual HCJFS Petitioners amounted to a deprivation of the Respondents' procedural due process rights. But without any analysis of each HCJFS Petitioners' individual actions, the Sixth Circuit has acted in a manner contrary to its own well-settled precedent. Since the appellate court declined to rehear the matter, a petition of certiorari is the only redress left for these Petitioners. If this Court does not grant this petition and reverse the decision of the Sixth Circuit, the prospective District Court proceedings will be conducted under a shadow of uncertainty, and summary judgment will necessarily include a re-litigation of certain items that should have been settled before the case was remanded to the District Court.

The purpose of qualified immunity is defeated if the analysis is left incomplete and improperly applied. Indeed, this Court has stated that "[b]ecause qualified immunity 'is an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is

erroneously permitted to go to trial.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808 (2009), *quoting Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806 (1985). While permitting a case to proceed past a Rule 12 motion and to summary judgment is not the same as letting a case go to trial, this Court has further recognized that "the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved *prior to discovery*.'" *Id.*, *quoting Anderson v. Creighton*, 483 U.S. 635, 640, n. 2, 107 S.Ct. 3034 (1987) (emphasis added).

This case, should it proceed, will likely involve an extensive and lengthy discovery phase. Minor Siefert was hospitalized for several weeks. Numerous doctors, nurses, and other hospital staff witnessed the events that took place at the hospital and were involved in Minor Siefert's care and Respondents' efforts to have their child discharged. There will be a necessary evaluation of the medical records, which may necessitate the hiring of experts to provide professional opinions. In total, the undersigned counsel estimate that thirty or more depositions may occur. Qualified immunity, where appropriately applied, is meant to prevent individual capacity defendants from the necessity of expending the cost and resources associated with such discovery. While this Court may decide to not reverse the appellate court's judgment, the law demands that the HCJFS Petitioners' claims of qualified immunity be addressed individually to protect them from such burdens in continued litigation. Providing that individualized analysis will, at the very

least, narrow some of the issues, thereby reducing the burden of continued litigation for all parties involved.

B. It is Not Clearly Established Law in the Sixth Circuit that a Caseworker has an Affirmative Duty to Protect Parental Due Process Rights When a Child is Hospitalized and Prior to the Initiation of Any Child Custody Proceedings.

Dovetailing with the individualized analysis of a qualified immunity defense, it must be clearly established that certain actions taken by a caseworker would violate the due process rights of parents in order for the Respondents' case to proceed. The Sixth Circuit's opinion erroneously concludes that Sixth Circuit law is clear in this case.

The Sixth Circuit has previously analyzed Ohio law regarding children's services caseworkers and parents' due process rights. In *Pittman v. Cuyahoga County Dept. of Children and Family Services*, 640 F.3d 716 (6th Cir. 2011), the court cited to Ohio R. Juv. P. 15(A) and Ohio Revised Code § 2151.29 while determining that "it is the juvenile court's responsibility to ensure that [the parent] received adequate notice of the custody proceedings." *Pittman*, 640 F.3d at 730. Thus, the Sixth Circuit has found that, even where a caseworker has taken affirmative steps to extinguish a parent's constitutionally protected parental rights, that caseworker is not the entity responsible for the provision of due process.

The Respondents' case does differ from *Pittman* in certain respects, but the overall basis of the *Pittman* decision should not be overlooked. A caseworker is not

the party to advise parents on their rights, as the caseworker has a duty to represent the state's interest. Applying *Pittman* to this case, the inquiry shifts: what duties does a caseworker have to inform parents of their rights when the child is hospitalized and no custody proceedings have been initiated to extinguish the parents' custody of their child? It is not logical to extend the thrust of *Pittman*'s discussion to conclude that a caseworker has a duty to protect the parents' child custody rights when 1) the caseworker, again, has a duty to represent the state's interest, and 2) there have been no formal steps taken to extinguish the parents' custody of their child. Therefore, *Pittman* provides support for the HCJFS Petitioners' position.

