No. 22-921

ORIGINAL

In The Supreme Court of the United States

DAN CHERNER,

Petitioner,

v.

WESTCHESTER JEWISH COMMUNITY SERVICES, INC. AND KATHLEEN MCKAY,

Respondents.

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

PETITION FOR REHEARING

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PRELIMINARY STATEMENT

This case came to this Court because 4 federal judges – 1 district court judge and 3 circuit court judges – ignored this Court's decisions and the decisions of 8 courts of appeal, and instead sought to empower bad actors by improperly granting them quasi-judicial immunity and ignoring Mr. Cherner's Constitutional rights.

This Court, on May 30, 2023, erroneously denied the petition for a writ. In doing so, this Court, and each of its members, has repudiated the rule of law and committed an error of magnitude comparable to those in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) and *Plessy v. Ferguson*, 163 U.S. 537 (1896), and can only reverse this error by a grant of the petition and reversal of the decisions below.

This Court has (i) ignored its own rulings on quasi-judicial immunity; (ii) allowed the Second Circuit to ignore this Court's rulings; (iii) allowed the Second Circuit to be in conflict with rulings made by 8 other circuits; (iv) ignored Mr. Cherner's Constitutional rights; (v) repudiated the rule of law by making it permissible for a forensic evaluator to act unethically and with malice, to violate court orders, and to harm families and children, violate Constitutional rights, and yet be shielded from such ethical, legal, and criminal violations by a misinterpretation of quasi-judicial immunity.

Such determination by this Court is an unacceptable repudiation of the rule of law and of this Court's precedential cases. When this Court

ignores the law and the rule of law, it destroys its own integrity and promotes evil and lawlessness. This Court has no choice but to grant the petition and reverse the rulings below.

INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL OR CONTROLLING EFFECT

Since the filing of the petition for a writ, substantial and controlling rulings have issued.

A. Sixth Circuit Ruling

In *Morgan v. Board of Professional Responsibility of the Supreme Court of Tennessee*, Case No. 22-5200, decided and filed March 20, 2023 (6th Cir. 2023), the Sixth Circuit noted:

> Absolute quasi- judicial immunity extends the doctrine to "those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994), citing *Scruggs v. Moellering*, 870 F.2d 376 (7th Cir. 1989).
>
> When determining whether the tasks are integral or intertwined with the judicial process, the Supreme Court has endorsed the "functional approach." *Forrester v. White*, 484 U.S. 219, 224 (1988). This approach requires a court to look to "the nature of the function performed, not the identity of the actor who performed it." *Id.*

> at 229; *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 273-74 (1993).

Morgan v. Board at *5-6, noting the test in *Guercio v. Brody*, 814 F.2d 1115, 1117 (6th Cir. 1987):

> first, the court must determine the "nature of the act itself, *i.e.,* whether it is a function normally performed by a judge"; second, the court must determine the "expectations of the parties, *i.e.,* whether they dealt with the judge in his judicial capacity."
>
> Judicial immunity, though absolute and firm, is something to be applied carefully and should not be extended further than its justification warrants. *See Barrett v. Harrington*, 130 F.3d 246, 254 (6th Cir. 1997) (citing *Burns v. Reed*, 500 U.S. 478, 486 (1991); *Guercio*, 814 F.2d at 1120.

Morgan v. Board at *5-6. *Morgan* follows *Burns* and *Antoine:* tasks or functions are intertwined or integral to a judicial process if they involve "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993), quoting *Burns*, 500 U.S. at 500.

