No. 12-215

IN THE

Supreme Court of the United States

CITY OF NEW YORK, ET AL.,

Petitioners,

v.

SONNY SOUTHERLAND, SR., ET AL.,

Respondents.

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

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Second Circuit correctly deny petitioner qualified immunity on respondents' Fourth Amendment search claim where a genuine issue of material fact existed as to whether petitioner recklessly, knowingly, or intentionally omitted relevant information from his sworn application seeking judicial authorization to enter respondents' home, and the omitted information would have undercut a finding of probable cause?

2. Did the Second Circuit correctly deny petitioner qualified immunity for removing child-respondents from parent-respondent without judicial authorization when a genuine issue of material fact existed as to whether petitioner reasonably could have believed child-respondents faced imminent harm?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed by petitioners, *see* Pet. iii, Sonny B. Southerland, Jr. and Nathaniel Southerland were plaintiff-appellants in the court below and remain parties to this case.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The version of Section 1034(2) of the New York Family Court Act in effect in 1997 provided, in pertinent part:

> Where there is probable cause to believe that an abused or neglected child may be found on premises, an order under this section may authorize a person conducting the child protective investigation, accompanied by a police officer, to enter the premises to determine whether such a child is present.

The version of Section 1024(a) of the New York Family Court Act in effect in 1997 provided, in pertinent part:

> [A] designated employee of a city or county department of social services shall take all necessary measures to protect a child's life or health including, when appropriate, taking or keeping a child in protective custody . . . without [a judicial] order under

> section one thousand twenty-two and without the consent of the parent or other person legally responsible for the child's care . . . if (i) such person has reasonable cause to believe that the child is in such circumstance or condition that his continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health; and (ii) there is not time enough to apply for an order under section one thousand twenty-two.

STATEMENT OF THE CASE

The Fourth Amendment permits government officials to enter private homes only when there is probable cause to believe that some person or thing for which they are entitled to search will be found there. Absent exigent circumstances, they must first obtain authorization from a neutral magistrate who determines whether such probable cause exists. In 1997, when the events relevant to this case occurred, New York law required caseworkers from the Administration of Children's Services ("ACS") to obtain the required judicial approval by applying for an "Order Authorizing Entry" from the Family Court. A judge could issue an entry order only if the supporting sworn application demonstrated probable cause that a neglected or abused child "may be found on premises." N.Y. Fam. Ct. Act § 1034(2) (McKinney 1983 & Supp. 1998).

The Fourth and Fourteenth Amendments also restrict the conditions under which the government

may seize children and remove them from their parents' control. New York law, consistent with constitutional standards, permits caseworkers to forcibly remove a child from his parents only if there is prior judicial authorization or there is "imminent danger to the child's life or health." N.Y. Fam. Ct. Act. § 1024 (McKinney 1983 & Supp. 1998).

In this case brought under 42 U.S.C. § 1983, the Second Circuit, relying on clearly established law governing petitioner Woo's conduct, denied him qualified immunity. With respect to respondents' illegal search claim, the court pointed to substantial evidence from which a jury could find that petitioner had knowingly or recklessly misled a court into authorizing entry into respondents' home. With respect to respondents' illegal seizure and procedural due process claims, the court pointed to substantial evidence from which a jury could find that the child-respondents faced no imminent threat of harm.

I. Factual Background

1. On May 29, 1997, petitioner Timothy Woo,[1] a caseworker in the Brooklyn Field Office of the New York City Administration of Children's Services ("ACS"), was assigned to investigate an Intake Report concerning Ciara Manning, an "emotionally unstable" sixteen-year-old. Pet. App. 42a. According to the Report, Ciara was "acting out" at school, where

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[1] There are no remaining claims against the City of New York. *See* Pet. App. 60a. It is therefore unclear why the City has petitioned for certiorari. Thus, all references to "petitioner" in this brief refer solely to petitioner Woo.

she had swallowed some non-toxic paint. *Id.* 43a. The report also indicated that Ciara "may be staying out of the home in an i[m]proper enviro[n]ment." *Id.* 42a (alterations in original).

Petitioner began his investigation by consulting files in a pending ACS case involving Ciara's mother, Diane Manning. Pet. App. 43a. Those ACS files listed six half-siblings: Eric Anderson, Richy Anderson, Felicia Anderson, Erica Anderson, Michael Manning, and Miracle Manning (the "Manning Children"). *Id.* 43a, 47a. According to petitioner, the older ACS files on Manning suggested that Ciara was living with her father, respondent Sonny Southerland. *Id.* 43a.

Petitioner then contacted Ciara's school guidance counselor, who told him, among other things, that Southerland "doesn't approve of the place [where she] is staying." Pet. App. 43a-44a (alteration in original). The counselor apparently told petitioner of two "possible" addresses for Ciara: 1257 Pacific Street (with "Corey Smith"); or 333 Clifton Place (with "Ms. Canty"). *See* Woo Handwritten Notes from Phone Interview with Ms. Euwing, Ex. A to the Declaration of Michael G. O'Neill (Dkt. No. 182) ("O'Neill Decl."), *Southerland v. City of New York*, No. 99-cv-3329 (E.D.N.Y. Dec. 29, 2006). Neither of these locations matched the Southerland home at 10 Amboy Street in Brooklyn.

Petitioner nonetheless attempted to visit Southerland's home later that day, and left a note with his contact information. Pet. App. 44a. The following day, Southerland telephoned and then came to the ACS office, where the two men met. *Id.* 44a-45a. Consistent with both the Intake Report and the

counselor's statements, Southerland informed petitioner that Ciara was not living at his home. *Id.* He explained that she was "a runaway who would not obey him," and that he had several times sought the State's assistance in finding her. *Id.*[2] Southerland told petitioner that "he would be willing to make an appointment" for a home visit as long as petitioner notified him in advance. *Id.* 44a, 46a.[3]

Despite this conversation, petitioner attempted three additional, unannounced visits to Southerland's home. Pet. App. 46a. During the third visit, on June 4, petitioner encountered Southerland as he was taking five of his children to school. *Id.* Southerland introduced petitioner to each of the children, and petitioner wrote their names in his notes – Sonny Jr., Venus, Emmanuel, Nathaniel, and Kiam (five of the six "Southerland Children," who are respondents here). *Id.* Ciara was not in the group.