The HCJFS Petitioners, however, do not contend that *Pittman*'s decision is wholly dispositive of the question at hand. While it is revealing to the Sixth Circuit's general tenor on the subject, if there are other in-circuit cases on point with fact patterns substantially similar to the Respondents,' there may yet be clearly established rights to litigate further before granting qualified immunity. The appellate court concluded that such a case exists, citing *Kottmyer*. Specifically, the Sixth Circuit cited a footnote for the proposition that "when state officials do not allow parents to remove a child from the hospital until the defendants say so, that can 'be construed to interfere with parental custody of a child.'" App. 18-19, *quoting Kottmyer v. Maas*, 436 F.3d 684, 691 n.2 (6th Cir. 2006).

Primarily, it is crucial to recognize that a footnote is dicta and cannot be established law. While dicta has

been recognized has having "persuasive precedential value," *Jordan v. Gilligan*, 500 F.2d 701, 707 (6th Cir. 1974), it is not binding, and therefore not clearly established. This Court has commented on how clearly established law must be in order to put a defendant on notice, admonishing courts "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S.Ct. 2074 (2011). While a case that is directly on point is not required to clearly establish a point of law, the "existing precedent must have placed the statutory or constitutional question *beyond debate*." *Stanton v. Sims*, 571 U.S. 3, 6, 134 S.Ct. 3 (2013), *quoting al-Kidd*, 131 S.Ct. at 2083 (emphasis added); *see also Wilson v. Layne*, 526 U.S. 603, 616 (1999) (recognizing that unpublished opinions and opinions from intermediate state courts cannot create a clearly-established proposition of law). In fact, the Sixth Circuit has recognized this, and stated that, in order for law to become clearly established, it must be particularized to the facts of the case. *Vanderhoef v. Dixon*, 938 F.3d 271, 278 (6th Cir. 2019), *citing White v. Pauly*, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017).

Looking closely at the *Kottmyer* footnote, there is no clearly established law therein. The footnote, at best, establishes that there are "some circumstances" where parents being told they could not remove their child from the hospital until a social worker allows them could be construed to interfere with custody rights. But the footnote concludes that *Kottmyer* is not one of those cases. *Kottmyer v. Maas*, 436 F.3d 684, 691 n.2 (6th Cir. 2006). Moreover, the footnote fails to proceed to identify when such a fact pattern rises to the level necessary to where such alleged facts constitute a

claim. It is impossible, then, to conclude from *Kottmyer* that the constitutional rights discussed therein are beyond debate such that this Court's admonition is adhered to.

The remaining case citations in this area of the Sixth Circuit's opinion are either not on point with regard to a social worker or case worker telling a parent they cannot remove their child from a hospital, or are out-of-circuit cases which cannot prove that the law in this circuit is clearly established. Nor do the cited cases and dicta amount to a "robust consensus" of persuasive authority such that this Court's admonition is followed. *See al–Kidd, supra,* at 741–742*,* 131 S.Ct. 2074 *(quoting Wilson v. Layne,* 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)). For this reason, Petitioners urge this Court to grant this petition for a writ of certiorari in which the analysis of the law as applied to these individual Petitioners can be revisited and conducted in accordance with the well-established law regarding qualified immunity. While the question of the Respondents' consent may not be resolvable at this stage of the litigation, these individual Petitioners should not be subjected to potential individual liability on constitutional rights not yet clearly established in this circuit.

This matter is of significant importance beyond this case. Throughout the various jurisdictions within the Sixth Circuit, caseworkers and social workers are tasked with carrying out their job duties while preserving the delicate balance between parents' constitutional rights and the state's interest in the health and well-being of children. Because of this,

qualified immunity is an important defense that allows these public servants to perform their job duties without unnecessary fear of subsequent individual liability for doing something which has not clearly been established to be a constitutional violation. Should the Sixth Circuit's opinion stand, not only will these Petitioners be deprived of their legal right to be spared from further litigation, but caseworkers and social workers in the Sixth Circuit will be faced with the prospect of performing their job duties under the shadow uncertainty cast by an appellate court's unwillingness to respect the importance of qualified immunity for such public servants who work in this challenging and vital field.

