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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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DECEMBER 2021

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REPLY BRIEF

Try as they might, respondents cannot skirt the issue demanding this Court's attention. Federal courts have a virtually unflagging obligation to decide cases within their jurisdiction. That is why this Court has spent decades carefully circumscribing the exceptional circumstances that may overcome this obligation. Yet the Seventh Circuit refuses to abide by these limits, claiming unbounded discretion to decline jurisdiction in any case involving pending state proceedings. As respondents effectively concede, two courts of appeals openly disagree with the Seventh Circuit's precedent, and five others have adopted standards irreconcilable with that same precedent. Only this Court can resolve this divide that goes to the heart of the relationship between federal and state courts. And respondents do not even attempt to defend the Seventh Circuit's anything-goes approach to abstention.

Instead, respondents hope to evade review, asserting that they have closed these children's CHINS proceedings and that this case is therefore moot. But respondents ignore that abstention is itself jurisdictional. This Court thus can and should decide the abstention question presented, leaving respondents' fact-intensive mootness claim for the lower courts. This Court has done just that in the past. Regardless, respondents fail to meet their heavy burden to demonstrate mootness, as they offer no guarantee that these children will not again be subjected to CHINS proceedings without counsel. At the very least, mootness would

require vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). One thing is clear: the decision below cannot stand.

I. THE SEVENTH CIRCUIT IS IN DEEP CONFLICT WITH OTHER CIRCUITS

Respondents acknowledge that the Seventh Circuit has split from other courts of appeals in its approach to abstention. Opp. 7 ("The Court may someday choose to resolve the *Courthouse News* split."). Their attempt to limit that conflict fails. It is the Seventh Circuit's ad hoc balancing approach to abstention that other circuits have rejected, not the particular application of that approach to "First Amendment claims of reporters seeking timely access to state court documents." *Contra* Opp. 7, 9.

Thus, the Fourth Circuit made clear that the Seventh Circuit's use of abstention as "'a license for free-form *ad hoc* judicial balancing'" was "inconsistent" with Fourth Circuit precedent. *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 325 n.2 (4th Cir. 2021) (quoting *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007)). This recognized conflict is not limited to specific First Amendment claims. Indeed, the Fourth Circuit identified a decision involving Due Process and Equal Protection challenges to a state statute regulating gambling machines as conflicting with the Seventh Circuit's approach. *Ibid.* (citing *Martin*, 499 F.3d at 364).

The Ninth Circuit likewise rejected the Seventh Circuit's general approach to abstention, not its

reasoning specific to certain First Amendment claims. In fact, the Ninth Circuit "agree[d] with the Seventh Circuit['s]" substantive First Amendment analysis; it "disagree[d]" only "with the Seventh Circuit's decision to abstain" because the case "neither presented a risk of an 'ongoing federal audit' of a state's judicial system nor amounted to 'a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state * * * proceedings.'" *Courthouse News Serv. v. Planet*, 947 F.3d 581, 591 & n.4 (9th Cir. 2020) (citations omitted).

In addition to these decisions expressly rejecting the Seventh Circuit's ad hoc balancing approach to abstention, respondents fail to distinguish the numerous other decisions applying abstention standards fundamentally inconsistent with that approach. Contrary to respondents' suggestion (Opp. 8-9), it does not matter that *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018), and *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), involved bail hearings; *Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253 (10th Cir. 2002), involved foster-care services; *Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 467 (1st Cir. 1989), involved abortion; or *Kaplan v. Hess*, 694 F.2d 847 (D.C. Cir. 1982), involved religious freedoms. What matters is that those decisions held that, before a federal court may abstain, a suit must fall within certain well-defined exceptional circumstances. Pet. 14-18. Unlike the Seventh Circuit here, none of those courts claimed "discretion to put any federal

proceeding on hold" absent "some urgent need for federal intervention." Pet. App. 6a. That is the conflict.