2. Two days later, listing Ciara and the Manning Children (not the Southerland Children) as the subjects of his investigation, petitioner filed a sworn application for a judicial order to enter the

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[2] Southerland had sought several "PINS" ("person in need of supervision") warrants against Ciara. *See* Pet. App. 45a; *see also* N.Y. Fam. Ct. Act § 711 *et seq.* (McKinney 2010 & Supp. 2012).

[3] Petitioner submitted a declaration contesting Southerland's account. *See* Declaration of Timothy Woo (Dkt. No. 169) ("Woo Decl.") ¶ 6, *Southerland v. City of New York*, No. 99-cv-3329 (E.D.N.Y. Sept. 18, 2006). Because this case is before the Court following petitioner's motion for summary judgment, this factual dispute must be resolved in favor of respondents.

Southerland home pursuant to Section 1034(2) of the New York Family Court Act. Pet. App. 47a.[4] The sole bases for petitioner's sworn application were, first, that Southerland was "legally responsible" for the children; second, that he "did not take [Ciara] to a medical doctor and refused to take [her] for psychiatric evaluation" after the paint episode; and third, that Southerland had "refused to allow the Administration for Children's Services into his home to speak to the above-named children." Application for Order Authorizing Entry, Ex. C to the Declaration of Janice Casey Silverberg (Dkt. No. 168) ("Silverberg Decl."), *Southerland v. City of New York*, No. 99-cv-3329 (E.D.N.Y. Sept. 18, 2006); *see also* Pet. App. 47a-48a n.5. Nowhere in the sworn application did petitioner explain why he thought Southerland was "legally responsible" for the Manning Children, who were not related to him, or why petitioner thought those children could be found at Southerland's home. Nor did petitioner include any of the information he possessed suggesting that Ciara was a runaway who had not lived with Southerland for quite some time.

3. Based on petitioner's sworn application, the family court issued an Order Authorizing Entry into Southerland's home. Pet. App. 48a.

Three days later, on the night of June 9, petitioner entered the Southerland home, accompanied by two other caseworkers and "upwards

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[4] Under New York law, "[t]he standard of proof and procedure for such an authorization shall be the same as for a search warrant under the criminal procedure law." N.Y. Fam. Ct. Act § 1034(2) (McKinney 1983 & Supp. 1998).

of six or eight" police officers. Pet. App. 48a; Deposition of Timothy Woo ("Woo Dep.") at 24, Ex. D to the O'Neill Decl. Petitioner found neither the Manning Children nor Ciara in the Southerland home. *See* Pet. App. 49a. Nonetheless, petitioner remained in the home and conducted a further search over Southerland's protests. *Id.* 48a-51a; *see also* Woo Dep. at 27-29. Petitioner then called his supervisor to describe his observations, and the two concluded that the children should be removed. Pet. App. 49a. In the early morning hours of June 10, without judicial authorization, petitioner, assisted by the police, removed the six Southerland children from the home. *Id.* 51a; Woo Dep. at 26.

The parties sharply disagree over the facts underlying petitioner's decision to remove the children.

Petitioner claims that there was inadequate food; that "malodorous" children were sleeping on the floor; that there was a lamp without a shade within the children's reach connected to an outlet by several extension cords; that one room had electrical equipment that was stacked in a dangerous way; and that one of the children was limping because she had stepped on a nail. Pet. App. 49a.

Respondents contest nearly all of these facts. Southerland testified that there was adequate food in the kitchen; that he "bathed the children daily" and regularly laundered their clothing; that the children all had beds but "preferred to sleep on yellow foam sleeping pads on the floor"; and that there were no extension cords running from room to room. Pet. App. 50a-51a.

After removing the children, petitioner and the police officers took them to an ACS shelter, and arrangements were made to place them in emergency foster care. Pet. App. 51a.

4. ACS subsequently commenced child protective proceedings. Pet. App. 52a. In 1998, based solely on evidence obtained after the children's removal – in particular, regarding excessive corporal punishment and Ciara's allegations of sexual abuse – the family court deprived Southerland of custody. *See id.* 51a-52a. In 2002, however, Ciara recanted her allegations, explaining in a sworn declaration that Southerland "had never molested or abused her in any way." *Id.* 51a n.8. In 2004, Sonny Jr., Venus, Nathaniel, and Emmanuel returned to live with Southerland. *Id.* 52a-53a.

II. Procedural History

1. In 1999, Southerland brought a pro se civil rights action under 42 U.S.C. § 1983 on behalf of both himself and his six children who had been removed from their home without judicial authorization. Pet. App. 54a. His initial complaint named numerous defendants, among them petitioner Woo and the City of New York, and advanced claims under both federal and state law. *See Southerland v. Giuliani*, 4 Fed. Appx. 33, 35-36 (2d Cir. 2001). In 2000, the district court dismissed the complaint. *See id.* at 36; *see also* Pet. App. 54a.

On appeal, the Second Circuit reversed the district court's dismissal of several Section 1983

claims against petitioner Woo and the City.[5] *See Southerland*, 4 Fed. Appx. at 36-37; Pet. App. 54a-55a; *see also id.* 124a.

2. On remand, the district court appointed counsel to represent both Southerland and his children. Counsel then filed an amended complaint.[6] Pet. App. 55a. As is relevant here, the amended complaint alleged three claims: an unlawful search claim based on petitioner's entry into the Southerland home; a procedural due process claim for removal of the Southerland Children without a court order in the absence of imminent harm; and a substantive due process claim by the children for the ex parte removal – a claim subsequently recast by the court as arising under the Fourth Amendment's guarantee of protection against unlawful seizure. *Id.* 57a, 132a n.24.