C. This Court Should Decide That a Private Hospital and Private Healthcare Providers Are Not State Actors Subject to Claims Under 42 U.S.C. § 1983 When They Collaborate With State Agencies to Meet their Legal Duties.

1. The Sixth Circuit's Decision Finding the Allegations in the Complaint Adequately Pled the CCHMC Petitioners Acted Under Color of State Law Conflicts with Sixth Circuit Precedent, Other Circuit Court Precedent, and Precedent from this Court.

There can be no claim under 42 U.S.C. § 1983 against private defendants unless they have acted under color of state law. This Court has long held that "the under-color-of-state-law element of §1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *American Manufacturers Mutual Insurance v. Sullivan*, 526 U.S. 40, 50, 119

S.Ct. 977, 985 (1999), *citing Blum v. Yaretsky*, 457 U.S. 991, 1002, 102 S.Ct. 2777, 2785 (1982). "Only in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes." *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992.) The "color of state law" requirement restricts the imposition of § 1983 liability to persons who "carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *NCAA v. Tarkanian,* 488 U.S. 179, 191, 109 S. Ct. 454 (1988).

This Court, the Sixth Circuit, and other Circuit Courts have consistently held that private health care providers are not state actors who can be sued under 42 U.S.C. § 1983. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. at 1004 (the "mere fact that a [nursing home] is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."); *Pino v. Higgs*, 75 F.3d 1461, 1466-67 (10th Cir. 1996) (private physician who examined a detainee brought to the emergency department by the police and certified him for involuntary commitment was not a state actor); *Hogan v. A.O. Fox Mem'l Hosp.*, 346 F. App'x 627, 629 (2d Cir. 2009), citing *Doe v. Rosenberg,* 996 F.Supp. 343 (S.D.N.Y. 1998), *aff'd* 166 F.3d 507 (2d Cir. 1999) (finding private hospitals and private healthcare providers are not state actors when they secured an involuntary psychiatric commitment pursuant to New York's civil commitment statutes); *Collyer v. Darling*, 98 F.3d 211, 231-33 (6th Cir. 1996) (independent psychiatrists who evaluated plaintiff state employee's fitness for duty were not state actors); *Ellison v. Garbarino*, 48 F.3d 192, 195-97 (6th Cir.

1995) (private physicians who certified plaintiff for commitment to a mental hospital were not state actors); *Tracy v. SSM Cardinal Glennon Children's Hosp.*, E.D.Mo. No. 4:15-CV-1513, 2016 U.S. Dist. LEXIS 89993, *15-16, 23-25 (July 12, 2016) (collecting cases and noting courts have uniformly held that private hospitals and physicians are not state actors).

Indeed, under similar factual circumstances, the First Circuit has held that private actors, such as a private children's hospital and employees of the hospital, cannot be subjected to liability under 42 U.S.C. § 1983 as having acted under color of state law. *Brown v. Newberger*, 291 F.3d 89, 93 (1st Cir. 2002). The court specifically found that "[N]othing seems more counterintuitive to us than to reason that a [child abuse reporting statute] which protects one who complies from civil or criminal actions under state law should be the vehicle for subjecting the actor to liability under federal law." *Id*.

The Eleventh Circuit has held private healthcare providers who act pursuant to state statutes to commit the mentally ill cannot be liable under 42 U.S.C. § 1983 and that even extensive governmental regulation is not sufficient to transform private hospitals into state actors. *Harvey v. Harvey*, 949 F.2d 1127, 1132 (11th Cir. 1992). "To hold otherwise would expose private hospitals and private physicians to section 1983 liability whenever they act pursuant to the Georgia commitment statutes, despite the fact that their actions ultimately reflect medical judgments made according to professional standards that are not established by the state." *Id*., citing *Blum,* 457 U.S. at

1008. *Accord Spencer v. Lee*, 864 F.2d 1376, 1377 (7th Cir. 1989) (dismissing a claim under 42 U.S.C. § 1983 against a private physician and private hospital who were alleged to have confined the plaintiff against his will and to have injured him by improper medical treatment because the physician and hospital did not act under color of state law).

