No. 21-479

IN THE
Supreme Court of the United States

NICOLE K., BY NEXT FRIEND LINDA R., *et al.*,
Petitioners,
v.

TERRY J. STIGDON, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE INDIANA DEPARTMENT OF CHILD SERVICES, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may review a right-to-counsel claim concerning a state-court civil proceeding that has already been resolved.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

STATUTES

STATUTES [CONT'D]

OTHER AUTHORITIES

INTRODUCTION

Petitioners ask the Court to afford them federal-court review of their constitutional claim seeking appointed counsel in state-court child-welfare proceedings—proceedings that have now concluded. The Court should deny such review for two reasons: First, because the underlying state child-welfare proceedings have concluded, Petitioners' claims are moot. Second, mootness aside, there is no circuit split on the specific question presented in the petition, and because *Younger v. Harris*, 401 U.S. 37 (1971), squarely applies in any event, this case is a poor vehicle to resolve any broader question about abstention.

STATEMENT OF THE CASE

1. The Indiana General Assembly has established a robust two-phase system for protecting children whose parents or legal guardians are unable or unwilling to care for them. During the first phase, the State asks a court to adjudicate the child to be a child in need of services (CHINS), which allows the State, with court supervision, to provide services to the child—and the child's parents—with the goal of reunifying the family. *See* Ind. Code ch. 31-34-9 *et seq.* If reunification efforts fail, the State moves to the second phase by seeking a permanent placement for the child, which may involve involuntary termination of existing parental rights. *See id.* §§ 31-34-21-7.5, 31-35-2-1.

Indiana law grants the child's parents a statutory right to counsel in CHINS or termination of parental rights (TPR) proceedings. *Id.* §§ 31-32-4-1, 31-32-2-5,

31-34-4-6(a)(2)(A). It does not grant the child such a statutory entitlement to counsel, although the state trial court has discretion to appoint counsel for the child, *id.* § 31-32-4-2(b), and the Department of Child Services can request appointment of counsel for the child. In most cases, the child is represented by a Guardian ad Litem (GAL), a Court Appointed Special Advocate (CASA), or both. *See* Indiana Youth Institute, *2021 Indiana Kids Count Data Book* 25 (2021) ("In 2019, 4,491 volunteers spoke on behalf of abused and neglected Hoosier children in 24,340 CHINS cases."). State law requires appointment of a GAL or CASA in abuse and neglect cases, Ind. Code § 31-34-10-3, and courts may appoint one even if not required by law, *id.* § 31-32-3-1; *see also Gibbs v. Potter*, 77 N.E. 942, 943 (Ind. 1906).

2. The State of Indiana initiated state-court proceedings to have each named plaintiff—all minor children at the time—adjudicated a CHINS under Indiana law to protect them from abuse or neglect at the hands of their parents. Appellants' App. A28, A30, A33. All of these CHINS cases began at least five years ago, and over the course of this lawsuit, each case has been resolved, either by reunification or adoption.

When Petitioners filed this case in district court, all ten of their CHINS cases remained pending. By the time the Seventh Circuit heard argument and issued its judgment, seven had concluded. After the Seventh Circuit issued its judgment but before Petitioners filed their petition in this Court, the remain-

ing three CHINS proceedings were closed. Nothing remains to be adjudicated in any of the state-court proceedings.[1]

3. Petitioners brought this suit under 42 U.S.C.§ 1983 against defendants Terry J. Stigdon, the Director of the Department of Child Services; Judge Marilyn A. Moores and Judge Mark A. Jones of the Marion Superior Court; Judge Thomas P. Stefaniak, Jr., of the Lake Superior Court; Judge Jason M. Mount of the Scott Circuit Court; and Judge Marsha Owens Howser of the Scott Superior Court (collectively, the State). Appellants' App. A37–A38. The ten named plaintiffs appeared by their next friends—Linda R., Nancy B., and Jessie R.—who served as their foster parents and were "sufficiently familiar with the facts and circumstances surrounding the children's situation to represent the children's interests in this litigation fairly and adequately." *Id.* at A30, A33, A37. The complaint does not allege that the next friends have standing in their own right. While Petitioners styled the complaint as a class action

[1] Respondents cannot serve on counsel for Petitioners (and therefore cannot file or lodge with the Court) the confidential state-court dockets demonstrating closure of the underlying CHINS cases. Indiana law forbids Respondents from disclosing such CHINS records to anyone except the subject children, their parents, or their GAL or CASA. *See* Ind. Code §§ 31-33-18-1, 31-39-1-2, 31-39-2-1 *et seq.* Counsel for Petitioners function in none of those roles. Counsel for Petitioners, however, may lawfully obtain the now-closed CHINS dockets directly from the very children they represent. Respondents, of course, can submit the records for *in camera*, *ex parte* review if the Court issues an appropriate order. *Cf.* Ind. Code § 31-33-18-2(9) (providing for a court's review of records).

seeking to represent all children involved in Indiana CHINS or TPR proceedings who have not been appointed counsel in those proceedings, *id.* at A38–41, no class of any sort has ever been certified.