3. After some discovery, the district court granted petitioner's motion for summary judgment. Pet. App. 58a-60a.

a. In analyzing the illegal search claim, the district court assumed that Section 1034(2)(a)(i)(A)-(C) of the New York Family Court Act as it existed in 2007 (a decade after the events at issue) governed the permissibility of the search. Pet. App. 117a n.7.[7] The

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[5] Justice Sotomayor was a member of the Second Circuit panel on that first appeal.

[6] Southerland later decided to proceed pro se, while counsel continued to represent the Southerland Children. Pet. App. 55a n.10.

[7] The district court quoted the wrong statutory subsection. The version of Section 1034(2) that the district court cited has

court then offered two alternative bases for its decision to grant summary judgment to petitioner. In one part of its opinion, the court held that "no reasonable juror could infer that [petitioner] knowingly and intentionally made false and misleading statements to the family court in order to receive an order authorizing his entry into the Southerland home."[8] *Id.* 139a. On this view, petitioner committed no Fourth Amendment violation. In another part of its opinion, the court concluded that even if petitioner made knowingly or intentionally false or misleading statements about Ciara and the Manning Children's whereabouts and thereby violated the Fourth Amendment, he was entitled to qualified immunity under the "corrected affidavits" doctrine, *id.* 133a-35a (citing *Martinez v. Schenectady*, 115 F.3d 111 (2d Cir. 1997)), because

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two subsections: One subsection – subsection 1034(2)(a) – governs court orders requiring that a parent or other person "produce the child or children at a particular location." *See* N.Y. Fam. Ct. Act § 1034(2)(a)(ii) (McKinney 2007). The other – subsection 1034(2)(b) – governs entry orders. The district court cited the first subsection, relating to production of children. But when the government seeks a court order "to enter the home," subsection 1034(2)(b)(ii) requires "probable cause to believe that an abused or neglected child may be found on the premises," § 1034(2)(b)(i). In any event, as the Second Circuit noted, Pet. App. 69a, the provision in effect at the time the search in this case took place required "probable cause to believe that an abused or neglected child may be found on premises." N.Y. Fam. Ct. Act § 1034(2) (McKinney 1983 & Supp. 1998).

[8] The district court did not address the question of whether a reasonable juror could find petitioner's conduct reckless. *See* Pet. App. 138a-39a.

based on all of the information that was available to Woo when he applied for the order, there would have been "an objective basis" for a reasonable caseworker to believe that probable cause existed, *id.* 135a.

b. With respect to the illegal seizure and procedural due process claims, the district court held that petitioner was not entitled to summary judgment on the merits because a genuine issue of material fact existed as to whether the children were at risk of imminent harm, and it would violate the Constitution to remove them without judicial authorization absent that risk. *See* Pet. App. 60a-61a, 141a-42a n.29.

Nonetheless, the district court granted summary judgment on qualified immunity grounds. First, it held that "prior to the Court of Appeals' decision in *Tenenbaum* [*v. Williams*, 193 F.3d 581 (2d Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000)], there was no clear application of Fourth Amendment standards in the child removal context." Pet. App. 135a. Second, again citing *Tenenbaum*, it held that "the law concerning procedural due process rights in the context of child removals was not clearly defined at the time of the events in question." *Id.* 137a.

4. Southerland and the Southerland Children appealed. *See* Pet. App. 61a. A unanimous panel reversed with respect to the claims relevant here.[9] *See id.*

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[9] The Second Circuit affirmed the district court's grant of summary judgment on Southerland's substantive due process claim regarding the children's removal. *See* Pet. App. 61a, 91a-92a. Respondents do not challenge that decision here.

a. With regard to the search claim, the Second Circuit identified a legal error in the district court's probable cause analysis: the district court had not used "the version of the statute that governed at the time of Woo's application." Pet. App. 69a. The version of the statute in effect in 1997 squarely required that the affiant "demonstrate 'probable cause to believe that an abused or neglected child may be found *on premises*.'" *Id.* (emphasis in original) (quoting N.Y. Fam. Ct. Act § 1034(2) (McKinney 1983 & Supp. 1998)).[10]

Having corrected that legal error, the court of appeals then held that "genuine issues of material fact exist, both as to whether Woo knowingly or recklessly made false statements in his affidavit to the Family Court and as to whether such false statements were necessary to the court's finding of probable cause" to believe that either Ciara or the Manning Children would be found in Southerland's home. Pet. App. 78a. Specifically, the Second Circuit identified "substantial evidence, viewed in the light most favorable to the plaintiffs, that Woo knew or had reason to know that Ciara was not residing at the Southerland home when he applied for the Order Authorizing Entry." *Id.* 74a. A jury could therefore reasonably find that petitioner recklessly, knowingly, or intentionally omitted material facts in his warrant application. *See id.*

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[10] The Second Circuit italicized the words "on premises" in its opinion. Petitioner's appendix mistakenly omits this emphasis.

Moreover, the Second Circuit rejected petitioner's argument under the corrected affidavits doctrine. Pet. App. 67a-73a. Even under that doctrine, petitioner was required to show probable cause to believe that Ciara could be found at Southerland's home. The Second Circuit held that the mere fact that Southerland was Ciara's father and legally responsible for her was not enough to show probable cause in light of the contrary information. *Id.* 70a.