In *Kottmyer v. Maas*, a child was born with significant brain damage, and a CCHMC hospital social worker determined that the child's mother was a danger to the child and should not be permitted to take the child home. 436 F.3d 684, 686-87 (6th Cir. 2006). After the children's services agency conducted an investigation for several months, while the child was transferred and kept at another medical facility, the agency determined the mother was not a danger to the child. *Id.* at 687.

The parents then filed suit against CCHMC and the social worker employed by CCHMC under 42 U.S.C. § 1983. *Id.* The district court granted a motion to dismiss the complaint against the hospital and the social worker because the parents failed to allege a constitutional violation. *Id.* The Sixth Circuit affirmed on the grounds that the complaint failed to allege CCHMC was a state actor because conclusory allegations that the defendants were acting under color of state law were insufficient to withstand a motion to dismiss. *Id.* at 688.

The Sixth Circuit went on to acknowledge past precedent is clear that the right to family integrity is neither absolute nor unqualified. *Id.* at 690. The Sixth Circuit ultimately concluded "that the right to familial

association is not implicated merely by governmental investigation into allegations of child abuse." *Id.* at 691. *Accord, Blythe v. Schlievert*, 2017 U.S. Dist. LEXIS 45556 (N.D. Ohio, March 28, 2017) (dismissing complaint alleging due process violations against private hospital and individual doctors for complying with state reporting requirements).

Likewise, the Sixth Circuit recently held a private hospital, and its doctors, are not state actors subject to claims under 42 U.S.C. § 1983 in a suit brought by parents alleging violations of their right to familial association and right to make decisions regarding medical procedures for their children. *Thomas v. Nationwide Children's Hosp.*, 882 F.3d 608, 612 (6th Cir. 2018). The court held that "the frequent reality that the State regulates private entities **or cooperates with them** does not transform private behavior into state behavior." *Id.* (emphasis added), citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *Marie v. Am. Red Cross*, 771 F.3d 344, 363 (6th Cir. 2014).

In an attempt to overcome this hurdle, Respondents alleged in conclusory fashion that the HCJFS Petitioners "exercised such coercive power and/or provided significant encouragement that the actions by the Children's employees would be deemed to be that of the state." (RE 1, P. 24). Respondents further alleged that "there was a sufficiently close nexus or pervasive entwinement between HCJFS and the Children's employees so that their conduct was fairly attributable to the state." (RE 1, P. 24). Respondents' mere conclusory allegations, however, are not sufficient to

state a plausible claim that the CCHMC Petitioners acted under color of state law.

Respondents' Complaint merely parrots the language of the elements required for establishing that a defendant is acting under color of state law, which must be disregarded. *See, e.g.*, *Lillard v. Shelby County Board of Education*, 76 F.3d 716, 726-27 (6th Cir. 1996) (court not required to accept unwarranted legal conclusions in determining whether complaint states a §1983 claim for relief); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). Other than mimicking the tests to establish that a defendant is acting under color of state law, Respondents' Complaint is devoid of factual allegations demonstrating the CCHMC Petitioners "carr[ied] a badge of authority of a State and represent[ed] it in some capacity," as is required to impose liability under § 1983. *NCAA. v. Tarkanian*, 488 U.S. at 191.

The Sixth Circuit's decision not only conflicts with the precedent set forth above from this Court, the Sixth Circuit, and other Circuit Courts, it also clearly involves questions of exceptional public importance under federal law. The Sixth Circuit's decision allows a plaintiff to overcome the general rule that a private, non-profit hospital is not a state actor by simply pleading that the hospital and its employees cooperated with a state agency for the appropriate treatment of a suicidal minor while the state agency performs its own independent investigation of abuse by the child's parents. The Sixth Circuit's decision will expose private hospitals and physicians to liability under 42 U.S.C. § 1983 every time they collaborate with state

agencies to meet their legal duties. Such exposure will have an inevitable chilling effect when cooperation between a hospital and a state agency is needed to administer care they deem medically necessary for a child in need, particularly from parents who are alleged to be abusive.

