No. 13-933

In the Supreme Court of the United States

PATRICIA CAMPBELL-PONSTINGLE, PAM CAMERON, AND VIKKI L. CSORNOK, PETITIONERS,

v.

KATHERINE KOVACIC AND DANIEL KOVACIC

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

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND TWELVE OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The *amici* States focus on the first question presented in the petition:

Whether the Due Process Clause of the Fourteenth Amendment allows a social worker to take temporary custody of a child, without advance notice and pre-deprivation evidentiary hearing, when the social worker has probable cause to believe that the child has been abused; and, if not, whether the contrary legal principle was clearly established in 2002.

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INTEREST OF *AMICI CURIAE*

"Child abuse is a problem of disturbing proportions in today's society." *Coy* v. *Iowa*, 487 U.S. 1012, 1022 (1988). Addressing this problem and protecting children from abuse is an important state responsibility, one that each of the *amici* States takes very seriously. That is why "every state has a complex statutory scheme establishing child protective services agencies and enabling them . . . to take actions to protect children that can include the removal of children from their homes and the termination of parental rights." Jill D. Moore, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. Rev. 2063, 2064 & n.6 (1995). In particular, the *amici* States are concerned that requiring a pre-deprivation hearing before they can temporarily take custody of children who have already suffered abuse needlessly exposes children to further abuse.

The *amici* States also have a strong interest in preserving the protections of qualified immunity for the social workers that carry out this grave responsibility on behalf of the States. As this Court has recognized, qualified immunity is necessary to protect officials from personal liability "because 'officials should not err always on the side of caution' because they fear being sued." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991). This is especially true in the child-abuse context—when deciding whether to intervene to protect a child, social workers should be able to focus on the best interests of the child, and not have to wonder whether a close judgment call will result in personal liability.

INTRODUCTION AND ARGUMENT SUMMARY

If a State has probable cause to believe a child has been abused, yet fails to act, its failure could lead to permanent harm to the child—"physical injury, emotional scarring, a lifetime of recovery, disease, dysfunction, or death." *Arredondo* v. *Locklear*, 462 F.3d 1292, 1294 (10th Cir. 2006). This reality is why States take allegations of child abuse seriously and act quickly when confronted with such evidence.

Here, Ohio social workers and police met to discuss whether a boy and a girl should be removed from their mother's custody. The boy had told one of the social workers "that his mother hit him on a regular basis" and had hit his sister too. Pet. App. 56a. The police officers told the social workers that the mother had been accused in the past of stealing a gun, that she had recently been accused of assault (against her ex-husband's sister), and that they believed she "intended to kill her children." Pet. App. 57a & 11a–12a. Acting on this information, the social workers took temporary custody of the children. Three days later a judge confirmed that probable cause existed to remove the children. Pet. App. 4a.

The Sixth Circuit concluded that due process required the social workers to hold an evidentiary hearing before taking temporary custody of the children. But what process is due varies with context, and child abuse is an extraordinary context. That is why at least three other circuits—the First, Third, and Tenth—have concluded, on similar facts, that a post-deprivation hearing is sufficient to meet the requirements of due process. Certiorari is warranted to resolve this split.

ARGUMENT

I. When there is probable cause to believe that a child has been abused, a child may be removed without a pre-deprivation hearing.

It is a basic principle of due-process analysis that context matters: "Where procedural due process must be afforded because a 'liberty' or 'property' interest is within the Fourteenth Amendment's protection, there must be determined 'what process is due' in the particular context." *Smith* v. *Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 847 (1977). What process is due "is flexible and calls for such procedural protections as the particular situation demands." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976). This means the analysis must consider "the governmental and private interests that are affected." *Id.*

Here, the private interest of parents in raising their children free from government interference is, to be sure, a weighty one. But when parents cross the line by engaging in physical or other serious abuse, the State's interest in shielding children—an interest supplemented by the child's own interest in being free from abuse—is weightier still. E.g., *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years."); *Maryland* v. *Craig*, 497 U.S. 836, 837 (1990) (recognizing "the State's traditional and transcendent interest in protecting the welfare of children"). Thus in the particular situation of child abuse, the first concern of whatever process is due must be to protect the child from further abuse.

