No. 25-662

IN THE

# Supreme Court of the United States

ERIKA MABES, INDIVIDUALLY
AND ON BEHALF OF L. M., J. R. M.,
AND J. A. M., MINOR CHILDREN, *et al.*,

*Petitioners,*

*v.*

SHANNON THOMPSON, *et al.*,

*Respondents.*

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

## SUPPLEMENTAL BRIEF OF PETITIONER PURSUANT TO RULE 15.8

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## INTRODUCTION

Petitioners submit this supplemental brief to bring to the Court's attention *State v. Nieves*, 2025 N.J. LEXIS 1149, 262 N.J. 161, 345 A.3d 1127 (2025), a landmark decision issued by the Supreme Court of New Jersey on November 20, 2025—ten days after the petition in the above-captioned case was filed. *Nieves* is pivotal because, after thorough consideration, the court rejected as unreliable and inadmissible the type of reckless analysis provided by the child abuse pediatrician in *Mabes*.

## ARGUMENT

*Nieves* arose out of a *Frye* hearing on the scientific reliability of the shaken baby syndrome/abusive head trauma (SBS/AHT)[1] diagnosis rendered by a child abuse pediatrician. After a five-day hearing, the trial court issued a 75-page decision concluding that "testimony concerning SBS/AHT could not be permitted in this case because it is not reliable evidence." 2025 N.J. LEXIS 1149, *73. The court precluded the child abuse pediatrician from testifying on SBS/AHT and dismissed the charges for insufficient evidence. The appellate court concurred, explaining in a unanimous 48-page opinion that "the State has not demonstrated general acceptance of the SBS/AHT

1. Shaken baby syndrome was rebranded abusive head trauma in 2009. *See* App. 96a. In *Mabes*, the child abuse pediatrician primarily used the term abusive head trauma in describing L.M.'s brain injury. *Nieves* uses the combined term SBS/AHT for reasons explained in footnote 2 of the opinion, and we use it here for similar reasons. The Innocence Network in their amicus brief also used the combined term for similar reasons, albeit in reverse order. App. 86a.

hypothesis to justify its admission in a criminal trial." 2025 N.J. LEXIS 1149, *76. Multiple amicus briefs were filed with the New Jersey Supreme Court, including, as in *Mabes,* amicus briefs from the Innocence Network and the American Academy of Pediatrics. By a 6-to-1 vote, the New Jersey Supreme Court concluded in a 124-page opinion that the child abuse pediatrician's testimony on SBS/AHT was "unreliable and inadmissible at trial." 2025 N.J. LEXIS 1149, *124. All charges were dismissed.

The parallels between *Nieves* and *Mabes* are striking. In both cases,

- Infants developed neurological symptoms (seizures/respiratory distress) while in their fathers' care.

- The child abuse pediatricians diagnosed SBS/AHT without adequate investigation and despite the absence of direct evidence of abuse.

- The child abuse pediatricians ignored the histories provided by the parents, the supporting medical records, and the advances in the scientific literature on SBS/AHT.

- The child abuse pediatricians' opinions were treated as dispositive proof of abuse despite the lack of scientific validation for their claims.

- Multiple reviewing experts, including Dr. Mack (pediatric radiology) and Dr. Scheller (pediatric neurology), found that the medical findings had non-

abusive medical explanations, including extreme prematurity in *Nieves* and a botched intubation in *Mabes*, with no evidence of abuse or neglect.

- The criminal charges brought against the fathers were dismissed when the child abuse pediatricians' medical claims fell apart.

- The Innocence Network (IN) provided amicus briefs that addressed the relevant developments in the scientific literature.

*Nieves* and *Mabes* followed the same pattern: initial charges were based on unreliable SBS/AHT diagnoses that ultimately could not be sustained. In *Nieves*, criminal charges were dismissed after the courts determined that there was no scientific basis for the child abuse pediatrician's diagnosis of SBS/AHT. In *Mabes,* criminal charges against the father were dismissed when "the medical evidence fell apart." Nearly two years later, DCS removed Dr. Mabes from the child abuse registry because it "lacked sufficient evidence" to substantiate the allegations against her. But by this point, her intended medical career had been demolished and the family was deeply in debt.