As for qualified immunity on the illegal search, the Second Circuit held that petitioner's actions, viewed in the light most favorable to respondents, violated clearly established law. The court of appeals pointed to its earlier decision in *Golino v. City of New Haven*, 950 F.2d 864 (2d Cir. 1991), *cert. denied*, 505 U.S. 1221 (1992), which held that an officer cannot benefit from qualified immunity if he knew or had reason to know that his statements materially misled a magistrate into issuing a warrant without probable cause. *See id.* at 871. Turning to the case before it, the court held that respondents' claim fell within *Golino* because they had made a "substantial preliminary showing" that petitioner knowingly or recklessly made false statements in his sworn application. Thus, he was not entitled to qualified immunity at this stage in the proceedings. Pet. App. 74a.

b. The Second Circuit also reversed the dismissal of respondents' procedural due process claims and the children's Fourth Amendment illegal seizure claims regarding the children's removal from their home. Pet. App. 61a. In light of the available evidence, "a reasonable juror could determine that the circumstances Woo encountered did not

demonstrate an imminent danger to the children's life or limb." *Id.* 83a (quoting *id.* 142 n.29); *see also id.* 83a-84a. Absent such a danger, the court of appeals held that, as of 1997, the law was clearly established that removing the children without judicial authorization violated the Constitution. *Id.* 84a.

The court of appeals rejected the argument that circuit law was unclear prior to *Tenenbaum*, explaining that the district court had "overstated" any uncertainty. Pet. App. 81a. Indeed, *Hurlman v. Rice*, 927 F.2d 74 (2d Cir. 1991) – a procedural due process case decided "some six years before the events here in issue" – had held that "state officials could not remove a child from the custody of a parent without either consent or a prior court order unless 'emergency circumstances' existed." Pet. App. 81a-82a (quoting *Hurlman*, 927 F.2d at 80) (internal quotation marks omitted). Moreover, with respect to the illegal seizure claim, the Second Circuit concluded that applying the rule from *Hurlman* in the Fourth Amendment context was simply a change in "constitutional nomenclature" that did not disturb the underlying law. *Id.* 102a-04a. It was therefore "inappropriate" to "afford Woo qualified immunity on the Southerland Children's claim solely because, two years after the events in question, we shifted the constitutional *label* for evaluating that claim from the Fourteenth to the Fourth Amendment." *Id.* 103a-04a (emphasis in original).[11]

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[11] The Second Circuit italicized the word "label" in its opinion. Petitioner's appendix mistakenly omits this emphasis.

5. A majority of active Second Circuit judges voted to deny one judge's *sua sponte* request to rehear the case en banc. *See* Pet. App. 2a. Five judges dissented. *Id.* They criticized the panel's application of qualified immunity law and proposed two new per se rules never advanced by petitioner. First, the dissenters suggested holding that "there is always probable cause to look for an at-risk child in the home of the custodial parent," absent "conclusive evidence" that the child is elsewhere. *Id.* 5a-6a. Second, the dissenters proposed holding that child-plaintiffs "state no cognizable due process or Fourth Amendment claims in connection with the challenged removal" if their parents lose custody in a subsequent family court adjudication of abuse or neglect. *Id.* 26a.

This petition followed.

REASONS FOR DENYING THE WRIT

This case meets none of this Court's criteria for granting review. Petitioner has identified no question of federal law on which the lower courts are divided. Nor has he identified any unsettled and important question of federal law properly presented by this case or any way in which the Second Circuit's decision conflicts with this Court's precedent. *See* Sup. Ct. R. 10. To the contrary, this case involves nothing more than a conventional application of qualified immunity doctrine to hotly contested facts.

Resolution of this fact-intensive case turns on two major disputes concerning the record. First, is there sufficient evidence to support a finding that petitioner knowingly or recklessly misled a state court into issuing an order authorizing him and a number of police officers to enter respondents' home?

Second, is there sufficient evidence to support a finding that petitioner removed the respondent children from their home in the middle of the night despite the absence of imminent danger? The Second Circuit correctly answered "Yes" to each of these factbound questions. Having done so, it then correctly held that petitioner was not entitled to qualified immunity because the record could support a conclusion that petitioner had "'violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pet. App. 62a (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (reaffirming the *Harlow* standard).

Faced with this situation, petitioner tries to reargue his version of the disputed facts. This Court, however, "does not sit" as a court of "error-correction." *Halbert v. Michigan*, 545 U.S. 605, 611 (2005). As this Court explained in *Johnson v. Jones*, 515 U.S. 304 (1995), appellate review of denials of qualified immunity operates best when it involves "the application of 'clearly established' law to a given (for appellate purposes undisputed) set of facts." *Id.* at 313. In this case, the clearly established law cuts in respondents' favor and the state of the record precludes adopting a set of facts on which qualified immunity would be appropriate.

Perhaps realizing this difficulty, petitioner also asks this Court to adopt two new categorical rules – which he never presented to the courts below – through which he can avoid application of the customary standards for liability under Section 1983. These eleventh-hour proposals are not properly presented to this Court, but even if they were,

neither merits this Court's consideration.

I. The Second Circuit's Denial Of Qualified Immunity To Petitioner On The Fourth Amendment Search Claim Raises No Questions Worthy Of This Court's Review.

None of the issues petitioner raises with regard to the illegal search are appropriate for this Court's consideration. First, petitioner challenges the Second Circuit's routine application of basic constitutional prohibitions against making misleading statements to obtain a warrant. He does so not on the grounds that the Second Circuit has made a legal error, but solely on the grounds that the court should have accepted his view of the contested facts. Second, petitioner seeks to conjure up a question of law by proposing a new per se probable cause rule that has neither been briefed by the parties below nor endorsed by any lower court.

A. Petitioner Points To No Issues Involving The Illegal Search Claim That Merit This Court's Review.

1. Petitioner does not contest that, at the time he acted, the law was settled that government officials could not establish probable cause to enter a private home by filing affidavits that were knowingly or recklessly misleading. Nor could he. At least since this Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978), the law has been clearly established that searches authorized by warrants based on (i) reckless, knowing, or intentional falsifications or omissions that are (ii) necessary to the finding of probable cause violate the Fourth Amendment. *See*

id. at 155-56. When a "reasonably well-trained officer in petitioner's position" knows or should know that his affidavit is flawed, then "the officer's application for a warrant [is] not objectively reasonable." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). Under such circumstances, he is not entitled to qualified immunity for the ensuing unconstitutional search. *Id.*

By June of 1997, when petitioner sought authorization to enter the Southerland home, the Second Circuit had provided additional guidance on exactly this point: "Where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause" or "where a material omission is intended to enhance the contents of the affidavit as support for a conclusion of probable cause," the "shield of qualified immunity is lost." *Golino v. City of New Haven*, 950 F.2d 864, 871 (2d Cir. 1991) (citations omitted), *cert. denied*, 505 U.S. 1221 (1992).