At bottom, while respondents argue that the application of abstention doctrine is "fact-dependent" (Opp. 9), they ignore that the proper legal framework governing whether to abstain is not. Surveying a host of decisions involving a variety of claims, this Court has held that "only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (*NOPSI*). These identified "exceptional circumstances" define the bounds of abstention in *every* case. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013) ("We have not applied *Younger* outside these three 'exceptional' categories, and today hold, in accord with *NOPSI*, that they define *Younger's* scope."). Yet the Seventh Circuit has adopted a different legal framework. The resulting divide in the courts of appeals requires immediate intervention.

II. THE DECISION BELOW IS WRONG

The Seventh Circuit's outlier view of abstention is also wrong. Respondents do not even defend it. The Seventh Circuit refused to decide "whether *Younger* does, or does not, apply," purporting instead to exercise unfettered "discretion to put any federal proceeding on hold." Pet. App. 6a. Respondents acknowledge that reasoning (Opp. 4-5), but cast it aside, arguing only that "*Younger* itself plainly bars federal court interference with state CHINS

proceedings" here. Opp. 9. Respondents' unwillingness to defend the actual ground for the decision below confirms petitioners' point: the Seventh Circuit's view of abstention is indefensible.

Nor would *Younger* provide an alternative basis for abstention here. Respondents contend that because the children might raise right-to-counsel claims in state court, *Younger* necessarily applies. Opp. 9-10. But this Court has expressly rejected the proposition that the alleged adequacy of state procedures alone justifies abstention. *Sprint*, 571 U.S. at 81-82. Instead, such adequacy is merely an "*additional*" factor to consider only after determining that a federal suit seeks to enjoin the type of state-court proceeding falling within the "three 'exceptional' categories" of criminal and quasi-criminal proceedings that "define *Younger's* scope." *Id.* at 78, 81 (emphasis in *Sprint*). Thus, while the children being able to raise their claims in CHINS proceedings would be a necessary condition for *Younger* abstention, it would by no means be sufficient.[1]

Respondents cannot show the "exceptional" circumstances required for *Younger* abstention. As

[1] Even were the adequacy of state-court proceedings sufficient for abstention, courts recognize that expecting unrepresented minors to appreciate and raise their own constitutional claims is inadequate. *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319, 1322-23 (D.C. Cir. 1993); *M.D. v. Perry*, 799 F. Supp. 2d 712, 719-20 (S.D. Tex. 2011).

petitioners have explained (Pet. 25-27 (citing *Sprint*, 571 U.S. at 73, 77-79, 81-82)):

- *Younger* applies only to plaintiffs targeted for state sanctions, yet no child here has been accused of wrongdoing;
- *Younger* applies only to claims seeking effectively to enjoin state proceedings, yet the children seek relief that would aid state proceedings;
- *Younger* applies only to quasi-criminal and other narrowly defined judicial proceedings, yet the proceedings here are not even judicial because, as respondents concede, the state court's role is one of "supervision" over the provision of "services to the child" (Opp. 1).

Respondents offer no response to the first two independent reasons *Younger* is inapplicable. Either dooms their argument.

To the extent respondents address the third reason, they suggest *Moore v. Sims* held that a "state child-welfare proceeding" is the type of state-court proceeding to which *Younger* applies. Opp. 9-10 (citing 442 U.S. 415 (1979)). But *Moore* addressed proceedings deciding whether to remove children from their parents in the first instance—which even the Seventh Circuit recognized is different in kind from the proceedings here. Pet. App. 2a-6a. As the petition explained, and respondents never dispute, by the time this suit was filed, these children had long

since been removed from their parents. Pet. 26-27 (citing C.A. A28-37).

As a last resort, respondents argue the underlying merits of the children's due process claim (ignoring the separate equal protection claim). Opp. 10-11. In doing so, respondents repeat one of the Seventh Circuit's glaring errors: merits considerations play no role in the abstention inquiry. Pet. 24-25. Regardless, this merits argument fails. Respondents cannot justify their logical leap in arguing that because parents have no right to counsel in dependency proceedings, neither do children. Opp. 11. Although respondents acknowledge that "'the constitutional rights of children cannot be equated with those of adults,'" they draw the wrong conclusion. *Ibid.* (citation omitted). Parents' interests in dependency proceedings may be a "desire for and right to 'the companionship, care, custody and management'" of their children. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) (citation omitted). But children have far more at stake—including having every aspect of their lives subject to government control. C.A. A17-27; *Lassiter*, 452 U.S. at 25-27 (recognizing that similar circumstances can trigger right to counsel).

