

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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SHEILA MIKEL,

*Petitioner,*

v.

JENNIFER NICHOLS, ET AL.,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether a pre-adoptive foster mother has a constitutionally protected liberty interest right to procedural due process in the removal of her foster girls, where the parental rights of the biological parents have been terminated, where the foster mother has been the resident parent for eighteen months, where the adoption papers were submitted for approval and where the foster mother has been afforded no proper notice of removal and no hearing in connection with the removal.

**PARTIES TO THE PROCEEDING AND RULE  
29.6 STATEMENT**

Petitioner, Sheila Mikel, was the appellant in the Court of Appeals and is the plaintiff in the underlying action.

Respondents, Jennifer Nichols, Commissioner of the Department of Children's Services, the Department of Children's Services and Omni Visions, Inc., were appellees in the Court of Appeals and are defendants in the underlying action.

Pursuant to this Court's Rule 29.6 of the *Federal Rules of Civil Procedure*, Petitioner states that no disclosure is required.

**STATEMENT OF RELATED PROCEEDINGS**

There are no proceedings directly related to this petition.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

### **INTRODUCTION**

This action arises out of the removal of two girls from their pre-adoptive foster mother, Shelia Mikel, without proper notice and without a hearing on the merits of the removal. An appeal then proceeded through the Tennessee Courts which did not consider the constitutional issues raised here. This action was then filed in the United States District Court for the Eastern District of Tennessee, and a motion to dismiss the complaint under Rule 12(b)(6) of the *Federal Rules of Civil Procedure* was granted. A panel of the Sixth Circuit affirmed the dismissal of the case by the District Court and held that a pre-adoptive foster mother possessed no constitutional rights.

This case presents an opportunity for this Court to consider a circuit split between the decision of the 6th Circuit and decisions of the 10th Circuit in *Elwell v. Byers*, 699 F.3d 1208 (10<sup>th</sup> Cir. 2012), and of the 2d Circuit in *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982), and to revisit its prior decision in *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 846-847 (1977) (hereinafter *OFFER*).

In considering the constitutional issues raised, the Sixth Circuit decision stated that it was adhering to its prior decisions in *Renfro v. Cuyahoga County*

*Department of Human Services*, 884 F.2d 943 (6<sup>th</sup> Cir. 1981), and *Zak v. Pilla*, 698 F.2d 800 (6<sup>th</sup> Cir. 1982) which considered *OFFER*, and which stated that a parent's right to a constitutional guarantee of due process does not exist until the adoption process is complete.

This Court's review is warranted for at least three reasons.

First, the Sixth Circuit decision is in conflict with decisions of the 10<sup>th</sup> Circuit and of the 2d Circuit.

Second, the reasoning expressed in *OFFER* for not reaching the constitutional issue presented here are not present. This case involves a pre-adoptive foster parent, where the rights of the biological parents have been terminated and where due process has clearly been denied.

Third, the question presented is exceptionally important because pre-adoptive foster parents, who are looking forward to the adoption of a foster child after over twelve months with an adoptive child, extensive training sessions and the establishment of a relationship with a child in anticipation of adoption, have a right to know whether they possess a constitutional liberty interest protection in connection with the arbitrary removal of that child from their care.

## **OPINIONS BELOW**

The Sixth Circuit opinion (App. A) is not yet reported but maybe found at 2023 WL 313860 (6<sup>th</sup> Cir. 2023). The opinion of the United States District Court for the Eastern District of Tennessee (App. B) is not reported but may be found at 2022 WL 18396308 (E. D. Tenn. 2022).

## **JURISDICTION**

The Sixth Circuit filed its opinion on January 19, 2023. The deadline for filing this petition is April 17, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

## **CONSTITUTIONAL PROVISION INVOLVED**

The Due Process Clause of the United States Constitution provides:

“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 . . .”

Amendment XIV, Section 1.

