NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIRIAM LOWELL AND SETH HEALEY,

Petitioners,

- v. -

VERMONT DEPARTMENT FOR CHILDREN AND FAMILIES ("DCF"); KENNETH SCHATZ, FORMER COMMISSIONER, DCF; KAREN SHEA, DEPUTY COMMISSIONER FOR THE FAMILY SERVICES DIVISION ("FSD"), DCF; CHRISTINE JOHNSON, DEPUTY COMMISSIONER FOR FSD, DCF; EMILY CARRIER, DISTRICT DIRECTOR, DCF; CATHERINE CLARK, DIRECTOR, COMMISSIONER'S REGISTRY REVIEW UNIT, DCF; KATHLEEN SMITH, FAMILY SERVICES SUPERVISOR, DCF; CHRISTINE GADWAH, FAMILY SERVICES WORKER, DCF; KATHLEEN GREENMUN, SUBSTANTIATION HEARING OFFICER, DCF; ET AL.,

Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENT

1. Is a State's child abuse substantiation process sufficiently akin to a criminal proceeding such that it is subject to *Younger* abstention when a parent accused of child abuse is not given any information about the accusations, not allowed to compel witness testimony, or not allowed to cross-examine witnesses at a pre-deprivation hearing?

2. Does a State's child abuse substantiation process comply with the Due Process Clause of the United States Constitution if a parent accused of child abuse is not given any information about the accusations, not allowed to compel witness testimony, or not allowed to cross-examine witnesses at a pre-deprivation hearing?

3. Does a State's child abuse substantiation process comply with the Due Process Clause of the United States Constitution if a parent accused of child abuse does not have an opportunity to raise constitutional issues until after the parent is placed on the State's Child Protection Registry?

4. Does a complaint sufficiently allege that a State's investigation into child abuse or neglect, or substantiation of a finding of child abuse or neglect, implicates the bad faith exception to *Younger* abstention where the original allegation does not meet the State's statutory definition for child abuse or neglect?

PARTIES TO THE PROCEEDING

Petitioners are Miriam Lowell and Seth Healey (pseudonyms), who were Plaintiffs-Appellants in the court below. Respondents, the Vermont Department for Children and Families ("DCF"); Kenneth Schatz, former Commissioner, DCF; Karen Shea, Deputy Commissioner for the Family Services Division ("FSD"), DCF; Christine Johnson, Deputy Commissioner for the FSD, DCF; Emily Carrier, District Director, DCF; Catherine Clark, Director, Commissioner's Registry Review Unit, DCF; Kathleen Smith, Family Services Supervisor, DCF; Christine Gadwah, Family Services Worker, DCF; Kathleen Greenmun, Substantiation Hearing Officer, DCF; and John and Jane Does 1-10, were the Defendants-Appellees in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT AND RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the District of Vermont and the United States Court of Appeals for the Second Circuit:

• *Lowell, et al. v. Vermont Department for Children and Families, et al.,* Case No. 5:19-cv-00150-gwc (D. Vt. Nov. 18, 2019)

• *Lowell, et al. v. Vermont Department for Children and Families, et al.,* No. No. 19-3987-cr (2d Cir. Dec. 15, 2020)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Miriam Lowell and Seth Healey seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Second Circuit is included herein as Appendix 1. The opinion is reported at 835 Fed. App'x 637. The decision of the District Court granting Respondents' motion to dismiss is included herein as Appendix 2 and is available at 2019 WL 11767547.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 1, 2020 (modified on December 15, 2020). On March 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the judgment being appealed. Thus, this petition is timely filed on April 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Vermont statutes 33 V.S.A. §§ 4912, 4915, 4915b, 4916, 4916a, 4916b, 4916c, 4916d, 4919. The full text of these Vermont statutes is available at Appendices C-K.

