

*No. 12-56*  
IN THE  
SUPREME COURT OF THE UNITED STATES

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E.T., *ET AL.*, PETITIONERS

v.

TANI CANTIL-SAKAUYE, JUDGE, CHAIR OF THE JUDICIAL COUNCIL OF  
CALIFORNIA, IN HER OFFICIAL CAPACITY, *ET AL.*, RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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Brief for *Amici Curiae* First Star, the National Association of Counsel  
for Children and Voices for America's Children in Support of  
Petition for a Writ of Certiorari

NOY S. DAVIS Schiff Hardin LLP <i>1666 K Street, NW, Suite 300</i> <i>Washington, DC 20006</i> <i>(202) 778-6400</i> ndavis@schiffhardin.com	CHRISTOPHER J. RILLO COUNSEL OF RECORD <i>Schiff Hardin LLP</i> <i>One Market, Spear Street Tower</i> <i>Thirty-Second Floor</i> <i>San Francisco, CA 94105</i> <i>Telephone: (415) 901-8700</i> <i>crillo@schiffhardin.com</i>  C. CRAIG BRIDWELL <i>Schiff Hardin LLP</i> <i>One Market, Spear Street Tower</i> <i>Thirty-Second Floor</i> <i>San Francisco, CA 94105</i> <i>Telephone: (415) 901-8700</i> cbridwell@schiffhardin.com
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Attorneys for *Amici Curiae*

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## I. STATEMENT OF INTERESTS

This brief<sup>1</sup> is filed on behalf of three *amici curiae*: First Star, the National Association of Counsel for Children,<sup>2</sup> and Voices for America's Children in support of the Petition for Writ of Certiorari (Docket No. 12-56).

These *amici curiae* are all organizations of child advocates with extensive and varied experience representing children within legal and foster care systems, and file this brief to underscore the importance of certain matters they deem not adequately considered by any of the courts below.

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<sup>1</sup> No counsel for a party authored the brief in whole or in part. No counsel for a party or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici curiae*, its members, or its counsel made such a monetary contribution. In accordance with Supreme Court Rule 37(2)(a), the *amici curiae* provided timely notice of intent to file this *amici curiae* brief, and all parties granted consent to the filing of this brief which are submitted herewith.

<sup>2</sup> Robert Fellmeth, who is one of the counsel for petitioners, and Chris Wu, who is employed by respondent Administrative Office of the Court of the Judicial Council, are members of the Board of the National Association of Counsel for Children. Each recused himself from voting on the matter of this *amici curiae* brief.

These *amici curiae* have the specialized knowledge and experience to describe the unique qualities of child protection dependency courts, as well as the impact of the Court's decision on the abused and neglected children seeking a federal forum through Petitioners. A clear understanding and appreciation of these factors is critical to the issues that must be addressed by any court making a determination with respect to abstention.

**A. First Star**

First Star is a 501(c)(3) child advocacy organization that promotes practices that improve life for abused and neglected children in the United States. First Star's programs support children's basic rights and include programs evaluating the right to counsel for children in dependency cases. First Star has regularly provided testimony and other information to lawmakers and has filed numerous legal briefs as *amicus curiae* regarding issues affecting abused and neglected children. Its programs also include direct service "foster care academies" that further the academic aims and

achievements of foster children by providing them with residential academic programs housed on college campuses.

**B. National Association of Counsel for Children**

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association that works to improve the delivery of legal services to children, families and agencies, advance the rights of children, develop the practice of law for children and families, and educate public officials about their needs. The NACC's 2,200 members include attorneys who represent children before family and juvenile courts of the nation, judges, physicians, psychologists, social workers, law professors and other professionals concerned about children. The NACC works with the American Bar Association, the National Council for Juvenile and Family Court Judges, and others. The NACC Amicus Committee has contributed numerous *amicus curiae* briefs involving the legal interests of children.

**C. Voices for America's Children**

Voices for America's Children (Voices) is the nation's largest network of multi-issue, child-advocacy organizations. With 60 member organizations, located in nearly every state, its nationwide nonpartisan, nonprofit network leads advocacy efforts with administrative and legislative entities at the community, state, and federal levels to improve the lives of all children, especially those who are most vulnerable. The Voice's network makes up the most extensive advocacy group in the nation representing only the interests of children. Voices has a special stake in the rights of foster children, and has included a child welfare working group among its activities for many years.