B. Ninth Circuit Ruling

In *Gay v. Parsons*, 61 F.4th 1088 (9th Cir. 2023), the issue was whether psychologists who prepare comprehensive risk assessment reports for the

California Parole Board are entitled to quasi-judicial immunity. The Ninth Circuit answered no:

> Our understanding of *Antoine* and the distinctions made in subsequent precedent are illuminating here. In this case, the psychologists conduct objective assessments of inmates' risk of violent behavior, which they report to the Board. The psychologists, however, are not decisionmakers. Rather, it is the Board, not the evaluating psychologist, that has the discretion and authority to determine the inmate's eligibility for parole. While non- judicial "officials performing the duties of advocate or judge may enjoy quasi-judicial immunity for some functions," *id.* at 1188 (cleaned up), the psychologists were neither acting as advocates nor as judges.
>
> Though the psychologists emphasize that they exercise discretion in recommending a risk level of low, moderate, or high, *Miller [v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc)]* instructs that exercising some discretion is not enough where it is not functionally comparable to a judge's decision. *See Miller*, 335 F.3d at 897. While the psychologists provided a risk level based on their clinical experience, they "ha[d] no power of decision in the judicial sense." *Id.* at 898.

Gay, 61 F.4th at 1093.

As is the case herein, the psychologists did not have the power of "resolving disputes between parties, or of authoritatively adjudicating private rights." *Antoine,* 508 U.S. at 435-36, quoting *Burns,* 500 U.S. at 500.

C. Eleventh Circuit Ruling

In *Darst v. Scriven*, No. 22-10918 (11th Cir. 2023), the Eleventh Circuit noted that

> Absolute quasi-judicial immunity extends to people who perform duties closely related to the judicial process, but only for actions taken within the scope of their authority. *Roland v. Phillips*, 19 F.3d 552, 555 (11th Cir. 1994). We determine whether quasi-judicial immunity exists "through a functional analysis of the action taken by the official in relation to the judicial process." *Id.*

*Darst at *2.* There is no claim to quasi-judicial immunity if there is no power to resolve disputes or adjudicate private rights, or if there are acts outside the scope of granted authority.

Defendant McKay had no such power; acted outside the scope of her authority; and acted with malice. She is not entitled to quasi-judicial immunity.

OTHER SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED

A. Mr. Cherner's Constitutional Rights

"Freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *see also Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir. 1977):

> The existence of a "private realm of family life which the state cannot enter . . . has its source . . . not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'

Duchesne, 566 F.2d at 824, quoting *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977). *Duchesne* also noted:

> Here we are concerned with the most essential and basic aspect of familial privacy – the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children,. It is the interest of the parent in the "companionship, care, custody and management of his or her children", *Stanley v. Illinois*, 405 U.S. 645 (1972), and

> of the children in not being dislocated from the "emotional attachments that derive from the intimacy of daily association" with the parent, *Organization of Foster Families, supra*, 431 U.S. at 844.

Duchesne, 566 F.2d at 825. Further:

> This mutual interest in an interdependent relationship has received consistent support in the cases of the Supreme Court. "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic civil rights of man', *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and 'rights far more precious . . . than property rights', *May v. Anderson*, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder', *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Duchesne, 566 F.2d at 825.

Mr. Cherner was denied due process because the defendants herein violated the Family Court order and the ethical rules which bound them. Neither this Court nor the Second Circuit may do an end-run around Mr. Cherner's Constitutional rights

by improperly granting the defendants quasi-judicial immunity to which they are not entitled.

B. Second Circuit ruling on quasi-judicial immunity

In *Gross v. Rell*, 585 F.3d 72 (2nd Cir. 2009), the Second Circuit considered the applicability of quasi-judicial immunity to private (non-judicial) actors:

> if we ultimately conclude that the immunity defense *is* available to any of the defendants under federal law, we will have to determine the circumstances under which immunity is defeated. Even judicial immunity, which provides judges with very broad protection, may be overcome if the judge acts in the clear absence of all jurisdiction or if he is not acting in his judicial capacity. *See, e.g., Tucker [v. Outwater*, 118 F.3d 930 (2nd Cir. 1997), cert. denied, 522 U.S. 997 (1997)] at 933 (citing cases). ***It may be the case that quasi-judicial immunity may similarly be overcome: for example, if the plaintiff alleges that the actions a defendant took were discretionary (as opposed to in strict compliance with court orders), undertaken in bad faith, intentional torts, etc. . .*** If such immunity exists in this case, we will undertake to decide this second-order question.

Gross, 585 F.3d at 82-83 (emphasis added).