STATEMENT OF THE CASE

INTRODUCTION

"The charge of 'child abuse' is one of the most potent and destructive that our society can level against a parent. Once made, its effects cannot be undone. Even if disproved, a deep scar remains." *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 113 (2d Cir. 1999) (Calebresi, J., concurring). Parents in Vermont and other states are often branded as "child abusers" through statutory regimes *before* the parent has notice of the claims or evidence against them or a meaningful opportunity to present exculpatory evidence. The Second Circuit erred in holding that *Younger* abstention bars a District Court from hearing a parent's suit to enjoin a State's Department for Children and Families from pursuing a substantiation proceeding that would place a parent on the State's Child Protection Registry before the parent has notice of the allegations and evidence against them or a meaningful opportunity to present a defense.

A party facing a deprivation of a cognizable liberty interest is generally entitled to notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation omitted). For a hearing to be meaningful, this Court has "traditionally insisted" that it occur "*before* the deprivation at issue takes effect." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (emphasis added). The Due Process Clause tolerates exceptions to this general rule "only in extraordinary situations where some valid governmental interest . . . justifies postponing the hearing until after the event." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (internal quotation omitted). Even then, the government must hold a "prompt" post-deprivation hearing that concludes "without appreciable delay." *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

This case concerns whether a District Court has jurisdiction to enjoin the application of a State's statutory regime that authorizes the placement of a parent on a statewide registry of parents substantiated for child abuse or neglect, which affects the parent's eligibility for employment, without providing notice of the allegations or incriminating evidence, an opportunity to subpoena or cross-examine witnesses, or raise constitutional issues until at least 60 days after the parent is placed on the child abuse registry.

FACTUAL BACKGROUND

1. DCF's Accusation of Child Abuse or Neglect.

In August 2018, Ms. Lowell was falsely accused by her oldest daughter of crushing a pill and snorting it, although the daughter has recanted this allegation and would testify that it is untrue. As a result of the pill allegation (which is not child abuse or neglect as defined under Vermont law), a school counselor reported Ms. Lowell to the Vermont Department for Children and Families ("DCF"). Without conducting a reasonable investigation, employees of DCF:

(i) extrajudicially removed Ms. Lowell's three children from her home for 305 days for two of the children and 356 days for the third;

(ii) urged the biological fathers of the children to seek full custody of the children, going so far as to ghost-write the court papers;

(iii) improperly, without notice or invitation, appeared at a custody hearing in Ms. Lowell's divorce proceeding and advised the state court on the status of the child abuse "substantiation";

(iv) coerced Ms. Lowell to enter a drug treatment program, undergo urinalysis, and take the anti-addiction opiate drug suboxone, all despite the fact that Ms. Lowell had not used drugs for many years;

(v) fabricated evidence, made false accusations against Ms. Lowell and Mr. Healey, and ignored exculpatory evidence in conducting their initial "investigation"; and

(vi) caused Ms. Lowell to lose her job based on the false claim that Ms. Lowell had been substantiated.

Promptly after receiving the report of the pill allegation, Respondent Christine Gadwah convened Ms. Lowell and Mr. Healey, along with the children, under threat that if they did not comply, the police would take the children from Ms. Lowell and Mr. Healey. Ms. Gadwah then interviewed two of the children, separately and outside of the presence of Ms. Lowell and Mr.

Healey, and without another adult present. She did not permit Ms. Lowell or Mr. Healey to ask any questions, nor did she inform Ms. Lowell or Mr. Healey about the nature of the accusations.

Instead, Ms. Gadwah threatened to summon law enforcement if Ms. Lowell did not send her children to relatives or their fathers, who had long been estranged from the children. Ms. Lowell, so threatened and coerced, believed she had no choice but to comply. Ms. Gadwah prohibited Ms. Lowell and Mr. Healey from having contact with the children for weeks, after which Ms. Lowell was allowed to have limited contact by phone and text message only.