**II. SUMMARY OF THE ARGUMENT**

*Amici curiae* support and concur in the views of Petitioners and provide this brief to underscore the unique nature of the dependency proceedings that comprehensively determine the lives of foster children, the inadequacy of the state dependency court proceedings

to provide a vehicle for raising the claims asserted by Petitioners and the catastrophic impact on already vulnerable foster children if their claims cannot be heard in federal court. The details provided herein can assist in an understanding of the depth and complexity of the dependency court process, from the court's affirmative mandate to act on behalf of the children, to the continuous oversight and determinations made regarding all aspects of a foster child's life, including health, education, placement, familial interaction and relationship for the years of the child's life while in foster care. Closely interrelated is the impact of these proceedings on foster children, and the clear inadequacy of these proceedings as vehicles for asserting the federal claims sought to be asserted by Petitioners.

*Younger* and *O'Shea* must not be read to foreclose a federal forum for abused and neglected children asserting federal constitutional and statutory claims.

### III. ARGUMENT

Petitioners seek a writ of certiorari regarding the decision in *E.T. v. Cantil-Sakauye (E.T.)*, in which the Ninth Circuit denied rehearing and rehearing en banc and amended the panel opinion, *E.T.*, 682 F.3d 1121 (9<sup>th</sup> Cir. 2012), following an initial per curiam decision, *E.T.*, 657 F. 3d 902 (9<sup>th</sup> Cir. 2011). At issue is the affirmance of the District Court’s dismissal of the Petitioners’ complaint on the basis of abstention principles espoused in *O’Shea v. Littleton*, 414 U.S. 488 (1974) and *Younger v. Harris*, 401 U.S. 37 (1971).<sup>3</sup> *Amici curiae*, who have substantial understanding and experience with child protection policy and practice issues strongly believe the courts below, in erroneously applying *O’Shea* and *Younger* to this case, did not adequately consider the distinctive focus and continuing supervisory role of the court in these dependency proceedings nor the overwhelming and debilitating impact on children in the foster care system. We file this brief to detail and describe the unique aspects

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<sup>3</sup> *E.T. v. George*, 681 F.Supp.2d 1151 (2010).

of the dependency court in order to facilitate an informed consideration of the relevant factors implicated in the abstention doctrine.

**A. The Distinctive Nature of Child Protection Dependency Proceedings.**

Child protection dependency proceedings differ dramatically and in critical respects from other courts of American jurisprudence, including those considered in *O'Shea* and *Younger*. The fact that dependency proceedings are child protection cases gives rise to a purpose, complexity and breadth in these proceedings that simply has no match in other cases.

At the outset, children appear as parties in dependency proceedings involuntarily and through no wrongdoing of their own. They are parties only because they have been victimized by people who are supposed to care for and protect them. Yet they are parties to the legal proceedings. CAL. WELF. & INST. CODE § 317.5(b). And their rights and interests are to be protected. CAL. WELF. & INST. CODE § 317(c).

The statutory purpose of California's dependency court system also reflects the uniqueness of these proceedings. Rather than functioning in the usual way as a neutral forum for the dispassionate resolution of civil disputes between opposing parties, by statute, the California dependency court system must protect the best interest of the child. The dependency court itself has a statutorily imposed agenda "to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." CAL. WELF. & INST. CODE § 300.2. See Barbara Flicker, *Best Practices in Child Protection Courts*, AMERICAN BAR ASSOCIATION, 13 (May 24, 2005), <http://www.abanet.org/child/rclji/bestpractices.doc> (explaining that for this reason, dependency-court judges must have experience in "[c]hild development, parenting skills, the physiology of drug and alcohol exposure for

fetuses, child psychology, family systems and other areas of the behavioral sciences”).

The dependency attorney also is vested with a unique mandate. Under California law, a “primary responsibility of counsel appointed to represent a child pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child.” CAL. WELF. & INST. CODE § 317(c). Counsel for children in dependency court accordingly are statutorily required to “investigate the interests of the child beyond the scope of the juvenile proceeding, and report to the court other interests of the child.” CAL. WELF. & INST. CODE § 317(e)(3)

Moreover, dependency proceedings follow a statutorily prescribed, highly specialized process with specific times required for hearings at which specific issues related to the mandate of protecting the child must be considered. The following paragraphs describe the basic statutorily required process, which continues in the

review phase for foster children until the child ages out of care or no longer is a foster child.

**Initial Hearing.** A social worker typically initiates a dependency case after determining that a child must be removed from the home. Within days, the court must conduct an initial hearing, where it appoints counsel, advises parents of rights, explains the court process, orders any visitation, and inquires as to relatives as possible caretakers. CAL. WELF. & INST. CODE § 315; Cal. R. Ct. 5.670. With the core purpose of the hearing being the child's initial safety plan, the initial detention hearing is not amenable to litigating complex class actions.