## I. The SBS/AHT Hypothesis Is Not Supported by Biomechanical Research.

*Nieves* is directly relevant to *Mabes* in two ways. First, the *Nieves* conclusion that there is no biomechanical support for what purports to be a biomechanical hypothesis applies to both cases. The lack of biomechanical support

for the SBS/AHT hypothesis has been known since 1987—more than three decades before *Nieves* and *Mabes*—and confirmed in multiple experiments by biomechanical engineers and child abuse pediatricians. *See Nieves* at 2025 N.J. LEXIS 1149, *17-36.

It has also been known since 2001 that the medical findings historically attributed to shaking or other forms of abuse, including subdural hemorrhage, brain damage and later retinal hemorrhage, are also seen in short falls, natural disease processes and congenital conditions, which were present in *Nieves* and *Mabes.* This "overlap" was confirmed by the child abuse section of the American Academy of Pediatrics in 2009. Often, however, child abuse pediatricians paid little attention to these innocent alternatives, relying instead on outdated algorithms that did not reflect the full range of possibilities.

In *Nieves,* the child abuse pediatrician ignored that the infant was born more than three months early (weight 1.5 lbs.), remained in hospital for approximately seven months, had congenital heart defects requiring two cardiac surgeries, abnormal retinopathy (birth) and developmental delay (ongoing). At 11 months (adjusted age 8 months), he had three episodes of seizure-like activity, including one on videotape. Since there was no direct evidence of trauma or abuse, a child abuse pediatrician diagnosed shaking based on retinal hemorrhages and subdural bleeding, ignoring his complex medical history, which explained his seizures and other medical findings.

In *Mabes*, the child abuse pediatrician went even further. L.M., a two-month-old twin, did not have any of the classic findings of SBS/AHT. He did not have subdural

hemorrhage, he did not have retinal hemorrhages, and he did not have traumatic brain injury—the classic triad that for decades formed the basis for the SBS/AHT diagnosis. Instead, he was diagnosed with hypoxic ischemic encephalopathy, *i.e.*, brain damage due to lack of oxygen. It had been known since 2001 that the brain damage previously thought to be evidence of shaking or abuse was often hypoxic (due to lack of oxygen) rather than traumatic.

Brain damage due to lack of oxygen can be caused by anything that interferes with the flow of oxygen to the brain—infection, pneumonia, suffocation, etc. *See* App. 94a, notes 20, 21. In this case, the brain damage was fully explained by a botched intubation at a local hospital that deprived the child of oxygen for 12 minutes. The mother, a surgeon, witnessed this event and described it to the child abuse pediatrician, treating doctors and DCS *before* abuse was diagnosed or the children seized. Her account was corroborated by the medical records at the local hospital and the pre-admission records at the hospital to which he was transferred, all of which were readily available. Yet this catastrophic event was ignored entirely by the child abuse pediatrician and the Department of Child Services (DCS).

Over the following months, the medical records were reviewed by multiple experts, most of whom have published in peer-reviewed literature. These included a pediatric neurologist (Dr. Scheller), two pediatric radiologists (Dr. Mack, Dr. Hurt), two neuroradiologists, one who practiced in the same system as the child abuse pediatrician (Dr. Arvin, Dr. Hutchins), two pediatricians with expertise in child abuse, including the founder of a child abuse team

(Dr. Miller, Dr. Hyman), a neuropathologist (Dr. Auer) and an emergency physician (Dr. Glaser), all of whom found that the brain damage was attributable to the botched intubation, with no evidence of abuse or neglect. After reviewing this information, the prosecutor withdrew the criminal charges against the father and advised DCS that the medical evidence had fallen apart. By then, the children had been returned to their parents, who were described by DCS supervisors as exemplary.