Ms. Gadwah also contacted the biological fathers and told them to take the children and that Ms. Lowell was not to have access to or custody of the children. Ms. Gadwah encouraged the fathers to file for sole custody of their children and ghost-wrote pleadings on a supposedly emergent basis to help them to petition for sole custody. One of the fathers swore under oath in connection with his petition for custody that "DCF called me and told me that the kids were taken from mother and that I was able to pick my son up," and that "DCF told me that he is not to be with his mother." When the state family court signaled in one of the cases that it was disinclined to grant the emergency petition for sole custody, Ms. Gadwah volunteered in open court that Ms. Lowell was in the process of being substantiated for child abuse, although no substantiation had occurred yet.

In October 2018, Respondents made the administrative decision to "substantiate" their initial findings for "Risk of Harm." Ms. Lowell and Mr. Healey received only perfunctory letters informing them that they were being substantiated but without identifying any particular allegation or evidence, let alone anything sufficient to put them on notice of the nature of the claims against them. The letters also informed them that they would immediately be placed on the State's Child Protection Registry unless they sought an administrative "review" within 14 days. Ms. Lowell and Mr. Healey timely sought a Substantiation Review (the "Review") within 14 days, as required under 33 V.S.A. § 4916a(c)(1) (A28). That statute requires that the Review take place "within 35 days of receipt of the request for review." *Id.* Nevertheless, the Reviews were not scheduled until August 28, 2019, almost nine full months after the statutory deadline.

After numerous requests, Ms. Lowell and Mr. Healey received a heavily-redacted version of DCF's investigation files (the "Redacted Investigation Files"). The Redacted Investigation Files are redacted so heavily as to obscure the charges and evidence against them. They also contain false information and ignore exculpatory evidence in the few portions that are unredacted. The file conceals all of the information that Ms. Lowell and Mr. Healey would need to defend themselves against the morphing charges against them.

Ms. Gadwah and DCF have claimed that Ms. Lowell and Mr. Healey forced one of the children to drink alcohol and smoke marijuana (an allegation that Ms. Lowell, Mr. Healey, and the children all deny). Then the allegation morphed to claim that unnamed friends of Ms. Lowell and Mr. Healey forced alcohol on one of the children. They also appear to have allege that another one of the children was permanently scarred on his back due to physical abuse from Mr. Healey, which is demonstrably untrue. To date, it remains unclear exactly what Defendant Gadwah's, and therefore DCF's, actual accusations are against Ms. Lowell and Mr. Healey.

Although DCF took Ms. Lowell's children from her without a court order or exigency, and has substantiated an allegation that she abused or neglected her children, for which she would be branded on the Registry as a child abuser, the children were returned to Ms. Lowell and Mr. Healey. Ms. Lowell and Mr. Healey still have not been provided documentation describing the charges against them, except a heavily-redacted case file, despite repeated requests for such information. Nor will they have a hearing or meaningful opportunity to present evidence and otherwise defend themselves before being placed on the Child Protection Registry.

In addition to Vermont, approximately 25 states and the District of Columbia have enacted similar statutory procedures through which parents are placed on statewide registries of child abusers without first being given a meaningful opportunity to be heard.

2. Substantiation Review Process.

The procedure through which Vermont substantiates allegations of child abuse or neglect, which results in the accused's addition to the Registry, are materially similar to procedures that several Circuit Courts of Appeal have held to be constitutionally deficient. *See, e.g.*, *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994).

Vermont law defines an abused or neglected child, in relevant part, as "a child whose physical health, psychological growth and development, or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare." 33 V.S.A. § 4912(1) (A17). "Harm" is defined as: (a) "physical injury or emotional maltreatment"; (b) "failure to supply the child with adequate food, clothing, shelter, or health care. . . ."; or (c) "abandonment of the child." *Id.* § 4912(6) (A17-A18). A "risk of harm"

> means a significant danger that a child will suffer serious harm by other than accidental means, which harm would be likely to cause physical injury, or sexual abuse, including as the result of: (A) a single, egregious act that has caused the child to be at significant risk of serious physical injury; (B) the production or preproduction of methamphetamines when a child is actually present; (C) failing to provide supervision or care appropriate for the child's age or development and, as a result, the child is at significant risk of serious physical injury; (D) failing to provide supervision or care appropriate for the child's age or development due to use of illegal substances, or misuse of prescription drugs or alcohol; (E) failing to supervise appropriately a child in a situation in which drugs, alcohol, or drug paraphernalia are accessible to the child; and (F) a registered sex offender or person substantiated for sexually abusing a child residing with or spending unsupervised time with a child.