Gross acknowledged this Court's holding that quasi-judicial immunity can "be defeated by a showing of malice", *Burns*, 500 U.S. at 499-501, ***for example, by failure to comply with court orders.*** The Second Circuit's ruling herein is in conflict with *Gross*.

Defendants acted with such malice:

- McKay violated the court's order by not observing the children with each parent. (A30-31);
- McKay committed multiple violations of the American Psychological Association's (APA) Code of Ethics. (A31).
- McKay falsely claimed that she had sent Mr. Cherner an email requesting his assistance in facilitating appointments, and that when he did not respond, she "assumed" that he was "no longer going to comply." (A34).
- McKay delayed the issuance of her report in violation of the court order. (A35).
- McKay failed and refused to obtain the therapist's records, in violation of the court order. (A36).
- McKay improperly included hearsay in her report and reached untenable and unsupported conclusions. (A36).
- McKay included in her report hearsay allegations about Cherner which were false and defamatory, which she knew or should have known were false. (A36).
- McKay sought to minimize the threats and violence by the adverse party, by falsely claiming that the adverse party's behavior

was the fault of Cherner's children, for not being "empathic" enough to understand the "triggers" that cause her threats and violence. (A36-37).

- Cherner's expert, Peter Favaro, found the report inappropriate and one-sided, and found multiple ethical violations by McKay. (A37).
- The report violated APA Guidelines 2.05, "Knowledge of the Scientific Foundation for Opinions and Testimony." (A37);
- The report violated APA Guideline 9.02, "Use of Multiple Sources of Information." (A38).
- The report violated APA Guideline 10.02, "Selection and Use of Assessment Procedures." (A38).
- The report violated APA Guideline 11.02, "Differentiating Observations, Inferences, and Conclusions." (A38-39)
- The report violated APA Guidelines for custody evaluation, and violated Section I ("Orienting Guidelines: Purpose of the Child Custody Evaluation Subsection 3: The evaluation focuses upon parenting attributes, the child's psychological needs, and the resulting fit"). (A39).
- The report violated Section I Subsection 5 ("Impartial Evaluators"). (A39).
- The report violated Section 12 ("Psychologists strive to complement the evaluation with the appropriate combination of examinations"). (A39-A40).

C. Report of New York State's Blue Ribbon Commission on Forensic Custody Evaluations (December 2021)

In 2021, the State of New York formed a "Blue Ribbon Commission" to review forensic evaluations in custody matters, and issued a report in December 2021.[1]

The Commission made significant findings:

> Ultimately, the Commission members agree that some New York judges order forensic evaluations too frequently and often place undue reliance upon them. Judges order forensic evaluations to provide relevant information regarding the "best interest of the child(ren)," and some go far beyond an assessment of whether either party has a mental health condition that has affected their parental behavior. ***In their analysis, evaluators may rely on principles and methodologies of dubious validity. In some custody cases, because of lack of evidence or the inability of parties to pay for expensive challenges of an evaluation, defective reports can thus escape meaningful scrutiny and are often accepted by the court, with potentially disastrous consequences for the parents and children.*** Commission members recognize that this Commission

[1] The report is at https://ocfs.ny.gov/programs/cwcs/assets/docs/Blue-Ribbon-Commission-Report-2022.pdf

> was established in the hope of preventing such tragic occurrences in the future. ***As it currently exists, the process is fraught with bias, inequity, and a statewide lack of standards, and allows for discrimination and violations of due process.***

Report at p. 4 (emphasis added).

Addressing quasi-judicial immunity, the Commission stated:

> ***Most of the members of the Commission agree with the need for the elimination of quasi-judicial immunity. Currently, when parents and attorneys believe unethical, biased or incompetent evaluators have victimized them or their children, there is no well-known avenue to have their grievances addressed.*** In the First and Second Departments, a process overseen by the Office of Court Administration exists to have the evaluator removed from a panel where the evaluator is appointed, but parents are often not given information about it and do not know how to pursue it. The Commission suggests this be rectified with information about every aspect of the process provided in writing to all litigants.