Given this compelling State interest in protecting children from abuse, a number of courts have recognized that due process allows state social workers to remove children from abusive situations immediately, without the delay of first providing a pre-deprivation hearing.

The Tenth Circuit, for example, has explained that, "[g]iven the state's powerful countervailing interest in protecting children from abuse and neglect," it has "long recognized that 'extraordinary circumstances' may justify the state in 'postponing the hearing until after the event.'" *Arredondo*, 462 F.3d at 1298 (some quotation marks omitted) (quoting, via another Tenth Circuit case, *Smith*, 431 U.S. at 848). Under this principle, state officials may remove a child if they have evidence "'giving rise to a reasonable and articulable suspicion that the child *has been abused* or is in imminent peril of abuse.'" *Arredondo*, 462 F.3d at 1298 (quoting *Hatch* v. *Dep't for Children, Youth & Their Families*, 274 F.3d 12, 20 (1st Cir. 2001)) (emphasis added). This temporary custody does not violate due process when it is followed by a prompt post-deprivation hearing. *Id.*

The same principle has been recognized, as the petition notes, by both the First Circuit and the Third Circuit. The First Circuit, for example, agrees that a case worker "may place a child in temporary custody when he has evidence giving rise to a reasonable and articulable suspicion that the child has been abused or is in imminent peril of abuse." *Hatch* v. *Dep't for Children, Youth & Their Families*, 274 F.3d 12, 21 (1st Cir. 2001). And here, probable cause, not just reasonable suspicion, existed.

"The justification for such a rule is," the First Circuit explained, "easily grasped: where a state official has a reasonable basis to suspect abuse, 'the interest of the child (as shared by the state as parens patriae) in being removed from that home setting to a safe and neutral environment outweighs the parents' private interest in familial integrity'"—and this is true "'as a matter of law.'" *Hatch*, 274 F.3d at 21 (quoting *Thomason* v. *SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1373 (8th Cir. 1996)).

The First Circuit's analysis hits the nail on the head: "[T]he government has a compelling interest in safeguarding children that it suspects are victims of abuse and in acting quickly on their behalf." *Id.* at 22. Faced with "the necessity of making on-the-spot judgments on the basis of limited and conflicting information," "without time for extensive investigation," a case worker must have a fair amount of leeway to act in the interest of an imperilled child—and it is better to err on the side of caution than to do nothing and await incontrovertible proof." *Id.* "Given these realities, the existence of a reasonable suspicion of child abuse warrants protecting the child by taking him or her into custody—subject, of course, to appropriate procedural safeguards—while investigating further." *Id.* (citation omitted); see also *Croft* v. *Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997) ("a child services bureau may be justified in removing" a child if it "has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse").

In contrast, the Sixth Circuit's due-process analysis fails to take this context into account. It accordingly fails to give adequate weight to the child's interest in being free from abuse and to the State's corresponding interest in protecting children from further abuse. See *Lehr* v. *Robertson*, 463 U.S. 248, 256 (1983) (liberty interests in maintaining familial integrity "merit constitutional protection *in appropriate cases*") (emphasis added).

Specifically, the Sixth Circuit concluded that "due process requires, among other things, that 'parents be given notice prior to the removal of the child . . . stating the reasons for the removal . . . [and that] [t]he parents be given a full opportunity at the hearing to present witnesses and evidence on their behalf.'" Pet. App. 20a (alterations in original). Instead of recognizing that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands," *Mathews*, 424 U.S. at 334, the Sixth Circuit thus requires a full evidentiary hearing before a State can step in to protect a child it believes has already been abused from suffering further abuse. Due process does not support, much less require, this outcome.

Indeed, compare this analysis with an instance of probable cause to arrest. In that context, where a person's liberty is at stake, the person to be arrested does not have the right to be notified and to appear at a pre-deprivation hearing. And given that due process does not require providing a pre-deprivation hearing in that context, it makes little sense to impose that procedural hurdle in the context where a child's safety is at issue.

II. The circuit split is even deeper than the petition describes, also dividing the Tenth and Seventh Circuits.

As the petition notes, the Sixth Circuit's decision is contrary to decisions of the First and Third Circuits. But the split also includes the Tenth Circuit (which sides with the latter two) and the Seventh (which sides with the Sixth).