Id. § 4912(14) (A18-A19).

Vermont law provides that, upon receiving a report of abuse or neglect, the DCF "shall promptly determine whether it constitutes an allegation of child abuse or neglect as defined in section 4912 . . . ." 33 V.S.A. § 4915(a)

(A21). If the allegation meets this initial threshold, DCF "shall determine whether to conduct an assessment as provided for in section 4915a . . . or to conduct an investigation as provided for in section 4915b . . . ." *Id.* § 4915(b) (A21).

An assessment "focuses on the identification of the strengths and support needs of the child and the family and any services they may require to improve or restore their well-being and to reduce the risk of future harm." 33 V.S.A. § 4912(2) (A17). It "does not result in a formal determination as to whether the reported abuse or neglect has occurred." *Id.* In contrast, an investigation "begins with the systematic gathering of information to determine whether the abuse or neglect has occurred and, if so, the appropriate response. An investigation shall result in a formal determination as to whether the reported abuse or neglect has occurred." *Id.* § 4912(7) (A18).

In this case, the DCF purported to undertake an investigation rather than an assessment. Section 4915b requires that an investigation include a visit to the child's place of residence and an interview with or observation of the child (monitored by a disinterested adult, if not the parents), and consideration of "all other data deemed pertinent." However, there is no requirement that the DCF interview the parents or give the parents any opportunity to be heard as part of the investigation or substantiation. 33 V.S.A. § 4915b(a)(1)-(8) (A23-A24). The DCF's investigation did not include any visit to Ms. Lowell's home, interview of Ms. Lowell or Mr. Healey, or consideration of any exculpatory evidence, such as percipient witnesses who could rebut the allegation of a permanent scar on one of the children's back. Respondent Gadwah also interviewed the children without the parents, or any disinterested adult, present.

Once a report of abuse or neglect is substantiated, the individuals who are the subject of the substantiated report are added to the Registry.[1]

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[1] Since 2014, the first year for which DCF can provide reliable data regarding the number of Registry checks that have been performed, more than 50,000 checks per year have been performed. Specifically, DCF has reported that the number of checks processed for inquiries per year were: 54,301 in 2014; 57,303 in 2015; 56,892 in 2016; and 53,497 in 2017. This number does not include "requested self-checks."

Addition to the Registry is postponed until after a Review if the Review is timely sought. A report is "substantiated" if the DCF "has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(16) (A20).

By statute, once a report is substantiated, the DCF is required to notify the accused person *only* of:

> (1) the nature of the substantiation decision, and that the Department intends to enter the record of the substantiation into the Registry; (2) who has access to Registry information and under what circumstances; (3) the implications of having one's name placed on the Registry as it applies to employment, licensure, and registration; (4) the right to request a review of the substantiation determination by an administrative reviewer, the time in which the request for review shall be made, and the consequences of not seeking a review; and (5) the right to receive a copy of the Commissioner's written findings made in accordance with subdivision 4916(a)(2) of this title if applicable.

33 V.S.A. § 4916a(a) (A28). The notice sent to Ms. Lowell and Mr. Healey told them only that "[b]ased on the information [DCF] gathered, [DCF] [has] determined that a reasonable person would conclude that you did place your children at risk for physical harm," that they could appeal, and that otherwise they would be placed on the Registry.

Section 4916a governs the Review. It provides that "[t]here shall be no subpoena power to compel witnesses to attend a Registry review conference." 33 V.S.A. § 4916a(d) (A29). It further provides that

> the person who requested the review shall be provided with the opportunity to present documentary evidence or other information that supports his or her position and provides information to the reviewer in making the most accurate decision regarding the allegation. The Department shall have the burden of proving that it has accurately and reliably concluded that a

> reasonable person would believe that the child has been abused or neglected by that person.