Petitioners allege that Indiana Code section 31-32-4-2(b), both on its face and as applied, violates the children's due process and equal protection rights because the statute provides state court judges the discretion to appoint or withhold counsel for children in CHINS and TPR proceedings, and no attorney was assigned to Petitioners in their CHINS cases. Appellants' App. A49–A50. In Petitioners' view, the Due Process Clause *requires* the State to provide them counsel in all such proceedings. *Id.* at A49. Petitioners also allege equal protection violations because some CHINS have appointed counsel while others do not, and because parents have a statutory right to counsel while children do not. *Id.* at A50. Petitioners seek a declaration that Indiana Code section 31-32-4-2(b) is unconstitutional, an injunction requiring the Department's director to provide counsel, and a declaration telling the state-court judges that their refusal to appoint counsel violated Petitioners' due process and equal protection rights. Appellants' App. A51.

The district court determined that it had to abstain from considering the case under *Younger v. Harris*, 401 U.S. 37 (1971), and dismissed the case without prejudice on March 3, 2020. Pet. App. 21a. Petitioners appealed to the Seventh Circuit, which affirmed on March 5, 2021. In doing so, the Seventh Circuit concluded that it need not "decide categorically whether *Younger* does, or does not, apply across the board" in CHINS cases because "a federal court has

discretion to put any federal proceeding on hold while a state works its way through an administrative process that was under way before the federal suit began." Pet. App. 6a. Noting that no "'civil *Gideon*' principle requiring counsel in every case" exists, the court determined that "it would be inappropriate for a federal court to resolve the appointment-of-counsel question in any of the ten plaintiffs' state proceedings." Pet. App. 7a, 9a.

REASONS TO DENY THE PETITION

I. The Court Should Deny the Petition Because the Case Is Moot

The conclusion of Petitioners' CHINS proceedings moots this case, which concerned only their right to counsel in those closed cases. Because "Article III of the Constitution restricts the power of federal courts to Cases and Controversies," a suit becomes moot "'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Chafin v. Chafin*, 568 U.S. 165, 171, 172 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). Thus, "'[i]t is not enough that a dispute was very much alive when suit was filed'; the parties must 'continue to have a personal stake' in the ultimate disposition of the lawsuit." *Id.* at 172 (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477–78 (1990)).

Here, all Petitioners' CHINS cases have closed, and federal courts can afford them no relief. Petitioners cannot, for example, use a newly minted right to counsel to reopen their CHINS proceedings and undo

either adoption or parental reunification. Consequently, they no longer have a legally cognizable interest in their claims or in whether *Younger v. Harris*, 401 U.S. 37 (1971), or any other abstention doctrine bars federal-court review of such a claim as to ongoing CHINS cases.

This case is moot, and the Court should deny the Petition.[2]

II. No Conflict Exists Over Federal-Court Abstention from Cases Challenging Ongoing State-Court Child-Welfare Proceedings, and This Case Is a Poor Vehicle To Address Any Broader Abstention Issues

1. Petitioners do not identify a circuit conflict as to whether abstention bars federal courts from considering a right-to-counsel claim (or any other claim)

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[2] Vacatur of the judgment below under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), would be inappropriate for at least two reasons. First, Petitioners' CHINS cases were closed *before* they filed their cert petition, yet the petition makes no mention of the mootness problem nor argues for vacatur under *Munsingwear*. Petitioners may not raise the argument for the first time in their reply brief. Second, because the Seventh Circuit's judgment simply affirmed the district court's dismissal of the case without prejudice, Pet. App. 9a, dismissal on mootness grounds would lead to the same result, *see, e.g.*, *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (instructing lower court to dismiss moot case without prejudice). The Court need not disturb the Seventh Circuit's judgment because it already leads to the same correct result. *See California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.'" (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956))).

concerning an ongoing state-court child-welfare proceeding. Indeed, they cite no other cases presenting the issue. Petitioners instead attempt to identify a circuit split as to the Seventh Circuit's broader approach to abstention issues generally. Pet. 9–19. But the cases that expressly acknowledge a conflict concern the First Amendment claims of reporters seeking timely access to state court documents, not challenges by children to the procedures being used in their own state-court child-welfare cases. *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 322 (4th Cir. 2021); *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1065 (7th Cir. 2018); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 779 (9th Cir. 2014).