## STATEMENT OF THE CASE

### I. Background

The facts in this case are taken from the complaint filed on December 10, 2020, against the Commissioner of the Department of Children's Services of the State of Tennessee, the Department of Children's Services ("DCS") and Omni Visions, Inc. Since this action was before the district court on a motion to dismiss the complaint pursuant to Rule 12(b)(6) the following facts may be taken as established. (Complaint, App. C)

On July 1, 2016, Sheila Mikel was approved as a pre-adoptive foster parent, meaning that at the time of placement of the two girls in question she was pre-approved for their adoption. (Id., ¶9)<sup>1</sup> Sheila had been providing therapy to the girls because of the sexual abuse by their father and his friends. Because DCS had been experiencing problems with their placement, Sheila was asked to adopt them, and she agreed. (¶10) Prior to that date the biological rights of the parents of the girls had been terminated, and their custody was awarded to the State of Tennessee by the Circuit Court of Bradley County, Tennessee. (¶8) After the approval of Sheila as a pre-adoptive mother, custody was transferred to her. (¶10)

During the period from July 1, 2016, to December 7, 2017, Mikel nurtured the girls. She sent them to a private school where she lived (¶20). They

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<sup>1</sup> References in the form "¶\_\_" are to the Complaint, App. C.

were doing well in school and recovering from the trauma of their father (¶11).

In the summer of 2017 Sheila experienced what she believed to be unusual behavior with one of the girls. As a result, she sought the advice of a psychiatrist who had been treating one of them with the approval of DCS. That psychiatrist diagnosed one of the girls with a syndrome known as Dissociative Identity Disorder (“DID”). DCS then accused Sheila, as a mother, of providing therapy for the girls, which she discontinued. No further complaint was made regarding her provision of any therapy. Since its approved therapist had not made this diagnosis, however, DCS questioned the diagnosis and requested an independent diagnosis in September of 2017. Such an independent diagnosis was performed, and the diagnosis of the psychiatrist was partially confirmed with a diagnosis of Post-Traumatic Stress Syndrome with Moderate Dissociation. The Department disagreed that this diagnosis was a diagnosis of DID and continued to send the girls for therapy with its approved therapist, John Arias. While the psychiatrist referred to above who did diagnose one of the girls with DID was a licensed Doctor, John Arias was not (¶ 12).

After the girls had resided with Sheila for just over seventeen months, Sheila submitted for final approval her adoption papers to Omni Visions, the adoption agency under whose supervision she had been parenting the girls and which had been receiving over \$100,000 per year for the girls. Those papers were submitted on December 4, 2017, and on December 7,

2017, the agency, not DCS, prepared a Notice of Removal of the girls, stating that the girls would be taken on December 6, 2017, the day before the date of the Notice of Removal. The girls were taken on that date without the knowledge of Sheila and with no hearing or notice of hearing. The girls were taken without any allegation of physical abuse, which under regulations of DCS required the girls to be left with her (¶15).

On December 8, 2017, Sheila appealed from the Notice of Removal, and on December 13, 2017, without notice or explanation, the agency closed Sheila's home in good standing (¶22).

## **II. This Lawsuit**

After the filing of her appeal from the Notice of Removal, a hearing was convened by an Administrative Law Judge, but no hearing on the merits occurred because the judge found the controversy had been rendered moot by the closing of her home by the agency which issued the Notice of Removal, even though it had been closed in good standing. An appeal was taken to the Commissioner of the Department of Human Services, who affirmed the decision of the hearing officer. From that decision an appeal was taken to the Chancery Court of Bradley County, Tennessee, which affirmed the Commissioner, after which an appeal were taken to the Court of Appeals of Tennessee, which affirmed the Chancery Court's dismissal. The Tennessee Supreme Court declined to grant an appeal. At no point in this process did any

court consider the constitutional issues raised by Sheila Mikel. (¶¶25-29)

Sheila Mikel then brought suit in the United States District Court for the Eastern District of Tennessee, and the Defendants moved to dismiss. Sheila Mikel responded by asserting that the conduct of the defendants in removing her children from her custody was a violation of section 1983 and her right to due process under the liberty interest protected by the Fourteenth Amendment.

The district court granted the motion of defendants to dismiss and held that Mikel was not entitled to protection under the due process clause.