2. The CCHMC Petitioners' Compliance with State Reporting Statutes Did Not Transform them into State Actors.

Under Ohio Revised Code § 2151.421(A), health care professionals who have reasonable cause to suspect a minor child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition that reasonably indicates abuse or neglect of the child must report that suspected abuse to the appropriate public children services agency. Moreover, R.C. § 2151.421(D)(3) provides, in relevant part:

> If a health care professional provides health care services in a hospital, children's advocacy center, or emergency medical facility to a child about whom a report has been made under division (A) of this section, the health care professional may take any steps that are reasonably necessary for the release or discharge of the child to an appropriate environment. Before the child's release or discharge, the health care professional may obtain information, or consider information obtained, from other entities or individuals that have knowledge about the child.

Additionally, the statute further provides:

> Medical examinations, tests, or procedures conducted under divisions (D)(1) and (4) of this section and decisions regarding the release or discharge of a child under division (D)(3) of this section do not constitute a law enforcement investigation or activity.

R.C. § 2151.421(D)(5) (emphasis added).

Pursuant to the above statute, the CCHMC Petitioners were entitled to take any steps reasonably necessary for the discharge of Minor Siefert to an appropriate environment. R.C. § 2151.421(D)(5) specifically states that decisions regarding the release or discharge of such a child do not constitute a law enforcement investigation or activity (*i.e.* state action). At the time Minor Siefert was voluntarily admitted to CCHMC, Minor Siefert had already contacted the HCJFS Petitioners and reported suicidal ideations and abuse by Respondents, leading the HCJFS Petitioners to initiate an investigation into the suspected abuse. (RE 1, P. 7-8). Because the HCJFS Petitioners were actively investigating the suspected abuse throughout the time Minor Siefert was at CCHMC, CCHMC was unable to discharge Minor Siefert until it was determined that Minor Siefert could be discharged to an appropriately safe environment. (RE 1, P. 12). However, mere cooperation with HCJFS' investigation of suspected abuse by Respondents did not transform a private hospital and individual employees of a private hospital into state actors.

In fact, the CCHMC Petitioners were specifically entitled to obtain information from the HCJFS Petitioners in order determine whether Respondents would provide an appropriate environment upon Minor Siefert's discharge. R.C. § 2151.421(D)(5). Since the HCJFS Petitioners allegedly concluded Respondents posed a threat to Minor Siefert's health and safety due to the suspected abuse, the CCHMC Petitioners were compelled to consider that information in determining what was necessary to discharge Minor Siefert to an appropriate environment. (RE 1, P. 12, 14).

As alleged in the Complaint, it was not until December 20, 2016 that Respondents agreed to enter into a voluntary safety plan, allowing Minor Siefert to temporarily stay with Minor Siefert's maternal grandparents. (RE 1, P. 17). Once Respondents agreed to enter into that voluntary safety plan, the CCHMC Petitioners concluded Minor Siefert could be discharged to an appropriate environment. Minor Siefert was then discharged that same day. (*Id.*). Thus, the CCHMC Petitioners did nothing more than provide medical treatment, comply with Ohio's child-abuse reporting statutes, and cooperate with the state agency responsible for investigating suspected child abuse.

Consistent with precedent from this Court, the Sixth Circuit, and other Circuit Courts, the CCHMC Petitioners' compliance with state reporting statutes did not transform them into state actors. *See, e.g.*, *Ellison*, 48 F.3d at 195-97 (finding a private physician's decision to admit a patient pursuant to a state involuntarily commitment statute was not made under color of state law); *Harville v. Vanderbilt University,*