III. THIS CASE IS AN IDEAL VEHICLE TO ANSWER THE QUESTION PRESENTED

Respondents attempt to avoid review by raising a purported alternative ground. Based on extra-record evidence they "cannot file or lodge," respondents assert that petitioners' claims are moot because "the

underlying state child-welfare proceedings have concluded." Opp. 1, 3 n.1. But those allegations pose no obstacle to this Court's review for two independent reasons: (1) the jurisdictional abstention question can be decided, leaving respondents' mootness challenge for remand, and (2) in any event, the case remains justiciable.

1. "[A] federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). That includes jurisdiction to decide whether a case involves the exceptional circumstances required to abstain. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 100 n.3 (1998) (Court "ha[s] treated" *Younger* abstention "as jurisdictional"); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17 (1996) (similar for other abstention doctrines). When a case presents multiple jurisdictional issues, nothing dictates any particular "sequencing of jurisdictional issues." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999).

This Court has thus repeatedly explained that abstention "represents the sort of 'threshold question' " that "may be resolved before addressing" other jurisdictional issues like mootness. *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005); *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (similar). In *Steffel v. Thompson*, for example, the Court recognized that "subsequent events"—the country's reduced involvement in Vietnam—raised "a question as to the *continuing* existence" of a "controversy" related to protesting the Vietnam War. 415 U.S. 452, 459-60 (1974)

(emphasis in *Steffel*). Yet the Court left that question "for the District Court on remand" and proceeded to reverse the lower courts' unduly expansive view of abstention. *Id.* at 460-62. The Court did the same thing in *Ellis v. Dyson*, despite "greater reservations" about potential mootness than in *Steffel* given that petitioners' counsel "had not been in touch with their clients for approximately a year and were unaware of their clients' whereabouts" or whether the clients wished to continue challenging Dallas's loitering ordinance. 421 U.S. 426, 433-35 (1975).

Respondents' mootness allegations thus present no obstacle to resolving the clear split in authority on the question presented. Instead, much as this Court has done before, it can reverse the Seventh Circuit's erroneous abstention decision and remand for consideration of any mootness issue. *See Ellis*, 421 U.S. at 434-35; *Steffel*, 415 U.S. at 459-60. That course is particularly warranted because respondents' mootness claim is premised on outside-the-record materials. Opp. 3 n.1. The courts below are better positioned to develop the record needed to resolve it.

2. Even so, respondents are wrong that this case is moot.

a. A defendant whose "voluntary conduct" allegedly moots a case bears a "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000). That

standard applies here because respondents, who include the Director of the Indiana Department of Child Services and judges presiding over the children's CHINS cases (C.A. A37-38), have ultimate authority over whether and when to close CHINS proceedings. *See* Ind. Dep't of Child Servs., *Indiana Child Welfare Policy Manual* 380 (Nov. 10, 2021) (Department of Child Services responsible for "mov[ing] for case closure with the court");[2] Ind. Code § 31-34-21-11 (CHINS cases conclude "[w]hen the juvenile court finds that the objectives of the dispositional decree have been met").

Respondents fail to meet their "formidable burden" for showing mootness. *Laidlaw*, 528 U.S. at 189-90. They assert only that the children's "CHINS cases have closed"—that is, they claim only that they have ceased the challenged conduct. Opp. 5-6. But showing mootness here requires more: respondents must make "absolutely clear" that their denial of counsel to petitioners cannot "reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. Respondents' silence on this element of their burden alone defeats mootness.