Id. § 4916a(e) (A29).[2]

If the substantiated report is affirmed in the Review, the accused person's name is added to the Registry immediately. 33 V.S.A. § 4916a(e) (A29). The accused may thereafter appeal to the Human Services Board and, if necessary, to the Supreme Court of Vermont. *Id.* § 4916b (A31). The Human Services Board is supposed to hold a hearing within 60 days of the appeal and issue a decision within 30 days after the hearing. *Id.* § 4916b(b)(1) (A31). During that time, however, the names of the accused remain on the Registry.

Information on the Registry is available to prospective employers who are regulated by the DCF or who provide "care, custody, treatment, transportation, or supervision of children or vulnerable adults." 33 V.S.A. § 4919(a)(3) (A36). Ms. Lowell was engaged in such a position and was terminated when it was revealed that a report of abuse or neglect against her had been "substantiated" by Defendants Gadwah and Smith.

3. Proceedings Below.

Petitioners took an interlocutory appeal to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1292(a)(1). The Second Circuit held that *Younger* abstention barred the District Court from hearing the parents' request for injunctive relief. It held that *Younger* applied because the substantiation process was sufficiently akin to a criminal prosecution. A4. It also held that the ability to raise constitutional issues after the point at which the parents would be listed on the Registry provided a sufficiently meaningful opportunity. A5. Finally, it held that Petitioners had not sufficiently alleged plausible facts that would implicate the bad faith exception to the application of *Younger* abstention. This Court should grant review and reverse the decision below.

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[2] The Review Officer is Defendant-Appellee Greenmun.

REASONS FOR GRANTING WRIT

This petition presents critically important questions about the application of the *Younger* doctrine and the due process applicable to parents accused of child abuse or neglect and whether due process requires notice and an opportunity to be heard before being placed on a State's Child Protection Registry. This issue affects parents in 25 states and the District of Columbia, which have enacted procedures that could result in a parent being listed on a child abuse registry before having a meaningful opportunity to be heard.

THE ISSUES BEFORE THE COURT ARE VITALLY IMPORTANT

Whether a parent has a right to notice of the allegations of abuse and evidence supporting those allegations and a meaningful opportunity to rebut that evidence before being placed on a child abuse registry affects numerous parents across the country. A regime that fails to provide the minimum notice necessary for a party accused of child abuse or neglect to know the allegations against them, or to mount a defense, cannot be said to be sufficiently akin to a criminal proceeding for *Younger* to apply and bar federal court jurisdiction.

All 50 states maintain central registries or other similar recordkeeping systems for those substantiated of child abuse or neglect. In many cases, parents have alleged that they were listed on a central child abuse registry without due process, as Petitioners claim here. Approximately 24 states and the District of Columbia have statutes or regulations that permit the placement of an individual on a central child abuse registry prior to any hearing or administrative review. *See, e.g.*, Ala. Code § 45.2028; Alaska Stat. § 12-18-908; Cal. Pol. & Proc. Man. § 31-021; Colo Rev. Stat. § 19-3-313.5; D.C. Code §§ 4-1302.05; 4-1302.06; Fla. Department of Children and Families CF Operating Procedure No. 170-16; Ga. Code § 49-5-182; Ill. Comp. Stat. Ch. 325, § 5/7.16; Ind. Code § 31-33-26-8(b); Iowa Code § 235A.19; Maine Child & Fam. Pol. Man. § XV. E; 110 Mass. Code Regs. § 10.06(12); MI Comp. Laws § 722.627(4)-(6); MO Rev. Stat. § 210.152; N.D. Cent. Code § 50-25.1-05.2; N.D. Admin. Code §§ 75-03-18-02; 03; 04; 05; 07; 12; 13; Neb. Rev. Stat. § 28-723; NH Rev. Stat. § 169-C:35; N.J. Rev. Stat. § 9:6-8.10a; N.Y. Soc. Servs. Law § 424; Okla. Admin. Code tit. 340, § 75-3-530; 23 Pa. Cons. Stat. § 6338; Tex.