Inc., 95 Fed. Appx. 719, 726 (6th Cir. 2003) (private physicians were not acting under color of state law in reporting to child welfare agency); *Mueller v. Auker*, 700 F.3d 1180 (9th Cir. 2012) (hospital did not become a state actor simply because it complied with state law requiring its personnel to report possible child neglect to protective services); *Brown v. Newberger*, 291 F.3d 89, 93 (1st Cir.2002) ("Nothing seems more counterintuitive to us than to reason that a [child abuse reporting statute] which protects one who complies from civil or criminal actions under state law should be the vehicle for subjecting the actor to liability under federal law."); *Thomas v. Beth Israel Hospital*, 710 F.Supp. 935, 940 (S.D.N.Y. 1989) (a healthcare institution's compliance with state law by reporting suspected child abuse did not constitute acting under color of state law); *Blythe*, 2017 U.S. Dist. LEXIS 45556, *19 (noting courts have consistently rejected claims that private healthcare providers became state actors when they complied with state reporting laws); *Haag v. Cuyahoga County*, 619 F. Supp. 262 (N.D. Ohio 1985) (psychologist who had mandatory duty under state statute to report child neglect and/or abuse was not a state actor), *aff'd* 798 F.2d 1414 (6th Cir. 1986); *Tracy v. SSM Cardinal Glennon Children's Hosp.*, E.D.Mo. No. 4:15-CV-1513 CAS, 2016 U.S. Dist. LEXIS 89993, at *23-25 (July 12, 2016) (collecting cases and noting courts have uniformly held private hospitals and physicians who report suspected child abuse do not become state actors simply because the reporting is carried out pursuant to state law).

Respondents alleged that the CCHMC Petitioners should be considered state actors due to their mere cooperation with the HCJFS Petitioners' investigation of suspected abuse. That is simply insufficient to transform private healthcare providers into state actors under existing precedent from this Court, the Sixth Circuit, and other Circuit Courts.

Nevertheless, the Sixth Circuit panel determined that the CCHMC Petitioners' conduct was fairly attributable to the state in a manner sufficient to establish the CCHMC Petitioners' state-actor status. (RE 41-2, p. 7). The Sixth Circuit found that Respondents presented specific factual allegations "detailing a deep and symbiotic relationship between Children's and the county." (*Id.*). The Sixth Circuit's decision relied upon the fact that the CCHMC Petitioners and the HCJFS Petitioners remained in contact and allegedly gave Respondents conflicting information about who would make the ultimate decision to discharge Minor Siefert. (*Id.*) Finally, the Sixth Circuit found that the CCHMC Petitioners' cooperation with the HCJFS Petitioners showed it was a willful participant in joint activity with the state or its agents. (*Id.*)

Contrary to the Sixth Circuit's decision, the CCHMC Petitioners and the HCJFS Petitioners remained in contact simply because both parties were attempting to comply with their independent statutory duties. As Respondents alleged in their Complaint, HCJFS' purpose is to "take reports of child abuse and neglect, to investigate such reports, and to act to protect child victims at risk of harm." (RE 1, Page 3,

¶ 5.) There is no dispute that the HCJFS Petitioners were actively investigating suspected child abuse by Respondents throughout the time in which Minor Siefert was admitted at CCHMC.

Likewise, the CCHMC Petitioners were merely complying with their independent statutory duties to act in the best interest of Minor Siefert. In accordance with R.C. § 2151.421(D), CCHMC was unable to discharge Minor Siefert until it was determined Minor Siefert could be discharged to an appropriately safe environment. Under R.C. § 2151.421(D)(3), the CCHMC Petitioners were specifically authorized to obtain and consider information from other entities or individuals who had knowledge about Minor Siefert to ensure Minor Siefert was discharged to an appropriately safe environment. Thus, the CCHMC Petitioners did nothing more than provide medical treatment to Minor Siefert, cooperate with the HCJFS Petitioners' investigation, and fulfill their legal duties given the suspected child abuse. Nevertheless, the Sixth Circuit's decision did not acknowledge or reference R.C. § 2151.421(D) or the CCHMC Petitioners' independent legal duties thereunder.

As noted above, if Respondents' conclusory allegations are sufficient to withstand a motion to dismiss on the basis that a private hospital and private healthcare providers are state actors, that will have an inevitable chilling effect when cooperation between a hospital and a state agency is needed to administer care deemed medically necessary for a child in need, particularly from parents who are alleged to be abusive. Under such circumstances, private hospitals

and healthcare providers should be focused on providing necessary medical care and acting in the best interest of the child, without fear of exposure to liability under 42. U.S.C. § 1983.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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