In *Arredondo*, the Tenth Circuit case already discussed, New Mexico officials took custody (on February 20, 2001) of Jasmine, an 11-month-old child, because she had recently been to the hospital on two separate occasions, first for a fractured arm and then again, just four days later, for a broken leg. 462 F.3d at 1294–95. The next day (February 21) they took custody of her five-year-old sister too. *Id.* at 1296. Two days after that (February 23), a state court issued an ex parte order finding probable cause of abuse or neglect, *id.*, and six days later (March 1) at a custody hearing attended by the parents, the court upheld the removal. *Id.* at 1297.

The parents brought a § 1983 suit against police and social workers, alleging "that the removal of their children without notice and a hearing violated their procedural due process rights." *Id.* at 1297. Because "the evidence available to state officials was sufficient to create reasonable suspicion that Jasmine had been abused," *id.* at 1299, the Tenth Circuit concluded "that the Defendants' actions did not violate any constitutional right." *Id.* at 1302. The abuse justified the state's decision to "'postpon[e] the hearing'" until after the removal. *Id.* at 1298.

The Tenth Circuit thus reached the opposite holding from the Sixth Circuit in a case involving materially indistinguishable facts. While the Sixth Circuit held that due process required a hearing before the children's safety could be secured because there was, in its view, no emergency, Pet. App. 20a, the Tenth Circuit recognizes that evidence of past abuse is a sufficient reason to act immediately to protect the child by taking temporary custody.

The split is also deeper on the Sixth Circuit's side. Like the Sixth Circuit, the Seventh Circuit has held that a pre-deprivation hearing must occur even when there is evidence of past abuse. In *Hernandez ex rel. Hernandez* v. *Foster*, Illinois social workers removed a child from his parents because he had a fractured arm under circumstances a nurse felt were suspicious. 657 F.3d 463, 468 (7th Cir. 2011). The parents brought a procedural-due-process claim, "alleging that the defendants violated their due process rights by taking protective custody of [the boy] in the absence of an emergency or pre-deprivation hearing." *Id.* at 484. The Seventh Circuit concluded that only imminent danger of future abuse could excuse a pre-deprivation hearing: "government officials may remove a child from his home without a pre-deprivation hearing and court order if the official has probable cause to believe that the child is in imminent danger of abuse," but "[i]t does not suffice for the official to have probable cause merely to believe that the child was abused or neglected, or is in a general danger of future abuse or neglect." *Id.* at 486. The Seventh Circuit, then, like the Sixth Circuit, would require a hearing before a State could take temporary custody of an abused child.

At a minimum, the cases that make up this split confirm that the law was not clearly established in 2002 when the social workers in this case took temporary custody of the children. E.g., *Hatch*, 274 F.3d at 22 (observing in 2001 that its precedents were "inconclusive" "as to when (or under what circumstances) an officer's belief that a child has been abused justifies him in taking temporary custody without a hearing"); *Arredondo*, 462 F.3d at 1302 (declining to reach the question whether the law was clearly established in 2001 because no due-process violation occurred); *Hernandez*, 657 F.3d at 484 (granting the social workers qualified immunity for actions taken in 2008, because its case law "did not put a reasonable [social worker] on notice that removing [a child] without a pre-deprivation hearing violated the plaintiffs' clearly established procedural due process rights"). As this Court explained when addressing qualified immunity in the context of a circuit split, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).

The *amici* States also agree with the arguments presented by Judge Sutton's dissent about the Fourth Amendment issue. This child-welfare matter is not a case involving a law or process that is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." See *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 (1979). In fact, it is hard to understand how the majority could, in one breath, expressly recognize that "there was an absence of pre-2002 case law

specifically mentioning social workers" as subject to the Fourth Amendment and then, in the next breath, hold that the law was clearly established that social workers were subject to it. Pet. App. 19a. That issue also warrants review.

* * *

Social workers in the seven States located in the Sixth and Seventh Circuits who have probable cause to believe that child abuse has occurred must leave children at risk, in homes where they have already been abused, until they either somehow acquire evidence of a specific imminent threat (before it actually occurs and becomes merely additional evidence of *past* abuse) or can arrange for a full evidentiary hearing. In contrast, social workers in numerous other States may take temporary custody without a pre-deprivation hearing. This split warrants the Court's review.[1]

[1] The parties were notified of the intent to file at least 10 days prior to the due date of this brief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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