No. 12-56

In the Supreme Court of the United States

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 TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In trying to defend the Ninth Circuit's broad reading of the abstention doctrine articulated in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), Respondents have demonstrated exactly why certiorari is warranted in this case. Respondents defend the decision below based on an interpretation of *O'Shea* that would essentially make *all* policies and practices of a state judicial system unreviewable in federal courts acting under Section 1983. And Respondents strongly criticize a conflicting interpretation of *O'Shea* that has led the D.C. and First Circuits to reject abstention under that statute and to limit abstention to interferences with discretionary judicial decision-making. The choice between those two interpretations of *O'Shea* is the key question on which this case turns. It is also the key question on which there is an acknowledged circuit conflict. Certiorari is thus needed to resolve that conflict, to return the lower courts' interpretation of *O'Shea* to its original moorings, and to restore the scope of federal jurisdiction (closer) to what Congress enacted in Section 1983.

ARGUMENT

I. Respondents' Brief Confirms That The Lower Courts Are In Sharp And Acknowledged Conflict Over How To Interpret *O'Shea*.

In Respondents' broad view—echoing the Ninth Circuit—the *O'Shea* doctrine applies anytime "litigants seek federal court relief to reform the institutions of state government." Opp. 14. Thus, according to Respondents, *O'Shea* requires abstention from *any* "'interference'" with the "'administration of the judicial system.'" *Id.* at 15 (quoting *Luckey* v. *Miller*, 976

F.2d 673, 679 (11th Cir.1992)). Respondents acknowledge, however, that their view stands in stark conflict with Petitioners' view, which reads *O'Shea* as "limited to cases in which federal litigants only seek to affect the *merits* or *outcome* of present or future judicial proceedings." *Id.* at 14 (emphasis added). The question for this Court is therefore clear: Does *O'Shea* require abstention from all cases that would in any way limit or affect a state's administration of its judicial system, or does it require abstention only in cases that would interfere with discretionary judicial decision-making? Respondents admit that this case squarely presents that fundamental question. And Respondents cannot dispute that it is a question on which the lower courts are sharply split.

1. On one side of the split, Respondents agree that the Second, Fifth, Sixth, Tenth, and now the Ninth Circuit, have adopted their broad view. "Each of those circuits," Respondents note, "has concluded that abstention under *O'Shea* is available where a federal plaintiff seeks relief that would result in intrusion into and monitoring of state court *operations*." Opp. 17-18 (emphasis added).

This judge-made exemption to the jurisdiction provided by Section 1983 is thought by those courts to be far broader than mere abstention from interfering with state judicial decision-making. Instead, the exemption shields from federal suit *all* interference with "state court operations," and accordingly, in the words of the Sixth Circuit, it confers "'nearly absolute'" immunity "'[w]hen the state agency in question is a state court.'" *Id.* at 18 (quoting *Parker* v. *Turner*, 626 F.2d 1, 7 (6th Cir. 1980)).

2. On the other side of the split are decisions of the D.C., First, Fourth, and Eleventh Circuits. Although Respondents attempt to show that the facts of those cases differ from the facts here, Respondents do not—and cannot—dispute that those decisions take a fundamentally different view of *O'Shea*.

Indeed, Respondents have no answer to the D.C. Circuit's express acknowledgment of the circuit split in *Family Division Trial Lawyers* v. *Moultrie*, 725 F.2d 695 (D.C. Cir. 1984). Echoing what Respondents admit is the fundamental disagreement in this case, the D.C. Circuit squarely rejected a reading of *O'Shea* that would require abstention from all "challenges to regularized local court practices." *Id*. at 702 n.8. The D.C. Circuit instead limited abstention to challenges involving "oversight of inherently *discretionary decision-making* practices." *Ibid*. (emphasis added). In so doing, the D.C. Circuit acknowledged that it was creating a conflict with the Sixth Circuit. *Ibid*.

Rather than address the D.C. Circuit's acknowledgement of a circuit split, Respondents claim that *Moultrie* differed from this case because it involved a state court's policy of not paying court-appointed attorneys, as opposed to the policy here of burdening attorneys with unmanageable caseloads through underfunding. Opp. 18. But prohibiting state courts from conscripting lawyers into unpaid service as in *Moultrie* obviously "interfere[s]" with the state's "administration of [its] judicial system" (Opp. 15), and thus would plainly require abstention under Respondents'—and the Ninth Circuit's—broad interpretation of *O'Shea*.