Fam. Code § 261.309; Va. Code § 63.2-1526; Wa. Rev. Code § 26.44.125; Wyo. Stat. Ann. § 14-3-213.

Even where states, like Vermont, nominally provide a right to an administrative review or hearing prior to placement on the Registry, that review often lacks the hallmarks of due process, such as adequate notice of the allegations or evidence or a right to present evidence to rebut those allegations or evidence. This Court has long held that "[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" *Application of Gault*, 387 U.S. 1, 33 (1967) (internal citation omitted). In Vermont, the only notice provided to a parent is the conclusion that abuse, neglect, or a risk of harm has occurred. A parent is entitled only to a Redacted Case File that is redacted so heavily as to obscure most relevant information. Similarly, in California, the information presented to a parent may exclude evidence that the person reporting the abuse observed indicating that child abuse occurred. That is, the information disclosed to a parent may exclude the evidence that prompted the initial allegation. Cal. Pol. & Proc. Man. § 31-021. The procedures adopted in Vermont and other states fail to provide the minimum notice required for a parent or other party accused of child abuse or neglect to mount a defense. This increases the risk of erroneous deprivation and distances the procedure from anything akin to a criminal proceeding.

This is also seen in the investigative procedures used, where parents lack protections in investigations similar to those that they would have in a criminal proceeding, such as *Miranda* rights. *See* Donald Dickson, When Law and Ethics Collide: Social Control in Child Protective Services, 3 ETHICS & SOC. WELFARE 264, 268–69 (2009) ("[M]any of the constitutional protections available in a criminal setting, namely the right to a 'Miranda warning', the right to counsel, the right to know one's accuser, and protections against self-incrimination, among others, are not automatically available to parents or guardians in civil child abuse actions."). In this case, Respondent Gadwah employed improper methods to cause an extrajudicial removal of Ms. Lowell's children from her under threat of police force based on an allegation that did not meet the statutory definition of abuse or neglect in the first place.

Furthermore, the standards for listing an accused parent on a central registry vary from state to state and also fail to safeguard parents' rights to be heard. U.S. Dep't of Health and Human Services, Children's Bureau, Review and Expunction of Central Registries and Reporting Records 3-26 (2018), *available at* https://www.childwelfare.gov/pubPDFs/registry.pdf. For example, Vermont's standard for the Review is, in practice, so vague as to lack any meaningful guiding principle. *See* 33 V.S.A. § 4916a(e) (A29) (providing that at the Review, DCF has "the burden of proving that it has accurately and reliably concluded that a reasonable person would believe that the child has been abused or neglected . . . ."). Approximately 17 states permit substantiation of child abuse allegations and placement based on a low evidentiary threshold, such as "probable cause" or "credible evidence." *See, e.g.*, Ala. Code § 26-14-8(a)(1) (stating that a report is indicated "[w]hen credible evidence and professional judgment substantiates . . . abuse or neglect"); Alaska Stat. § 47.17.290(9) (requiring "reasonable cause"); A.R.S. § 8-804.01(D) (using "probable cause"); Ct. Gen. Stat. § 17a-101g ("[T]he commissioner shall determine, based upon a standard of reasonable cause, whether a child has been abused or neglected . . . ."); Fla. Admin. Code r. 65C-30.001 ("'Finding' means the investigative determination that there is credible evidence to support or refute the alleged child maltreatment."); Haw. Admin. Rules § 17-1610-2 (using "reasonable cause"); 325 Ill. Comp. Stat. 325, § 5/3 (requiring "credible evidence" for a report to be indicated); Juvenile Law: The Definition of 'Unfounded' within Meaning of § 235A.18(2), 1982 Iowa Op. Att'y Gen. 7 (1981), 1981 WL 37084 (interpreting Iowa statute on child abuse report standard to mean "some credible evidence" (citing Iowa Code § 232.71D)); *see also* LSA-Ch. C. Art. 615; MD Code, Family Law, § 5-701; 110 Mass. Code Regs. § 4.32; NAC 432B.170; N.M. Code R. § 8.10.3.17; N.Y. Soc. Servs. L. § 412; Okla. Stat. tit. 10A § 1-2-106; Utah Code § 62A-4a-101; and 33 V.S.A. § 4912 (A17) (stating that a substantiated "report is based upon accurate and reliable information that would lead a reasonable person to believe" that abuse or neglect occurred). Some states, such as New York, require only "some credible evidence" or "probable cause," as determined by a caseworker, to place individuals on the registry. N.Y. Social Serv. Law § 424-a(e)(ii)-(v). Low evidentiary standards present a high risk of an erroneous deprivation, especially where the other hallmarks of due process are lacking.