**Jurisdictional Hearing.** The court must determine whether the child has suffered harm in a manner conferring jurisdiction on the dependency court and warranting state intervention. This stage is the "trial" of a dependency case. Publication Development Committee, Victims of Child Abuse Project, *Resource Guidelines, Improving Court Practice in Child Abuse & Neglect Cases*, 46 (1995), <http://www.ncjrs.gov/pdffiles/>

resguid.pdf. Counsel argues whether past events satisfy the jurisdictional standards, and can examine and cross-examine witnesses. This is the stage that most resembles a typical non-dependency court proceeding. However, the judge's ruling that the jurisdictional standard is satisfied is effectively a beginning. From this point forward, the court plans for the child's future well-being. Jurisdiction in a dependency case is based on a finding of specific harms or risks of harm to an individual child and typically ends when a child is no longer at risk. It is very different from the personal and subject matter jurisdiction exercised in typical state court proceedings.

**Disposition Hearing.** Within ten days after the jurisdiction hearing, the court conducts a hearing to decide "whether to dismiss the case, order informal services for the family without making the child a dependent, appoint a guardian with the consent of the parties, or declare the child a dependent of the court." Cal. Admin. Office of the Courts, *California Juvenile Dependency Court Improvement Program Reassessment*,

2-4 (November 2005), <http://www.courts.ca.gov/documents/CIPReassessmentRpt.pdf>; Cal. R. Ct. 5.695(a). Where the court deems the parents' residence proper for the child, the child welfare agency provides "family maintenance" services. If the court determines that the child cannot remain with the parents, the social worker assigned to the case will prepare a "reunification plan" addressing the parental problems and specifying how the parents can earn back custody over the child. The goal of the dispositional hearing is to create a plan in the best interests of the child.

**Review Hearings.** In maintenance cases, the court reviews the parents' progress at periodic review hearings. The court, in its discretion, may choose to extend the child welfare services for another six months at these hearings. In reunification cases, the court must hold a review hearing no less frequently than every six months. If the child is not returned to the parents during a review hearing, the court must have found that return would have created a substantial risk to the child's well-being.

CAL. WELF. & INST. CODE § 366.21(e). Within 12 months of the disposition hearing, if the parental environment remains too dangerous, the court must hold a permanency hearing at which it specifies a permanent plan for the child. The court also may extend the reunification plan for another six months if the parent is making progress but has yet to satisfy the reunification requirements. At the review hearings, the court must consider issues such as the services that have been offered to the parent, efforts of the social worker to maintain relationships between a child and individuals important to the child, and the child's relationship with his sibling group. CAL. WELF. & INST. CODE § 366.21(e).

**Termination Hearing.** Once the time for reunification has expired, the court must set a "366.26," or termination of parental rights, hearing. At this hearing, all parties, including the parents who have failed their child, may present evidence to be considered as the court creates a permanent plan serving the child's best interests. There must be a compelling reason for the

court not to find adoption to be in the child's best interests. CAL. WELF. & INST. CODE § 366.26. Here, again, the focus is on the child's best interests—this hearing is not structured nor equipped to include litigation of the types of violations alleged in the Complaint filed in this case.

Importantly, this termination hearing does not end the court's involvement with the child: rather it focuses on the termination of parental rights and the development of a long term plan for the child that does not include reunification with those parents.

Each case involves at least these proceedings listed. The conclusion of the "trial" (the adjudication hearing), which in other cases would end the court process, simply establishes the legitimacy of state intervention and augers in a lengthy period where the court makes all of the significant decisions that flow from the removal of the parents as the decision-makers for the child. The dependency case then can, and often does, encompass many, many years in which the court determines where

the child will live, with whom, as well as all significant medical and psychological treatment and educational issues. Until the court makes a final determination with respect to the child, this court oversight and decision-making continues. Hence, decisions about all of the significant issues with respect to the child can be, and routinely are, made many times over as placements and other circumstances change.

Collectively, the unique position of the parties and the statutory mandates of the dependency court system as a whole render these proceedings barely cognizable to attorneys who have appeared only in ordinary civil and criminal matters.

Aside from the narrow fact finding hearings in the initial dependency and [termination of parental rights] stages, dependency proceedings tend to focus less on past facts and more on the current social, emotional, and medical well-being of children. While there is a body of law that governs these proceedings, the obligations of the agency, and the power of the dependency court to make certain types of orders, advocacy in dispositional and permanency hearings is, for the most part, less about the law and more about the people involved. It is less about standards and more about needs; less about burdens of proof and more about emotional suasion.

Erik S. Pitchal, *Where are all the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 233, 242 (2008).

Nor will the children individually assert their rights in the individual dependency proceedings. “Children are, by dint of their minority, typically seen as incompetent under the law.” Erik Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 684 (2006). No one expects that these children will recognize and assert their rights to adequate legal representation. The idea that any child will assert a deprivation of her or his rights in this context is highly improbable, and the idea that all children deprived of their rights will do so is incomprehensible.