2. In this case, the probable cause inquiry turns on whether petitioner had reason to believe that the children listed on his application could be found in the home he sought to search. N.Y. Fam. Ct. Act § 1034(2) (McKinney 1983 & Supp. 1998) (authorizing an entry order "[w]here there is probable cause to believe that an abused or neglected child may be found on premises").

The Second Circuit correctly viewed the facts in the light most favorable to the respondents, as courts are required to do at the summary judgment stage, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). It then determined that a genuine issue of material fact existed as to whether

petitioner was at best reckless (and, at worst, knowingly misleading) in applying for an entry order. Pet. App. 74a.

The Second Circuit's conclusion was correct. Petitioner had reason to believe – and perhaps knew – that none of the children he identified in the application would be found at the Southerland home.

With respect to Ciara, the Intake Report indicated that she had run away from home and might be living in an "improper environment." Pet. App. 112a-13a. Both Ciara's guidance counselor and father expressly told petitioner that she was a runaway who was staying outside the home. *See id.* 75a, 113a-14a. In his deposition, petitioner responded to a question asking why he had persisted in seeking to enter the Southerland home after learning that Ciara was not staying there by saying that he had hoped "to find out about [Ciara's] whereabouts," *see id.* 76a (alteration in original), thereby acknowledging that his actions exceeded the scope of Section 1034(2).

Petitioner never informed the judge about any of the indications that Ciara was a runaway. Rather, he framed his sworn application in a way that misleadingly suggested that she would be found at Southerland's home. For example, the application juxtaposed Ciara's paint-swallowing incident with an accusation that Southerland had failed to take Ciara to the doctor. *See* Pet. App. 47a-48a n.5. By leaving out the fact that the paint-swallowing incident actually occurred at school, *see id.*, petitioner created the impression that the event occurred in Southerland's presence, and by implication in his home, or at the very least that Southerland should

have been the person to take her for treatment because she was living with him.

With respect to the other children in the application, petitioner was at the very least reckless in listing the Manning Children as a basis for searching respondents' home. He had no basis whatsoever for thinking that they (as opposed to the Southerland Children) would be found at Southerland's home. The ACS files tied those children only to Diane Manning. Had petitioner bothered to review his own notes from two days prior, he would have realized that none of the children he saw with Southerland were the subjects of an ongoing ACS investigation because none of the Southerland Children's names matched the ACS files in his possession.

3. Nor, as the Second Circuit correctly held, can the corrected affidavits doctrine save petitioner. That doctrine confers qualified immunity on an officer who submits an application with false or misleading statements only if a corrected affidavit could support a finding of probable cause. *See* Pet. App. 67a-68a. Here, by contrast, correcting petitioner's sworn application would only further undermine probable cause to believe that Ciara could have been found at Southerland's home. Similarly, amending the application to state that the Southerland Children, rather than the Manning Children, could be found in the apartment would have provided no basis for a warrant. The Southerland Children were not the subject of any ongoing ACS investigation, and petitioner provided no information in his sworn application to indicate that they were abused or neglected.

Petitioner's reliance on *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012), *see* Pet. 14, is misplaced. To begin with, that case did not concern a corrected affidavit. The government did not point to evidence outside of Officer Messerschmidt's affidavit that would have justified issuance of the warrant. Moreover, this Court's "presumption" in *Messerschmidt* that an officer may reasonably rely on a court-approved entry order presupposes that the officer has not committed misconduct in connection with his affidavit. *See Messerschmidt*, 132 S. Ct. at 1245 n.2. Officer Messerschmidt did not mislead the magistrate with a falsified affidavit, and therefore he was entitled to rely on the magistrate's determination of probable cause. *See id.* at 1249. Here, by contrast, a genuine issue of fact remains as to whether petitioner recklessly, knowingly, or intentionally omitted material facts that were necessary to the magistrate's probable cause determination. Pet. App. 74a. It therefore could not have been objectively reasonable for petitioner to rely on the magistrate's issuance of the order based on *his own misleading application*. *See Malley*, 475 U.S. at 345.

4. The qualified immunity determination in this case raises no legal issues worthy of this Court's review. The underlying Fourth Amendment doctrine is clear. Even if the law governing searches or qualified immunity for those searches were ambiguous, this case would be an inappropriate vehicle for clarifying it. As this Court explained in *Johnson v. Jones*, refining the qualified immunity standard depends on having a set of facts that are "for appellate purposes undisputed." 515 U.S. at 313.

But this case involves the very opposite: it turns entirely on disputed facts.

In sum, this petition is nothing more than a plea for the Court to resolve a dispute about the best view of the summary judgment record in this particular case. *See Cash v. Maxwell*, 132 S. Ct. 611, 613 (2012) (statement of Sotomayor, J., respecting the denial of certiorari) (stating that "[m]ere disagreement" with a court of appeals' "highly factbound conclusion" is "an insufficient basis for granting certiorari"); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 902 (2009) (Scalia, J., dissenting) (stating that the "principal purpose" of exercising certiorari jurisdiction "is to clarify the law").

B. Petitioner's Novel Proposal To Create A Per Se Rule Of Probable Cause In Child Welfare Cases Is Unprecedented And Unnecessary.

Perhaps recognizing the futility of seeking certiorari to review the Second Circuit's factbound application of well-settled qualified immunity law, petitioner asks this Court to use this case to adopt a rule that "there is always probable cause to look for an at-risk child in the home of his or her custodial parent, at least absent conclusive evidence to the contrary." Pet. 27.