Report at p. 12 (emphasis added).

Further:

> A majority of Commission members believe that as common law effectively prohibits civil action against evaluators, a cocoon of quasi-judicial immunity impedes evaluator accountability. ***They recommend legislation be enacted eliminating such quasi-judicial immunity so that evaluators may be subject to civil liability where their conduct gives rise to a cognizable cause of action.***

Report at p.13 (emphasis added).

The Commission acknowledged that forensic evaluators (i) act badly; (ii) with bias and inequity; (iii) in violation of Constitutional rights; with (iv) disastrous consequences for parents and children. What the Commission did not understand – because the Second Circuit and lower courts have refused to follow this Court's rulings - is that forensic evaluators are NOT entitled to quasi-judicial immunity.

Such failures and refusals must stop. This Court is compelled to grant the petition and reverse the rulings below.

D. Matter of Catherine Youssef Kassenoff

On May 27, 2023, Catherine Youssef Kassenoff, a former Assistant United States Attorney, posted on her Facebook page that this would be her last post, as she had been given a

terminal cancer diagnosis and was proceeding with assisted suicide in Switzerland.

Ms. Kassenoff noted:

> The New York court system is responsible for this outcome and should be held accountable for ruining the lives of my children, me, and so many other similarly-situated protective parents (mostly mothers) who have tried to stand up against abuse but were labeled 'liars', 'mentally ill', and then treated like criminals.

See https://msmagazine.com/2023/06/05/catherine-kassenoff-death-child-custody-divorce-court/.

Ms. Kassenoff was disenfranchised in matrimonial court and family court, by bad actors, including a forensic evaluator, Marc Abrams. Details are at:

- https://custodypeace.medium.com/i-ask-that-you-please-keep-telling-my-story-so-that-the-truth-is-known-far-and-wide-a-final-plea-977df260097d

and

- https://www.facebook.com/catherine.y.kassenoff

and include:

- Temporary orders of protection based on bare allegations, which were used to effect a false

arrest, with no evidentiary hearing ever held on the TOPs

- Improper criminal charges brought based on unproven TOPs, charges which were later dismissed
- Resulting victimization of Ms. Kassenoff by the forensic evaluator, who made false and defamatory statements about her out of greed and corrupt animus.

The documents may be reviewed by going to:

(https://iapps.courts.state.ny.us/webcivil/FCASMain)

and searching by index number: 50594/2018 and 58217/2019. Ms. Kassenoff also left a trove of documents located at:

https://drive.google.com/drive/folders/1ZitsXgychSTNxN4FXFjjoip93w4E6EaN.

The situation is another example of the corruption of the New York State judiciary and actors in matrimonial and family court matters, including corrupt forensic evaluators who lie and deceive out of greed and evil. It shows the consequences of the Second Circuit's and lower court's failure to follow this Court's rulings, resulting in the illegal granting of quasi-judicial immunity and resulting bad behavior.

Mr. Cherner has given this Court the golden opportunity to stop this evil, where the Second Circuit and lower court failed. This golden opportunity is easy – ***all the Court has to do is grant the petition and apply its precedential***

rulings to find that forensic evaluators in custody cases are not entitled to quasi-judicial immunity, because they do not perform "the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Antoine*, 508 U.S. at 435-36, quoting *Burns*, 500 U.S. at 500. It is that simple. Failure to so act will place this Court on the wrong side of history and in a state of evil so extreme that it will be difficult if not impossible to overcome.

CONCLUSION

This Court should issue a writ of certiorari to review and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

/s/ Dan Cherner

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Dated: June 22, 2023
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RULE 44.2 CERTIFICATE

As required by Supreme Court Rule 44.2, I certify that the petition for rehearing of order denying petition for a writ of certiorari is restricted to grounds of intervening circumstances of a substantial or controlling effect and other substantial grounds not previously presented, and is presented in good faith and not for delay.

I declare under penalty of perjury that the foregoing is true and correct

Executed on June 22, 2023

/s/ Dan Cherner
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