Puzzlingly, Respondents also maintain that *Moultrie* does not conflict with the Ninth Circuit's de-

cision here because the D.C. Circuit found there that it "could adjudicate the attorneys' claims without evaluating or intruding into any state court *proceedings*" (Opp. 18, emphasis added)—i.e., without interfering with any "discretionary judicial conduct," *Moultrie*, 725 F.2d at 703. But that is exactly the standard that Respondents and the Ninth Circuit have rejected. See Opp. 15 ("[T]he issue is *not* whether a federal lawsuit would direct specific events in state court or require otherwise discretionary rulings or outcomes as Petitioners suggest"). Respondents' attempt to distinguish *Moultrie* thus confirms the very circuit conflict they seek to deny.

That conflict was further deepened by the First Circuit's decision in *Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459 (1st Cir. 1989). Respondents suggest that this decision does not conflict with the Ninth Circuit's decision because it involved a challenge to a state statute requiring judicial approval for minors to obtain abortions. But prohibiting state courts from following statutorily mandated state procedures certainly "interfere[s]" with the state's "administration of [its] judicial system" (Opp. 15), and thus would require abstention under Respondents' and the Ninth Circuit's interpretation of *O'Shea*. Indeed, the First Circuit in *Bellotti* admitted that "the way in which state courts treat future cases is affected" by striking down the abortion approval procedure. *Bellotti*, 868 F.2d at 465. The First Circuit nevertheless refused to abstain because "prohibition of an unconstitutional process" in its entirety would not interfere with the discretionary decision-making of state judges in particular cases. *Ibid*. In other words, the First Circuit agreed with the D.C. Circuit—and with Petitioners here—that *O'Shea* is

limited to interferences with discretionary judicial decision-making.

Moreover, the fact that the procedure challenged in *Bellotti* was enshrined in a statute makes no difference. An unwritten, non-statutory policy "indisputably operates more like a rule, a custom or a usage known to all participants in the system, than a decision left to the local judiciary's *discretion* to be exercised on a case-by-case basis." *Moultrie*, 725 F.2d at 703-04 (emphasis added). Whether the challenged rule is enshrined in statute (as in *Bellotti*) or followed as a matter of practice (as in *Moultrie* and here), "relief can be effected by requiring the superior court to adopt another 'rule'"—without intruding on discretionary judicial decision-making. *Id.* at 704; see also *New Orleans Public Service, Inc.* v. *City Council*, 491 U.S. 350, 370 (1989) (distinguishing challenges to rules from challenges to proceedings that are "judicial in nature").

3. This square circuit conflict is further enhanced by decisions of the Eleventh and Fourth Circuits. Although Respondents point out that those circuits found abstention appropriate, those circuits nevertheless reached that conclusion on narrower grounds, consistent with the D.C. and First Circuits' reading of *O'Shea*. See *31 Foster Children* v. *Bush*, 329 F.3d 1255, 1278 (11th Cir. 2003) (abstaining to avoid interfering with discretionary decisions about, e.g., "whether a particular placement is safe or appropriate or whether sufficient efforts are being made to find an adoptive family"); *Pompey* v. *Broward County*, 95 F.3d 1543, 1550 (11th Cir. 1996) (abstaining because challenge to management of contempt hearings would entail "relitigation of the state contempt proceeding issues" on which state courts had made dis-

cretionary decisions); *Suggs* v. *Brannon*, 804 F.2d 274, 278 (4th Cir. 1986) (abstaining because challenge to alleged "bad faith enforcement of the obscenity laws" would interfere with discretionary decision-making).

In sum, there is a fundamental, mature, and acknowledged conflict among the circuits. The Second, Fifth, Sixth, Ninth, and Tenth Circuits read *O'Shea* as requiring abstention from any action that in any way "interfere[s]" with the state's "administration of [its] judicial system." Opp. 15. In contrast, the D.C. and First Circuits, in harmony with the Eleventh and Fourth, read *O'Shea* as requiring abstention only where an action would interfere with discretionary judicial decision-making. This case therefore provides an opportunity to resolve a clear circuit conflict and bring clarity to a doctrine that has long generated uncertainty.