1. Petitioner's proposed rule does not plausibly fit within any of the questions presented. *See* Sup. Ct. R. 14.1(a).

2. Petitioner is foreclosed from raising this argument now. In the thirteen years that this case has been litigated, petitioner never before presented this argument to any court. This Court generally

"do[es] not decide questions neither raised nor resolved below." *Glover v. United States*, 531 U.S. 198, 205 (2001) (citation omitted); *see also United States v. Jones*, 132 S. Ct. 945, 954 (2012).

3. Petitioner's proposed rule does not apply to the facts of this case. The rule expressly depends on the target of the search being the "custodial parent" of the child being sought. Pet. ii. Those words have a precise meaning under New York law: "The term 'custodial parent' shall mean a parent to whom custody of a child or children is granted by a valid agreement between the parties or by an order or decree of a court." N.Y. Dom. Rel. Law § 236B(1)(e) (McKinney 2010 & Supp. 2012). Petitioner has pointed to nothing in the record to show either a court decree or a valid agreement between Southerland and Manning. Indeed, what evidence there is suggests the contrary. *See* Deposition of Sonny B. Southerland ("Southerland Dep.") at 199, Ex. F to the Silverberg Decl. Had petitioner proposed this rule to the district court in a timely fashion, respondents would have had an opportunity to show that Southerland was not Ciara's custodial parent at the time of petitioner's illegal entry.

4. Even if petitioner had properly preserved this argument, his proposed rule is ill conceived. He points to no court that has ever adopted a rule remotely like this. And for good reason. This Court has repeatedly cautioned against categorical probable cause determinations, observing that the "central teaching" of its "decisions bearing on the probable cause standard is that it is a 'practical, nontechnical conception.'" *See Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S.

160, 176 (1949)). Consequently, probable cause is "not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. Moreover, petitioner's proposed rule turns on a phrase – "custodial parent" – whose meaning differs from state to state.

* * * *

The case law shows that the current regime provides extensive qualified immunity protection to social workers who investigate child welfare cases. For examples of cases granting qualified immunity to social workers, see *Carroll v. Ragaglia*, 109 Fed. Appx. 459, 462 (2d Cir. 2004); *Tenenbaum v. Williams*, 193 F.3d 581, 599 (2d Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000); *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 99 (2d Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000); *Gottlieb v. Cnty. of Orange*, 84 F.3d 511, 520 (2d Cir. 1996). Qualified immunity already does what it is supposed to do.

II. The Second Circuit's Denial Of Qualified Immunity To Petitioner On The Procedural Due Process And Fourth Amendment Seizure Claims Raises No Questions Worthy Of This Court's Review.

None of the issues petitioner raises with regard to the seizure and removal of respondent children from their home are appropriate for this Court's consideration. First, on the current record, petitioner has not shown that the children faced imminent harm, and the law was clearly established at the time he acted that, absent such imminent harm, his acts were unconstitutional. Thus, his arguments regarding qualified immunity are entirely factbound. Second, petitioner's proposal that this Court adopt a

new per se rule to deprive children of their claims for illegal seizure or denial of due process was waived below, is not the subject of any circuit conflict, and cannot be reconciled with this Court's precedent.

A. Petitioner Points To No Legal Issues On The Unconstitutional Seizure Or Procedural Due Process Claims That Merit This Court's Review.

1. Petitioner does not contest that by 1997, the law was clearly established that an ex parte seizure of children violates both procedural due process and the Fourth Amendment, unless there is a threat of immediate harm. Caseworkers "may remove a child from the custody of the parent without consent or a prior court order only in 'emergency' circumstances." *Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir. 1991) (quoting *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987)). Such "[e]mergency circumstances mean circumstances in which the child is immediately threatened with harm." *Hurlman*, 927 F.2d at 80 (internal citations omitted). To show the existence of emergency circumstances, "[t]he government must offer 'objectively reasonable' evidence that harm is imminent." *Nicholson v. Scoppetta*, 344 F.3d 154, 171 (2d Cir. 2003) (quoting *Gottlieb v. Cnty. of Orange*, 84 F.3d 511, 520 (2d Cir. 1996), and *Hurlman*, 927 F.2d at 81).

The reason for the imminent harm requirement is straightforward. "[J]udicial authorization makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State." *Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999), *cert. denied*, 529 U.S.

1098 (2000). Indeed, removing children through the structured, orderly process of a judicial hearing is starkly different than a forced extraction in the middle of the night, with the aid of armed police officers and over likely protests by parents. Court proceedings allow opportunities for the children to be told what is happening, to grow accustomed to the possibility that they will be separated from their families, and to understand the reasons for and the results of the removal. Ex parte seizures, by contrast, are unexpected, unexplained, and extremely frightening.[12]

2. On the facts of this case, as they now stand, petitioner cannot satisfy the clearly established standard for when children can be removed without a judicial order. Both the court of appeals and the district court agreed that a genuine dispute of material fact precluded summary judgment on the

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[12] Potential trauma during child removal includes that "[c]hildren see their parents in great distress," are "[b]eing taken against their will," and may "not understand why they are being removed"; the experience is "[e]specially traumatic when it happens suddenly, unexpectedly." Ctr. for Improvement of Child & Family Servs., Sch. of Soc. Work, Portland State Univ., *Reducing the Trauma of Investigation, Removal, & Initial Out-of-Home Placement in Child Abuse Cases – Project Information and Discussion Guide* 12 (2009), http://www.ccf.pdx.edu/trauma_project/Project%20Information%20and%20Discussion%20Guide.pdf. *See generally* http://www.ccf.pdx.edu/trauma_project/pgTrauma.php (last visited Nov. 5, 2012) (presenting the center's research on "the need to address the trauma to children associated with the investigation of suspected child abuse and neglect and the initial out-of-home placement").

question whether there was imminent danger. *See* Pet. App. 80a, 141a n.29, 143a n.31.