None of this, however, swayed the child abuse pediatrician, who dismissed the experts who had written reports as "denialists." DCS then re-registered Dr. Mabes as a child abuser simply because she was "the mother" despite the fact she was not present when the child developed symptoms. This went on for 2½ years, destroying Dr. Mabes' intended medical career, crippling the family's finances and devastating the family, which now included a traumatized sibling and a severely disabled child. The DCS proceedings ended in February 2022, when DCS dismissed all claims against Dr. Mabes, finally acknowledging that they had no evidence to support any of these claims.

It took even longer—until June 2024—for the child abuse pediatrician to admit that 12 minutes without oxygen could indeed cause brain damage. The refusal to acknowledge the well-documented catastrophic intubation at the local hospital was just one of the many errors that the child abuse pediatrician made and refused to correct. App. 104a, n. 44. As the Innocence Network pointed out, when child abuse pediatricians act "with a lack of objectivity amounting to willful blindness or recklessness, then qualified immunity presumptively should not apply.

Such a lack of objectivity is apparent here [in *Mabes*]." App. 90a.

## II. *Nieves* Confirms That the Child Abuse Pediatrician in *Mabes* Did Not Act Reasonably in Diagnosing SBS/AHT.

In *Mabes*, the Seventh Circuit held that the child abuse pediatrician "acted reasonably at all points in time." App. 14a. This is not true. In the 2018 *Frye* hearing in *Nieves*—a year before the events in *Mabes*—the child abuse pediatrician testified that an evaluation of a child with suspected SBS/AHT requires consultation with multiple specialists to determine whether there is a "possible disease, medical issue, or pathology that might be contributing to the child's symptoms . . . such specialists work together to provide child abuse pediatricians with a full history of the child's health." She confirmed that there are no specific diagnostic criteria for SBS/AHT and that shaking has been challenged as the cause of injury. She testified that the triad of subdural hemorrhage, severe retinal hemorrhage and encephalopathy (altered mental state) raises concern for SBS/AHT and requires further investigation, and that the combination of subdural hemorrhage and severe retinal hemorrhages raises even more of a concern. If the symptoms of the triad remain unexplained after thorough review, then they are "more specific for inflicted head injury." SBS/AHT is, in short, a default diagnosis that "requires an elimination of other possible causes of the infant's symptoms."

In *Mabes,* this extensive search for alternative explanations by a team of specialists did not occur. Instead, the child abuse pediatrician acted largely on her own, overriding the findings of the treating physicians, the

radiologist at the local hospital, and even the radiologists at her own hospital.[2] This started when she ignored the observations of the mother, a surgeon, who witnessed the botched intubation, and it continued for the next four years. The District Court held that the refusal to credit—or even consider—the well-supported explanation for the brain damage and other iatrogenic findings (*i.e.*, findings caused by medical intervention) proffered by Dr. Mabes violated the family's right to due process.

The Seventh Circuit held that the District Court's findings were inadequate and conducted its own review of the 3,861-page record. In so doing, it omitted large swaths of the record, including the 686 pages of evidence provided in the administrative proceeding. Most striking, in its 26-page summary of the record, the Seventh Circuit does not mention—let alone discuss—Dr. Mabes' declaration[3] (which the District Court cited), the supporting medical records, the photographs of the almost invisible abdominal bruise, or the twelve expert reports presented in the administrative proceedings. It similarly omits any reference to hypoxia, ischemia, seizures, the 100% oxygen levels of the child at the house, the events at the local hospital, the multiple errors throughout the child abuse pediatrician's reports, the 2½ year administrative proceedings that took place before DCS removed Dr.

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2. The treating physicians confirmed on the first day that the skull fracture was "remote" [old] and seemingly unrelated to the acute hypoxic brain injury, yet the child abuse pediatrician insisted on connecting them. Similarly, the child abuse pediatrician repeatedly identified fractures that did not exist for both twins and insisted on dating them, which is not possible even if they did exist.