II. The Ninth Circuit's Approach To Abstention Improperly Expands *O'Shea*.

This case is also an opportunity to end an improperly broad misreading of *O'Shea* that dramatically restricts the scope of federal jurisdiction expressly granted by Congress in Section 1983. Although Respondents attempt to defend the Ninth Circuit on the ground that *O'Shea* broadly prohibits interference with *any* state administration of its judicial system, that is far from what *O'Shea* actually held. It is also flatly inconsistent with the plain text of Section 1983, which confers jurisdiction on federal courts to remedy "the deprivation of *any* [federal] rights, privileges, or immunities" by the States. 42 U.S.C. § 1983 (emphasis added).

1. *O'Shea* merely extended *Younger*'s prohibition on interfering with *ongoing* judicial proceedings so that it would cover interferences having the same effect on *future* proceedings. *O'Shea*, 414 U.S. at 499-500. It thus prohibited injunctions that would "indirectly accomplish the kind of interference" that occurs when a court enjoins an ongoing judicial proceeding. *Id*. at 500. That kind of interference involves second-guessing the discretionary judgments made by state judges when deciding particular cases—such as the judgment as to guilt in *Younger* and the judgments as to what sentence to impose or how much bond to set in *O'Shea*.

Respondents emphasize language from *O'Shea* disapproving of an "ongoing federal audit of state criminal proceedings." *Ibid*. But that language referred to an audit of the manner in which state judges imposed sentences and set bond in future individual cases, which would necessarily involve "interruption of state proceedings" so that those discretionary decisions could be relitigated in federal court. *Ibid*. Read in context, *O'Shea*'s language does not suggest that all aspects of state judicial administration are immune from "federal audit" or review of any kind.

Indeed, *O'Shea* itself distinguished the challenge to discretionary sentencing and bond-setting at issue there from challenges that seek to strike down a state statute. *Ibid*. Striking down a statute (or other general rule, *Moultrie*, 725 F.2d at 703-04) can obviously affect future cases. But doing so would not require second-guessing the exercise of judicial discretion in any particular case. That is the danger *O'Shea* sought to avoid.

2. No such danger is present here. Contrary to Respondents' characterization, Petitioners do not challenge the performance of counsel in any individual case, as a criminal defendant would in raising an "ineffective assistance" claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984). Opp. 19. Rather, Petitioners have brought a purely facial challenge to a *policy* of the administrative arm of the state judiciary, and Petitioners contend that, through underfunding, the policy systematically deprives all children in Sacramento's dependency courts of adequate counsel. Petitioners request only prospective, declaratory relief.

This challenge to Sacramento's policy of appointing an insufficient number of dependency counsel is no different from a facial challenge to a statute doing the same thing. Both challenges seek to invalidate a general state policy and to redress institutional deficiencies. Such challenges do not require showing that every child is prejudiced by counsel's ineffectiveness, only that plaintiffs face a *likelihood* of substantial injury. See *Kenny A.* v. *Perdue*, 356 F. Supp. 2d 1353, 1362 (N.D. Ga. 2005) (citing cases). Proof of plaintiff's facial claim will hinge on whether caseloads prevent all counsel from doing things that *all* minimally effective counsel must do, not on whether any *one* counsel in the past was capable of doing those things well.

To be sure, it may be more difficult to prevail in such a facial challenge than in an as-applied case. But on its face, Section 1983's grant of jurisdiction

requires courts to consider the challenge on the merits, not to abstain from it altogether.[1]

Respondents nevertheless express concern that "the court would necessarily have to consider through a generalized inquiry how many cases are constitutionally and/or statutorily permissible" for an attorney to handle. Opp. 11 (quoting Pet. App. 7a). But that is hardly a difficult inquiry, in light of California's own caseload study, authored by the Respondents, addressing this very question (see Pet. 6-8), and in light of the ease with which a district court (even without an abstention challenge) adjudicated nearly identical claims on the merits in another case. See *Kenny A. supra.* But even if this were a difficult inquiry, that is no reason to deprive plaintiffs of their statutory right to have their claim adjudicated on the merits.