Their holdings are correct. For example, while petitioner claimed that "there was no food in the home," Woo Dep. at 27, he also acknowledged that he reached this conclusion by checking only the refrigerator and not the kitchen cabinets. In any event, Southerland testified to the contrary: he stated that the refrigerator was stocked with "[b]irthday cake, French fries, some other food and frozen food,"[13] Southerland Dep. at 183, and that he went shopping for food once a week. *Id.* at 192. Moreover, petitioner acknowledged that the children did not appear malnourished. Woo Dep. at 33.

Similarly, although petitioner asserted that there were children sleeping on the floor, Pet. App. 49a, Southerland testified that the children all slept on cots, bunk beds, or mattresses. Southerland Dep. at 184-87. While petitioner claimed that the children "stunk as though they had not showered or bathed in quite some time, more than a couple days," Woo Dep. at 35, Southerland testified that he bathed the children daily and washed the laundry once a week, Pet. App. 50a. And although petitioner heavily emphasizes Venus's "puncture wound," *see* Pet. 25-26, he mentions no attempt to determine if Venus

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[13] The birthday cake, as Southerland explained, was from Elizabeth's birthday, which was one day before her and her siblings' removal. Southerland Dep. at 183. The home video of the birthday party, which took place on June 8, 1997 (two days before the seizure), was submitted by Southerland to the district court. *See* Pet. App. 121a n.16.

had already received treatment for the injury or had received the standard tetanus immunization. Indeed, his only knowledge of the wound was that a colleague had observed Venus limping and that the child had stated that she had stepped on a nail. *See* Pet. App. 49a. Finally, while petitioner described an "exposed light bulb" in the children's bedroom connected by "electrical extension cords" that extended throughout the house, Woo Dep. at 27, he acknowledged that the exposed bulb was simply a lamp on the floor with no lampshade, and that none of the extension cords or wiring appeared to be improperly insulated or exposed, *id.* at 30-31.

Viewed – as they must be – in the light most favorable to respondents, these factual disputes undermine any notion that the children faced imminent danger. The children had acceptable bedding in their shared bedrooms; they were adequately clothed and bathed; and the kitchen was stocked with sufficient food. A lack of lampshades or somewhat cramped sleeping arrangements could not have struck an objectively reasonable caseworker as indicia of immediate danger.

3. Indeed, even if the disputes about the subsidiary facts were resolved in *petitioner's* favor, there would remain a genuine issue of material fact as to whether he could reasonably have believed that the children faced imminent harm. To be sure, on petitioner's version of the facts, a reasonable caseworker might have concerns that would justify further investigation. But petitioner did not conduct further investigation; instead, he effected an immediate ex parte removal of the child-respondents in the middle of the night. Under no set of facts in

this record can petitioner justify these extreme measures.

For example, even accepting petitioner's description of the refrigerator (and excusing his failure to look in the kitchen cabinets), an empty refrigerator at night, after children have eaten and gone to bed, does not present an immediate threat of danger. Even petitioner acknowledged that "being hungry" would constitute an imminent danger only "if it is often." Woo Dep. at 34. But he conceded that the children did not look ill fed, and he could point to no facts prior to his ex parte seizure that indicated they were often hungry. *See id.* The only evidence of hunger to which he could point came when the children told him in the van, sometime after midnight and several hours after they had eaten dinner, that they were hungry. *See id.*

Petitioner also asserted that the shade-less lamp presented an imminent danger because it could be a "fire hazard" to the children. *See* Woo Dep. at 27. Yet petitioner fails to explain (i) how a lamp becomes a fire hazard simply because it is set on the floor, does not have a shade, and is connected by insulated extension cords; and (ii) why the appropriate response to this hazard is immediately seizing the children and removing them from the home, rather than placing the lamp on a table, requesting that Southerland obtain a shade for it, or removing the lamp, rather than the children, from the scene.

Petitioner's other observations are equally insufficient to establish an immediate threat of danger. Notwithstanding his description of the children's cleanliness, petitioner acknowledged that "not showering" poses no imminent danger to

children. Woo Dep. at 35. Venus's "puncture wound," Pet. 25, based on petitioner's description, may have merited some kind of medical treatment, but petitioner does not explain why securing that treatment – or requesting that Southerland secure it – required him to take the extreme measure of immediately removing not only Venus but all of the children without judicial authorization. Petitioner's reference to Ciara, *see* Pet. 25, is even less availing. He fails to explain how the troubles of a runaway teenager somehow place young children in imminent danger – especially given that Ciara was not living at home at the time of the seizure.

B. This Court Should Not Entertain Petitioner's Eleventh-Hour Proposal That A Subsequent Determination In Family Court Somehow Extinguishes A Child's Cause Of Action For An Illegal Seizure.

Petitioner's third question presented asks this Court to announce a new rule depriving children of a cause of action for a denial of due process whenever a family court later determines that their parents should be denied custody for a period of time. That question is not properly before this Court, but even if it were, petitioner's proposed rule is foreclosed by this Court's decisions.

1. Before the Second Circuit, petitioner waived any argument that respondents' causes of action are extinguished by the subsequent family court decision. As the court of appeals explained, petitioner "d[id] not dispute the plaintiffs' assertion" that the family court's later determination of abuse or neglect "should not bear on our consideration of whether

Woo's actions in effecting the removal were constitutional." Pet. App. 53a. At no point below did petitioner make the proposal he now advances. Instead, petitioner latched onto this novel theory only after it was floated by one of the judges who dissented from the denial of rehearing en banc. As with his proposal to adopt a new probable cause rule, petitioner has waited too long to make this argument. *See supra* p. 22-23.