### **III. The Sixth Circuit Decision.**

The Sixth Circuit affirmed the decision of the District Court. After finding that Mikel had standing, the Court then turned to the merits, which the court declared were “whether Omni deprived Mikel of ‘liberty’ when it took AK and SK away from her.” (App. 12)

The Sixth Circuit started its analysis by considering the meaning of “liberty interest” in the context of the Fourteenth Amendment. Finding the meaning not to be clear, the court found that in the context of the facts of this case, “the Supreme Court has explicitly declined to decide whether foster parents have liberty interests in their relationship with foster children,” citing *OFFER*. (App. 13) The court then continued that “[w]here the Supreme Court

has drawn blurred lines, however, our circuit has drawn comparatively crisp ones”, citing *Renfro v. Cuyahoga, supra*, which did not even consider *OFFER*. (App. 15) The court held that under its decision “Mikel lacked a constitutional liberty interest in her status as a foster parent” because she “had not otherwise established a permanent legal relationship with them.” (App. 13)

The court then distinguished the case from the 10<sup>th</sup> Circuit relied upon by petitioner, *Elwell v. Byers, supra*. The court found that Sheila’s status as a pre-adoptive parent was of no significance. Nor was the fact that the rights of the biological parents had been terminated. The Sixth Circuit decision distinguished *Elwell v. Byers, supra*, solely on the basis that “Mikel did not care for the girls for their entire lives, and her adoption plan did not make it out of the starting gate.” (App. 15)

The court then affirmed the dismissal by the district court.

## REASONS FOR GRANTING THE PETITION

There are three principal reasons for this Court to grant this petition.

First, there is a conflict between the decisions in 6th circuit and the 2d and 10th. The 10<sup>th</sup> Circuit decision is *Elwell v. Byers, supra*. The 2d Circuit decision is *Rivera v. Marcus, supra*. The 6<sup>th</sup> Circuit is this case.

Second, this case presents an opportunity to resolve the constitutional issue discussed but left undecided in this Court's decision in 1977 in *OFFER*. In that decision this Court expressed three reservations for not reaching the due process liberty interest issue: (1) that the rights of the biological parents had not been terminated; (2) that the parents were only contractual, not pre-adoptive, foster parents; and (3) that New York had provided procedural due process to the foster parents in the removal of their children. Each one of those factors is not present in this case. The rights of the biological parents have been terminated; Mikel was a pre-approved mother for adoption; and procedural due process was clearly not provided.

Third, this question is exceptionally important because of the number of foster children and parents potentially impacted. For the fiscal year 2021 alone, there were 16,381 pre-adoptive homes, where, as here, children in a pre-adoptive status could be removed from their home without the safeguards of procedural

due process. (See Report of the Department of Human Services, App. D.)

### **I. The Sixth Circuit Decision Creates a Split of Authority With The 10<sup>th</sup> Circuit and 2d Circuit.**

Under the Sixth Circuit decision, a pre-adoptive foster mother enjoys no constitutional protection to preclude the arbitrary removal of her children from her home.

The decision of the Sixth Circuit specifically holds that unless a foster parent has “come particularly close to consummating [the] adoption or “otherwise established a permanent legal relationship with them,” she possesses no constitutional rights. (App. 14) No definition of the phrase, “come close” was provided in the decision.

#### **A. The 10<sup>th</sup> Circuit Decision**

The decision of the 10<sup>th</sup> Circuit in *Elwell v. Byers, supra*, is contrary to the 6<sup>th</sup> Circuit in this case. In that case, the foster parents were, as here, pre-adoptive foster parents. Citing its prior decision in *Spielman v. Hildebrand*, 873 F.3d 1377 (10<sup>th</sup> Cir. 1989), the 10<sup>th</sup> Circuit pointed out that “the status of pre-adoptive parents ‘differs significantly’ from that of the typical foster-care parents, who care for children on a temporary basis because the objective of the pre-adoptive placement was to locate a ‘permanent stable home.’” *Elwell v. Byers, supra* at 1216. The court then found that the pre-adoptive parents were “not afforded

even the most elemental process -notice- before T.S was removed" and "h[e]ld that the Ewells had a liberty interest in their relationship with T.S.", *Id.*, at 1218 pointing to several factors which counseled in favor of that conclusion. First, they noted that "the parental rights of the biological parents had been terminated," *Id.* at 1216 noting that this factor was lacking in *OFFER*. Second, the court noted that "the Elwells had cared for T.S. for an extended period of time." Finally, the court noted that the Elwells were "very close to becoming adoptive parents." *Id.* at 1217 Here, as in *Elwell v. Byers, supra*, Mikel was a pre-adoptive parent, and although the girls had been with her for only eighteen months, she had developed a close relationship with them, considering their past experiences of severe sexual abuse at the hands of their father and his friends. Finally, Mikel had submitted her adoption papers for approval.