In short, the prospect that plaintiffs might not prevail on the merits of a facial challenge has been improperly transformed by the Ninth Circuit into a reason to abstain, and to grant a motion to dismiss, before any evidence on that issue is presented—and

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[1] Respondents cite two cases from this Court in an effort to show that "*O'Shea*'s interference principles have been applied in other settings." Opp. 9. But those decisions rejected requested injunctions *on the merits*, not on abstention grounds. In *Kelley* v. *Johnson*, 425 U.S. 238 (1976), the Court rejected a police officer's challenge to his police department's hairstyle regulations because those regulations did not violate a purported substantive due process right to choose one's own hairstyle. Similarly, in *Rizzo* v. *Goode*, 423 U.S. 362 (1976), the Court invalidated an injunction designed to prevent police misconduct—after a full trial on the merits—because the sweeping injunctive remedy was not tailored to the handful of violations found at trial.

indeed, without any determination whether they have adequately stated a claim on the merits.

Respondents are also wrong to suggest that Petitioners' claim for declaratory relief will interfere with judicial discretion in future cases. Unlike criminal defendants invoking *Strickland*, children in dependency proceedings cannot undo prior decisions simply by claiming ineffective assistance of counsel. *E.g.*, *In re Eileen A.*, 84 Cal.App.4th 1248, 1259 (Cal. App. 2000) (focusing on child's "current status").[2] The only situation in which adequacy of counsel would even be raised in an individual proceeding would thus be a claim by counsel that his own representation was inadequate. The suggestion (Opp. 27) that this will often occur is far-fetched, as it could occur now but does not. And even if it might occur, there is no reason to believe a purely prospective declaratory judgment with respect to attorney caseload allocation in general—the kind of relief sought here—would so interfere with any judge's decision in a particular case as to warrant a categorical prohibition of federal jurisdiction.

Petitioners, moreover, do not challenge any specific decisions that have been or will be made by judges, and they instead seek only a declaratory judgment that caseloads for dependency lawyers are too large. If federal courts must abstain from claims such as this, *O'Shea* will be transformed into a doctrine that puts all aspects of state court policy and administration beyond the reach of federal courts acting under Section 1983.

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[2] There are also significant procedural barriers to re-litigating dependency rulings. *E.g*, *In re Twighla T.*, 4 Cal.App.4th 799 (Cal. App. 1992) (dismissing untimely petition).

That is the opposite of what Congress sought to achieve when it enacted Section 1983—expressly conferring jurisdiction on federal courts to remedy "the deprivation" by the States "of *any* [federal] rights, privileges, or immunities." 42 U.S.C. § 1983 (emphasis added). Federal courts must of course be "mindful of the 'special delicacy … between federal equitable power and State administration of its own law.'" Opp. 7 (quoting *Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951)). But that delicate balance is not achieved by abdicating a wide swath of *jurisdiction* plainly conferred by an act of Congress. Accord U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme law of the land . . . ."). Respondents do not dispute that a "strong motive" behind Section 1983 "was grave congressional concern that the state courts had been deficient in protecting federal rights." *Allen* v. *McCurry*, 449 U.S. 90, 98-99 (1980). Yet Respondents would render federal courts powerless to employ Section 1983 for that purpose. Just as the Court has done in other recent cases, e.g., *Marshall* v. *Marshall*, 547 U.S. 293 (2006), it is high time to rein in this broad, judicially-created exception to federal jurisdiction.

III. This Case Is An Ideal Vehicle For Resolving An Acknowledged Circuit Split On An Issue Of Significant Importance.

This case is an ideal vehicle for resolving what Respondents' own brief confirms is a stark choice between two fundamentally different understandings of *O'Shea*. The issues here are straightforward and well developed, the circuit conflict is mature, and the case is of enormous importance to foster children in Sacramento and, indeed, around the country who seek a federal forum to challenge unconstitutional practices

of child welfare agencies—practices that may dictate the course of these children's lives. See Pet. 27 n.2.

Respondents bemoan the supposed "sheer magnitude of the intrusion" this case would impose on state courts. Opp. 29. But Petitioners ask for no more than a declaration that a few thousand children have inadequate access to appointed counsel—far less relief than this Court has provided before. *E.g., In re Gault*, 387 U.S. 1 (1967) (all children in state delinquency proceedings entitled to notice, counsel, right against self-incrimination, and opportunity to confront witnesses).

The fact that Respondents view this case as an "intrusion" of such "sheer magnitude" shows just how much jurisdictional immunity some states now believe they deserve. *O'Shea* did not countenance so sweeping an abstention doctrine. And this case presents an ideal opportunity, either to revisit the doctrine entirely, or at least to return it to its original scope.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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