The Court may someday choose to resolve the *Courthouse News* split. But given the essentially equitable nature of abstention doctrine, *Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (observing that what "explains the development of our abstention doctrines" is the principle that "a federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity'" (quoting *Fair Assessment in Real Estate Ass'n v. McNary*, 54 U.S. 100, 120 (1981) (Brennan, J., concurring))), it should do so in a First Amendment case that squarely presents the same equities as the cases giving rise to the circuit conflict. It is entirely plausible that the Court might reach one result in the situation presented by the *Courthouse News* cases and different results in other contexts.

2. Petitioners cite additional cases that supposedly conflict with the decision below—despite not

"call[ing] out the Seventh Circuit's abstention decisions by name," Pet. 13—but those cases vary widely in their factual and legal claims and do not stand in tension with the Seventh Circuit's decision here.

For example, the court in *ODonnell v. Harris County*, far from "reject[ing] the argument" that "comity and federalism" principles may generally warrant abstention, Pet. 14, merely concluded that applying *Younger* to a challenge to state bail hearings would be self-defeating, as it would require the court to assess the adequacy of those same hearings anyway. 892 F.3d 147, 156 (5th Cir. 2018). As an afterthought, the court also observed that the bail-hearing challenge "does *not* implicate our concerns for comity and federalism," *id.* at 157 (emphasis added), but if anything, that observation reinforces the significance of comity and federalism for abstention analysis, consistent with Seventh Circuit doctrine generally. Similarly, the court in *Walker v. City of Calhoun* concluded that *Younger* need not apply to a class action challenging the timing of a city's bail hearings because consideration of that issue would not be "intrusive." 901 F.3d 1245, 1254–55 (11th Cir. 2018).

The remaining cases are likewise inapposite. *See Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253, 1274 (10th Cir. 2002) (remanding for the district court to determine whether *Younger* required abstention from enforcing some provisions of a "stipulated exit plan" from a consent decree governing the New Mexico Children, Youth and Families Department); *Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 467 (1st Cir. 1989) (rejecting

Younger abstention in a challenge to parental consent/judicial bypass statute governing minor's access to abortions because the state court bypass proceeding was not initiated by the state itself); *Kaplan v. Hess*, 694 F.2d 847, 850–51 (D.C. Cir. 1982) (per curiam) (finding *Younger* abstention inapplicable because no state proceeding was pending when Free Exercise Clause challenge was filed).

Such fact-dependent applications of *Younger* signal no fundamental conflict with the decision below. Indeed, the Seventh Circuit might well have reached the same decisions in all these cases.

3. Regardless, this case is not a good vehicle to resolve any conflicts over abstract abstention questions because the decision below is correct even apart from general principles of abstention: *Younger* itself plainly bars federal court interference with state CHINS proceedings. In *Moore v. Sims*, the Court, applying *Younger*, abstained from reviewing a state child-welfare proceeding, holding that "the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims, and Texas law appears to raise no procedural barriers." 442 U.S. 415, 430 (1979); *see also Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79 (2013) (citing *Moore* as an example of a case where *Younger* is appropriate).

Nor does Indiana law raise procedural barriers to asserting the claim at issue here. Parties frequently assert due process claims in CHINS and TPR proceedings, and Indiana courts recognize that "due process concerns at all stages of a CHINS proceeding are of

paramount concern." *Matter of Eq.W.*, 124 N.E.3d 1201, 1209 (Ind. 2019). If a child claims entitlement to counsel, nothing prevents the child or the child's GAL or CASA (perhaps assisted by counsel) from presenting that argument to the CHINS court. *Cf. Kowalski v. Tesmer*, 543 U.S. 125, 132 (2004) ("If an attorney is all that the indigents need to perfect their challenge in state court and beyond, one wonders why the attorneys asserting this § 1983 action did not attend state court and assist them.").

Because Petitioners have not even "attempted to present [their] federal claims" in their CHINS cases, federal courts "should assume that state procedures will afford an adequate remedy," for Petitioners have failed to identify any "unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987). The district court thus appropriately abstained from hearing Petitioners' claims given that the proper forum for bringing a constitutional challenge is in state court. *See Juidice v. Vail*, 430 U.S. 327, 337 (1977) ("Here it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention." (footnote omitted)).

4. Finally, this case is not worth the Court's attention on the threshold abstention issue because Petitioners are manifestly wrong on the merits of their underlying claim. The Court has already held that parents do not have a due process right to counsel in child custody proceedings, even though "a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference

and, absent a powerful countervailing interest, protection.'" *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). If *parents* do not have a right to counsel in proceedings that may impinge the "fundamental right to make decisions concerning the care, custody, and control" of their children, *Troxel v. Granville*, 530 U.S. 57, 72 (2000), then *children* perforce have no such right in the same cases, *see Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (holding that "the constitutional rights of children cannot be equated with those of adults").

Petitioners' weak underlying claims undermine any rationale for using the Court's resources to review an obscure threshold procedural issue.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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