3. Dr. Mabes' declaration is included in the Supplemental Appendix (Sealed).

Mabes from the child abuse registry, or the 4 years that went by before the child abuse pediatrician admitted that the deprivation of oxygen for 12 minutes could indeed cause brain damage.[4]

Judicial concerns with unreliable SBS/AHT diagnoses did not originate with the New Jersey Supreme Court in *Nieves*. In 2011, a highly-respected Seventh Circuit Judge described a confession obtained in an SBS case—the type of confession on which the SBS/AHT diagnosis is now conceded to be based—as "worthless as evidence." *Aleman v. Village of Hanover Park*, 662 F.3d 897, 907 (7th Cir. 2011) (Posner J.). In 2014, after a full hearing in which testimony was taken from the leading proponents of the SBS/AHT hypothesis, a district court judge in the Seventh Circuit observed in a 97-page order that it appeared that "a claim of shaken baby syndrome is more an article of faith than a proposition of science." *Del Prete v. Thompson,* 10 F. Supp. 3d 907, 957 & n.10 (N.D. Ill. 2014) (Kennelly J.). In 2015, after a three-week jury trial, an Indiana federal district court entered judgment for $31 million against a child abuse pediatrician and DCS defendants for civil rights violations arising from erroneous allegations of abusive head trauma. *Finnegan v. Myers*, Cause No. 3:08-cv503 (N.D. Ind.), Dkt. 349.

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4. The 12 minutes of oxygen deprivation was established by the medical records, not the Mabes. The child abuse pediatrician did not face a "grave and urgent" situation—when she was called, as well as when she came to the hospital hours later, L.M. was stable and in the care of the treating doctors, and his siblings were with their grandmother, a radiologist. The child abuse pediatrician's only job was to consider whether there were explanations for L.M.'s findings other than abuse, which she failed to do not only on July 20 but for the next four years. Similar circumstances apply to the DCS defendants.

Similar developments are occurring regularly in other settings. In 2016, the first independent review of the evidence base for the shaking hypothesis found that there was no reliable evidence for shaken baby syndrome. App. 97a. This two-year review sponsored by the Swedish government was staffed largely by members of the Karolinska Institute – the same Institute that gives the Nobel Prize in Medicine. And in 2024, Supreme Court Justice Sotomayor noted that the National Registry of Exonerations included over 30 cases in which caretakers convicted of child abuse based partially on evidence of SBS were later exonerated. App. 99a. That figure is now up to 41. National Registry of Exonerations (Oct. 25, 2025). Additional civil rights suits are now also in progress, including a case in which Poland's Supreme Court denied extradition after a careful review by forensic experts from the Torun Institute, the leading Polish forensic institute, found the child abuse claims made by a Minneapolis child abuse pediatrician to be unfounded. *See William Reynolds et al v. Harper et al*, Amended Complaint, Case No. 25-CV-754-LMP-JFD (D.C. Minn. 2025).

## CONCLUSION

The Seventh Circuit's grant of immunity to the child abuse pediatrician and the DCS defendants in *Mabes* is phrased as qualified immunity but functions as absolute immunity. If it is acceptable for a child abuse pediatrician and other state actors to refuse to consider exculpatory evidence and to make up medical findings that do not exist, it would be hard to conceive of any actions that would not receive immunity. The Seventh Circuit stated that it was granting immunity to the child abuse pediatrician for "providing a medical opinion to DCS, even if that opinion, in hindsight, was incorrect." App. 15a. In this case,

however, no hindsight was needed—Dr. Mabes provided the exculpatory information to the child abuse pediatrician and DCS *before* the children were seized, and they had more than two years to consider it. This information was further supplemented by the medical records and twelve expert reports, all of which were ignored. Again, no hindsight was required.

*Nieves* vividly demonstrates that child abuse pediatricians and affiliated state actors routinely base constitutional deprivations on scientifically unreliable medical theories and refuse to consider exculpatory evidence. The Seventh Circuit's grant of immunity to a child abuse pediatrician and other state actors who refused to consider easily verifiable exculpatory evidence gives a green light to such behavior. *Nieves* confirms this concern is not theoretical but ongoing and urgent. These issues warrant review by this Court.

Respectfully submitted,

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