In contrast, at least 14 states require "substantial evidence" or a "preponderance of the evidence." Colo Rev. Stat. § 19-1-103(111); O.C.G.A. § 290-2-30-.02(f); Kan. Stat. Ann. § 600.020(1); MD Code Regs. 07.02.07.10; M.C.L. § 722.627; MO Rev. Stat. § 210.183; Mont. Admin. R. 37.47.602; N.C. Gen. Stat. §§ 7b-101,7B-311 (defining substantial evidence as "relevant evidence a reasonable mind would accept as adequate to support a conclusion"); N.H. Rev. Stat. § 169-C:3(XIII); N.J.A.C. § 10:44D-3.2; Neb. Rev. Stat. § 28-720 (stating a case will be entered into the central registry if "the subject of the report of child abuse or neglect was supported by a preponderance of the evidence"); R.I. Department of Children, Youth and Families Operating Procedure No. 100.0280; S.C. Code 1976 § 63-7-930; 22 Va. Admin. Code § 40-705-10.

The allegation of child abuse leaves an indelible mark even after it is disproven, which is difficult to do without notice of the allegations or the incriminating evidence. The fundamental right of parents to a relationship with their children, and right to pursue employment free from the unwarranted stigma of being labeled child abusers, requires consistency in the provision of due process in child abuse substantiation procedures.

Federal courts have a "virtually unflagging" obligation to hear cases or controversies, but that obligation is undermined if *Younger* bars District Courts from hearing claims for injunctive relief to enjoin a parent's placement on a child abuse registry before the parent has been afforded due process. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Where a state regime does not provide an opportunity to be heard until *after* the parent is placed on the child abuse registry, often affecting eligibility for employment, the parent may have no alternative forum in which to raise those issues or seek injunctive relief absent a federal forum.

Whether *Younger* removes this category of cases from a federal court's "virtually unflagging" obligation to hear cases within its jurisdiction is also centrally important to safeguarding parents' rights to due process. The Second Circuit erred in affirming the District Court's decision that *Younger* abstention barred it from adjudicating Ms. Lowell's and Mr. Healey's request for injunctive relief. Specifically, the Second Circuit upheld the District Court's conclusion that the substantiation procedure was sufficiently "akin to

a criminal prosecution," implicated vital state interests, and provided a sufficient opportunity to raise constitutional issues, albeit after placement on the Registry.[3]

This Court should conclude that an administrative process to list a parent on a child abuse registry is not sufficiently akin to a criminal prosecution where it lacks notice of the allegations and evidence against the parent, lacks an opportunity to compel witness testimony, and lacks an opportunity to cross-examine the investigator. This Court has identified three narrow classes of proceedings that may warrant abstention: (1) "pending state criminal proceeding[s]"; (2) civil proceedings that are "akin to criminal prosecutions"; and (3) civil proceedings "that implicate a State's interest in enforcing the orders and judgments of its courts." *Sprint*, 571 U.S. at 72, 78-79 (2013); *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("*NOPSI*"), 491 U.S. 350, 367-68 (1989). In *Sprint*, this Court explained that "[w]e have not applied *Younger* outside these three 'exceptional' categories, and today hold, in accord with [*NOPSI*], that they define *Younger's* scope." *Sprint*, 571 U.S. at 78.