Nor could respondents meet their burden had they tried. Indiana children can be placed in foster care until they turn twenty-one. *See* Ind. Code § 31-9-2-13. Thus, even the oldest of petitioners may again be adjudged CHINS and subjected to proceedings without counsel. While respondents assert that petitioners have either been adopted or reunified with their

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[2] https://www.in.gov/dcs/files/Child_Welfare_Policy_Manual.pdf.

parents (Opp. 2), more than one in five children entering Indiana foster care in 2019 were *reentering* the system after a previous episode. U.S. Dep't of Health & Hum. Servs., *Child Welfare Outcomes Report Data: Indiana*.[3] And far from "unconditional[ly] and irrevocabl[y]" committing to appoint counsel for petitioners in the future (*Already, LLC v. Nike, Inc.*, 568 U.S. 85, 93 (2013)), respondents continue to maintain that denying representation is lawful. Opp. 10-11.

b. Alternatively, even if any closure of the children's CHINS cases might otherwise be sufficient to moot this case, the controversy would remain justiciable because the alleged harm is capable of repetition yet evading review.

First, as just explained, the children have a "reasonable expectation" that they will "be subject to the same action again." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016). Given the reentry rate for children in Indiana foster care, there is at least a "'reasonable' likelihood" that petitioners will again be placed in CHINS proceedings and denied appointed counsel. *Turner v. Rogers*, 564 U.S. 431, 440 (2011).

Second, "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration." *Kingdomware*, 579 U.S. at 170. Indiana reports the median length of out-of-home placements for CHINS children—a rough proxy for the length of

[3] https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/indiana.html (last visited Dec. 14, 2021).

CHINS proceedings—as 452.7 days. Ind. Dep't of Child Servs., *Length of Stay in Out of Home Placement* 2 (Dec. 10, 2021);[4] *see* Ind. Code § 31-34-21-7(d) ("rebuttable presumption" that CHINS proceedings end twelve months after dispositional decree or removal). Given that "short duration," even were respondents' mootness contentions correct, challenges to respondents' failure to appoint counsel for children in CHINS proceedings would "likely 'evade review, or at least considered plenary review in this Court.'" *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 603 (1982) (citation omitted); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978) (rejecting mootness because eighteen-month period "too short").

3. If the Court nonetheless deems this case moot, it should vacate the judgment. When a case becomes moot "'while on its way'" to this Court, the "'established practice' is 'to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (quoting *Munsingwear*, 340 U.S. at 39). Vacatur "'clears the path for future relitigation'" of the issues "by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71-72 (1997) (quoting *Munsingwear*, 340 U.S. at 40).

Were this case deemed moot, it readily satisfies the criteria for vacatur: closure of their CHINS cases

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[4] https://www.in.gov/dcs/files/PI_Length_Of_Stay_Out_Of_Home_Placement_11-21.pdf.

after the Seventh Circuit's decision would have prevented petitioners from challenging the judgment against them. *Ibid.* Whether attributable to respondents or merely "happenstance," petitioners had no control over any case closures. *See ibid.* (vacatur warranted in such circumstances).

Respondents cannot avoid this result by asserting that petitioners' "CHINS cases were closed *before* they filed their cert petition." Opp. 6 n.2 (emphasis by respondents). Respondents fault petitioners for not raising the supposed "mootness problem" or "argu[ing] for vacatur under *Munsingwear*" in the petition. Opp. 6 n.2. But to the best of counsel's knowledge at the time of filing the petition, petitioners had a continuing controversy. Regardless, respondents cite no authority requiring a petition to seek vacatur based on a disputed mootness issue. To the contrary, this Court has ordered vacatur when a case became moot "before the certiorari petition was filed," even though the petition did not seek vacatur. *Garza*, 138 S. Ct. at 1793 (describing *Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009)).

Nor are respondents correct that vacatur is unnecessary because "dismissal on mootness grounds would lead to the same result" as an abstention dismissal. Opp. 6 n.2. That misses "[t]he point" of *Munsingwear* vacatur—"to prevent an unreviewable decision 'from spawning any legal consequences.'" *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (quoting *Munsingwear*, 340 U.S. at 41). In upholding abstention here, the Seventh Circuit issued a precedential decision. Vacatur would

"rightly strip[] the decision below of its binding effect" and "clear[] the path for future relitigation" of the abstention issue in another lawsuit, either by petitioners, their amici, or others. *Ibid.*

CONCLUSION

The petition should be granted or the judgment should be summarily reversed. At a minimum, the judgment should be vacated.

Respectfully submitted,

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