## **B. The 2d Circuit Decision**

The decision of the 2d Circuit in *Rivera v. Marcus, supra*, is also contrary to the 6<sup>th</sup> Circuit decision. Although the foster parent in that case was a half-sister of the child, she was also a foster mother, and the State of Connecticut argued that the rights of the half-sister should be viewed only as a foster parent. The court disagreed and held that "custodial relatives like Mrs. Rivera are entitled to due process protection when the state decides to remove a dependent relative." *Id.* at 1025. The court did go on to state that its holding was not in conflict with its prior decisions which do not afford due process rights

to foster parents, but those cases did not involve pre-adoptive parents.

## **II. This Case Gives This Court An Opportunity to Complete the Analysis Begun But Not Finished in *OFFER*.**

The only case decided by this Court in connection with the issue presented in this petition is *OFFER*, *supra* and the issue presented here was discussed in dictum but not decided. That decision has created uncertainty concerning the location of the boundary line of the constitutional protection to be afforded a foster parent. A decision is needed to bring about a settlement of the location of that line which separates protected status from unprotected status. *See Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_, 44 S. Ct. 2228 (2022).

Examples of the confusion about the location of the boundary between due process protection and the lack of due process protection is found in the decision of the 6<sup>th</sup> Circuit itself in this case, where that court stated that “[w]here the Supreme Court has drawn blurred lines, however, our circuit has drawn comparatively crisp ones.” (App. 13)

A number of decisions since *OFFER*, *supra*, have also pointed to the fact that the *OFFER* decision did not define the boundary line of constitutional protection. *Rodriguez v. McLoughlin*, 214 F.3d 328, 337 (2d Cir. 2000) (“the *OFFER* court ultimately chose not to resolve the question of the existence of a liberty interest”; *Rivera v. Marcus*, *supra* at 1024 (“[Courts]

in the wake of *OFFER* have relied on these distinguishing factors cited in that decision to support their ruling that foster parents do not possess a constitutionally protected liberty interest in the maintenance of the foster family relationship"); *Drummond v. Fulton County Department of Family & Children's Services*, 563 F.2d 1200, 1206 (5<sup>th</sup> Cir. 1977) ("[the liberty interest issue "was placed squarely before, and discussed by the Supreme Court," but "it did not find it necessary to resolve whether such an interest exists"]); and *Elwell v. Byers, supra* at 1216 "nonetheless the Court indicated that the liberty interest in family association may extend to foster parents in certain circumstances."

A definitive statement as to the location of the boundary line of constitutional protection for an adoptive parent is necessary. Is protection afforded only if an adoption has been completed? If not, where does the line exist? This case presents the opportunity for this Court to define the line where constitutional protection is to be afforded.

Finally, the decision in *OFFER*, as stated above, pointed to three factors which impeded the ability to declare that an adoptive parent in that case was entitled to procedural due process, and those factors are not present in this case. The rights of the biological parents have been terminated; Mikel was a pre-approved mother for adoption; and procedural due process was clearly not provided.

**III. This Case Presents a Question of Exceptional Importance That Will Arise Frequently.**

The question presented is exceptionally important because pre-adoptive foster families should have a right to expect fair and constitutional treatment in the removal of children whom they expect to adopt. The report of the United States Department of Health and Human Services for the fiscal year 2021, issued June 28, 2022, shows that there were 16,381 foster children in pre-adoptive homes. (App. D) A decision on the issue of whether pre-adoptive foster parents have constitutional rights in the removal of their children is necessary to give them an opportunity to make an informed decision as to whether they wish to participate in a process where they would potentially have no constitutional rights if their children are arbitrarily removed.

That there are over 16,000 children in the process of pre-adoption, compared with 305,500 children in foster care shows the preferred status of the children in pre-adoptive care and their expectation of establishing a meaningful familial relationship which is closer to fruition than the standard foster care relationship, especially when considering that 201,297 of the 305,500 children reunify with either their parents or a foster parent. Pre-adoptive foster parents should be afforded a right to know whether they enjoy constitutional protection when they embark upon their journey to create a new family.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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