The Review lacks sufficient notice or procedural safeguards that are traditionally associated with criminal proceedings. *Sprint* defines certain factors that may be present, but are not determinative, in assessing whether a proceeding is "akin to a criminal prosecution." *Sprint*, 571 U.S. at 592. For example, a criminal proceeding is generally initiated to sanction prohibited conduct. *Id.* In addition, a criminal prosecution "commonly involve[s]" an investigation, "often culminating in the filing of a formal complaint or charge." *Id.* (internal citations omitted). Here there was no genuine or reasonable investigation. In fact, the investigation was not compliant with Section 4915b because it lacked a home visit. 33 V.S.A. § 4915b(a)(1) (A23). It was also unreasonable *per se* because it investigated an allegation that facially did not meet the statutory definition of child abuse or neglect. In addition, there has been no formal charge or complaint notifying Ms. Lowell

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[3] The government has an "urgent interest in the welfare of the child." *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 27 (1981). As a result, the government "shares the parent's interest in an accurate and just decision," which generally requires a pre-deprivation hearing. *Id.*; *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993).

and Mr. Healey of the nature of the allegations against them. Instead, they are only aware of what they can glean from the Redacted Investigation Files. The Review fundamentally fails to provide Ms. Lowell and Mr. Healey with the opportunity to learn the accusations and evidence against them, present exculpatory evidence, or even test the evidence against them through cross-examination.

A criminal defendant has far more rights than a parent accused of child abuse or neglect in an administrative proceeding, including notice, a right to be provided with exculpatory evidence, a right to confront accusers, a right to counsel, a right to a neutral and dispassionate arbiter, and a right to a speedy trial by a jury of his peers. While not all of these procedural safeguards may be necessary in the context of an administrative substantiation, due process demands that a parent at least have notice of the allegation and evidence against her, a right to cross-examine the DCF employee conducting the investigation, and a right to compel other witness testimony and present the testimony of anyone willing to testify (including the subject minor, where the child wishes to recant or otherwise dispute the DCF's evidence).

The lack of due process in these types of administrative reviews, especially that enacted in Vermont, negates *Younger's* application. *Younger* held that federal courts "should not act to restrain [a state] criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). This Court has extended *Younger* to certain state law enforcement proceedings beyond criminal prosecutions, but only where the state proceeding itself affords an adequate opportunity to pursue the constitutional claims. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986) (*Younger* applies to administrative proceeding "so long as in the course of those proceedings, the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim.").

Petitioners argued in the courts below that they have already suffered a constitutional injury by the improper removal of their children absent a court order, and that being placed on Vermont's Child Protection Registry would cause further constitutional injury by affecting their eligibility for employment and stigmatizing them with the brand of "child abuser" before

any notice or meaningful opportunity to be heard. This Court has held that "[t]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Elrod v. Burns*, 417 U.S. 347, 373 (1976) (internal citation omitted). These circumstances distinguish this case from the class of cases in which the Court has held that *Younger* may bar a federal court from enjoining an administrative proceeding where a subsequent state-court appeal provides an opportunity to raise constitutional issues. In Vermont, the earliest post-deprivation hearing, which occurs before the Human Services Board, comes at least 60 days after the parent is listed on the Registry, in practice closer to a year later.

In *Gibson v. Berryhill*, 411 U.S. 564, 570 (1973), this Court held that the fact that an eventual state appeal was available was of no moment. *Id.* at 570 ("Moreover, the District Court also held that neither *Younger*, nor the doctrine normally requiring exhaustion of administrative remedies, forbade a federal injunction where, as the court found to be true here, the administrative process was so defective and inadequate as to deprive the plaintiffs of due process of law.") (citations omitted). This Court should grant the petition to determine whether Vermont's child abuse substantiation process provides sufficient due process such that the application of *Younger* abstention was appropriate.

This Court should take this opportunity to provide guidance to the states and federal courts regarding when the exercise of federal jurisdiction is appropriate to safeguard parents' rights to due process in the context of administrative proceedings to list parents as child abusers and minimize the risk of an erroneous deprivation of protected liberty interests.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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