2. Petitioner's proposed rule would not dispose of this case. By its terms, petitioner's new rule applies only to claims resting on "either substantive or procedural due process grounds." Pet. ii. There are no substantive due process claims remaining in this case. *See supra* p. 11 n.9. At the same time, the Second Circuit recognized respondents' ability to maintain their Fourth Amendment unconstitutional seizure claim without regard to the subsequent family court adjudication. *See* Pet. App. 53a. That claim does not fall within the question presented.

3. Even if petitioner had preserved this argument, this Court's longstanding precedent squarely forecloses petitioner's proposed rule. In *Carey v. Piphus*, 435 U.S. 247, 266 (1978), this Court reaffirmed the longstanding rule that "it is no answer" to a plaintiff raising a procedural due process claim "to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915). "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions . . . we believe that the denial of

procedural due process should be actionable for nominal damages without proof of actual injury." *Carey*, 435 U.S. at 266 (citations omitted); *cf. McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360-63 (1997) (after-acquired evidence goes to the amount of damages a Title VII plaintiff can obtain, rather than to whether she has a cause of action).[14]

In light of these cases, petitioner can point to no reason why a subsequent ruling adverse to a *parent* should deprive an innocent *child* of the right to sue officials for a procedural due process violation when such officials have seized the child in an unconstitutional manner. As respondents have already explained, a court's finding that a parent is unfit to retain custody does not extinguish a child's interest in being removed from his home in an orderly, calm, and well-planned way. Even if the child would ultimately be removed, this *substantive* conclusion should not affect his right to *procedural* due process; to hold otherwise would strike at the foundation of the Fourteenth Amendment.

It is therefore unsurprising that petitioner is unable to point to a single court that has ever

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[14] To be sure, in cases where social workers violate a plaintiff's right to pre-deprivation procedural due process but the plaintiff is ultimately removed from the home, the damages could well be de minimis. *Cf. Carey*, 435 U.S. at 266-67 (awarding only nominal damages). But if the evidence at trial were to show that the circumstances surrounding the removal had been particularly egregious and had caused long-term trauma to the children, a jury might well award more substantial damages.

adopted his proposed rule. Contrary to petitioner's claim, Pet. 27, *Cameron v. Fogarty*, 806 F.2d 380 (2d Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987), does not support his position. The plaintiff in *Cameron* was barred from bringing a Section 1983 action for arrest without probable cause because he was subsequently convicted of the offense for which the arrest was made. The court reached this decision based on the application of a common-law rule specific to "actions asserting false arrest, false imprisonment, or malicious prosecution" which states that the "plaintiff can in no circumstances recover if he was convicted of the offense for which he was arrested." *Id.* at 387 (citing *Broughton v. State*, 335 N.E.2d 310, 314-15 (N.Y.), *cert. denied*, 423 U.S. 929 (1975)).

This common-law rule involves only claims about arrests. It has nothing to do with other forms of seizure. *See Tennessee v. Garner*, 471 U.S. 1, 21 (1984) (permitting a Section 1983 claim for excessive use of force to proceed despite the fact that the officers had probable cause to believe that the plaintiff had committed a burglary). Nor does it have anything to do with procedural due process or unconstitutional seizure claims.[15] Petitioner offers no

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[15] The consensus view among the circuits is that a subsequent conviction does not extinguish a cause of action for an unconstitutional seizure. *See Sullivan v. Gagnier*, 225 F.3d 161, 165 (2d Cir. 2000) (per curiam); *Kane v. Hargis*, 987 F.2d 1005, 1008 (4th Cir. 1993) (per curiam); *Courtney v. Reeves*, 635 F.2d 326, 329 (5th Cir. Unit A Jan. 1981) (per curiam); *Donovan v. Thames*, 105 F.3d 291, 295 (6th Cir. 1997); *Williams v. Liberty*, 461 F.2d 325, 327 (7th Cir. 1972), *overruled on other*

reason for why the *Cameron* rule should be "analog[ized]" to the present case, Pet. 27, in direct contradiction to this Court's well-established *Carey* rule. Abandoning this Court's longstanding approach would contravene the Fourth and Fourteenth Amendments' protection for the interests of innocent children during removal proceedings.

* * * *

The "parade of horribles" petitioner and amici conjure up from the decision in this case is illusory. They identify no way in which the decision here changed the law on search and seizure, procedural due process, or qualified immunity. Under existing law, courts within the Second Circuit have frequently held that social workers are entitled to qualified immunity. *See, e.g., V.S. v. Muhammad*, 595 F.3d 426, 431 (2d Cir. 2010); *Cornejo v. Bell*, 592 F.3d 121, 129 (2d Cir. 2010); *Carroll v. Ragaglia*, 109 Fed. Appx. 459, 462 (2d Cir. 2004); *Tenenbaum v. Williams*, 193 F.3d 581, 599, 605 (2d Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000); *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 99 (2d Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000); *Gottlieb v. Cnty. of Orange*, 84 F.3d 511, 518-20 (2d Cir. 1996); *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987); *Sweeny v. Dunbar*, No. 3:05CV00580(PCD), 2007 WL 842010, at *6 (D. Conn. Mar. 19, 2007). And subsequent to the Second Circuit's preliminary ruling in *Southerland*,

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grounds by Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); *Hernandez v. City of Los Angeles*, 624 F.2d 935, 937-38 (9th Cir. 1980); *Vazquez v. Metro. Dade Cnty.*, 968 F.2d 1101, 1108 (11th Cir. 1992).

district courts within the Circuit have continued to extend qualified immunity to social workers. *See, e.g.*, *Doe v. Whelan*, No. 08-846(TLM), 2012 WL 4056723, at *5-7 (D. Conn. Sept. 14, 2012) (citing *Southerland* but finding qualified immunity on the facts of that case). Petitioner's prophecies of social workers losing their homes and facing "ruin and bankruptcy," Pet. 5 (quoting Pet. App. 36a (Jacobs, C.J., dissenting)) are hyperbolic.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Petitioner's proposed rule would do nothing but extend immunity to social workers within these undeserving categories.

* * * *

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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