Given the peculiarities of the dependency court process and the depth and breadth of issues at the heart of determining the lives of foster children, if funding shortages prevent the children’s advocates from

discharging their statutory and constitutional duties, as the complaint in this case alleges, these abused and neglected children will not as a practical matter have any forum in which to challenge the resulting deprivation of their rights. As noted, the dependency courts themselves simply are not structured to adjudicate the type of dispute at issue in this case. And no other state judicial forum exists which would allow these issues to be meaningfully heard. Petitioners' lawsuit challenges the funding decisions by the Administrative Office of Courts, an arm of the California Supreme Court. With federal court abstention, petitioners would have to file, seeking an order from a California Superior Court judge that his or her superior, the Chief Justice, who is in charge of the Administrative Office of Courts, has violated the petitioners' rights by failing to adequately fund the dependency courts. To state the obvious, there is no constitutionally impartial jurist in California who can decide this lawsuit. *Cf., Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 883 (2009), (in assessing the risk

of actual bias or prejudgment of a jurist, due process guarantees require “a realistic appraisal of psychological tendencies and human weakness....”).

Federal courts should not abstain when it leaves a party without a remedy or where the state court is not impartial. *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) (relaxing deference to abstention principles when the state court is “incapable of fairly and fully adjudicating” the matter); *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (ruling that abstention “presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved,” which was unavailable where the state tribunal was impermissibly biased).

#### **B. The Impact on Foster Children**

The impact on foster children of the Court’s decision whether to permit a rehearing on the availability of a federal forum for this dispute is extraordinary. Consistent with the dependency court’s mandate “to provide maximum safety and protection for children who

are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm,” CAL. WELF. & INST. CODE § 300.2, the legal system determines where and with whom these children live and each and every significant aspect of their lives, including educational, medical and psychological treatment. Administrative policies that establish staggering caseloads for attorneys for foster children severely undermine the attorneys’ functioning and greatly reduce, if not eliminate, advocacy for most of these children about most of these issues. Given the breadth of the advocacy role and an overburdened and unresponsive social service system, the effects can be catastrophic for these children. In simple terms, the children do not get what they need and their lawyers are too busy themselves to even know about it.

The District Court accepted the overburdened nature of the system, but neither that court nor the Ninth

Circuit Court of Appeals adequately considered the effects on the abused and neglected children. As noted above, to foreclose a federal forum in which to challenge the excessive caseloads policy is tantamount to stalling effective advocacy on behalf of these children. In an overburdened social service system, this can play out for child after child in terms of untold continuing hardship.

#### IV. CONCLUSION

*Amici curiae* support and concur in the views of Petitioners. For the reasons outlined above - the unique nature of dependency proceedings that comprehensively determines the lives of foster children, the inadequacy of the state dependency court proceedings to provide a vehicle for raising the claims asserted by Petitioners and the catastrophic impact on already vulnerable foster children - *Younger* and *O'Shea* must not be read to foreclose a federal forum for abused and neglected children asserting federal constitutional and statutory claims.

First Star, the National Association of Counsel for

Children, and Voices for America's Children support the  
Petition for a Writ of Certiorari and submit that this  
Court should grant the Petition.

August \_\_, 2012  
NOY S. DAVIS  
Schiff Hardin LLP  
*1666 K Street, NW, Suite 300*  
*Washington, DC 20006*  
*(202) 778-6400*  
ndavis@schiffhardin.com

By: /s/ \_\_\_\_\_  
CHRISTOPHER J. RILLO  
COUNSEL OF RECORD  
*Schiff Hardin LLP*  
*One Market, Spear Street Tower*  
*Thirty-Second Floor*  
*San Francisco, CA 94105*  
*Telephone: (415) 901-8700*  
*crillo@schiffhardin.com*

C. CRAIG BRIDWELL  
*Schiff Hardin LLP*  
*One Market, Spear Street Tower*  
*Thirty-Second Floor*  
*San Francisco, CA 94105*  
*Telephone: (415) 901-8700*  
cbridwell@schiffhardin.com

Attorneys for *Amici Curiae*

## CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of the Supreme Court 33, the attached *amici curiae* brief is proportionally spaced, has a typeface of 12 points in Century font and contains 3,933 words, excluding the parts of the brief exempted by Rule 33(d), as counted by Microsoft Word 2003.

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By: /s/

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CHRISTOPHER J. RILLO  
COUNSEL OF RECORD  
*Schiff Hardin LLP*  
*One Market, Spear Street Tower*  
*Thirty-Second Floor*  
*San Francisco, CA 94105*  
*Telephone: (415) 901-8700*  
*crillo@schiffhardin.com*  
*Attorneys for Amici Curiae*