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,

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth or Fourteenth Amendments prohibit social workers, deputized with all the powers of police officers in the state of Ohio, from seizing children, through forcible, nonconsensual, warrantless entry into private dwellings, without exigency; and, if so, whether that legal principle was clearly established on March 26, 2002.

2. Whether the United States Court of Appeals for the Sixth Circuit conducted its analysis of the infringement of Respondents' Fourth Amendment rights properly, at a high level of generality, under the doctrine of obvious clarity, using the text of the Amendment and controlling Ohio statute as its guide to determine whether deputized social workers who performed law enforcement functions, without evidence of emergency circumstances or imminent risk of serious physical or emotional harm, are subject to the core principles of the Fourth Amendment; and if so, whether the qualified immunity denial by the Court of Appeals was appropriate under the law as it existed on March 26, 2002.

PARTIES INVOLVED AND CORPORATE DISCLOSURE STATEMENT

Respondents Katherine Kovacic and Daniel Kovacic were plaintiffs-appellees in the court of appeals.

Petitioners Patricia Campbell-Ponstingle, Pam Cameron and Vikki L. Csornok were defendants-appellants in the court of appeals.

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state the following: No corporations are involved in this proceeding.

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CONTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND. IV

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, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., AMEND. XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO ADMINISTRATIVE CODE § 5101:2-1-01(98)

("Children services definitions of terms")

(98) "Duly authorized" is the established ongoing approval by a juvenile court, granting the PCSA [Public Children Services Agencies] permission to remove a child who is at imminent risk when time does not permit obtaining a court order or assistance from law enforcement. (brackets added).

OHIO JUVENILE PROCEDURE RULE 6

("Taking Into Custody")

(A) A child may be taken into custody:

(1) pursuant to an order of the court;

(2) pursuant to the law of arrest;

(3) by a law enforcement officer or duly authorized officer of the court when any of the following conditions exist:

(a) There are reasonable grounds to believe that the child is suffering from illness or injury and is not receiving proper care, and the child's removal is necessary to prevent immediate or threatened physical or emotional harm;

(b) There are reasonable grounds to believe that the child is in immediate danger from the child's surroundings and that the child's removal is necessary to prevent immediate or threatened physical or emotional harm;

(c) There are reasonable grounds to believe that a parent, guardian, custodian, or other household member of the child has abused or neglected another child in the household, and that the child is in danger of immediate or threatened physical or emotional harm;

(d) There are reasonable grounds to believe that the child has run away from the child's parents, guardian, or other custodian;

(e) There are reasonable grounds to believe that the conduct, conditions, or surroundings of

the child are endangering the health, welfare, or safety of the child;

(f) During the pendency of court proceedings, there are reasonable grounds to believe that the child may abscond or be removed from the jurisdiction of the court or will not be brought to the court;

(g) A juvenile judge or designated magistrate has found that there is probable cause to believe any of the conditions set forth in division (A)(3)(a), (b), or (c) of this rule are present, has found that reasonable efforts have been made to notify the child's parents, guardian ad litem or custodian that the child may be placed into shelter care, except where notification would jeopardize the physical or emotional safety of the child or result in the child's removal from the court's jurisdiction, and has ordered ex parte, by telephone or otherwise, the taking of the child into custody.

(4) By the judge or designated magistrate ex parte pending the outcome of the adjudicatory and dispositional hearing in an abuse, neglect, or dependency proceeding, where it appears to the court that the best interest and welfare of the child require the immediate issuance of a shelter care order.

(B) Probable cause hearing. When a child is taken into custody pursuant to an ex parte emergency order pursuant to division (A)(3)(g) or (A)(4) of this rule, a probable cause hearing shall be held before the end of the next business day after the day on which the order is issued but not later

than seventy-two hours after the issuance of the emergency order. (Effective: July 1, 1972; amended effective July 1, 1994; July 1, 1996).

OHIO REVISED CODE § 2151.31(A)(3)

("Taking child into custody")

(A) A child may be taken into custody in any of the following ways:

(3) By a law enforcement officer or duly authorized officer of the court when any of the following conditions are present:

(a) There are reasonable grounds to believe that the child is suffering from illness or injury and is not receiving proper care, as described in section 2151.03 of the Revised Code, and the child's removal is necessary to prevent immediate or threatened physical or emotional harm;

(b) There are reasonable grounds to believe that the child is in immediate danger from the child's surroundings and that the child's removal is necessary to prevent immediate or threatened physical or emotional harm;

(c) There are reasonable grounds to believe that a parent, guardian, custodian, or other household member of the child's household has abused or neglected another child in the household and to believe that the child is in danger of immediate or threatened physical or emotional harm from that person.

OHIO REVISED CODE § 2151.31(B)

("Taking child into custody")

(1) The taking of a child into custody is not and shall not be deemed an arrest except for the purpose of determining its validity under the constitution of this state or of the United States.

(2) Except as provided in division (C) of section 2151.311 of the Revised Code, a child taken into custody shall not be held in any state correctional institution, county, multicounty, or municipal jail or workhouse, or any other place where any adult convicted of crime, under arrest, or charged with crime is held.

OHIO REVISED CODE § 2153.11

("Bailiffs – compensation")

The administrative juvenile judge may appoint one or more bailiffs to preserve order and perform such other duties as such judge requires, as provided for constables in section 2701.07 of the Revised Code. The compensation of any such appointee shall be fixed and paid on the same basis as provided by section 2701.08 of the Revised Code for the compensation of constables in the court of common pleas of Cuyahoga county. (Effective Date: 06-29-1972).

OHIO REVISED CODE § 2701.07

("Court constables – duties")

When, in the opinion of the court, the business thereof so requires, each court of common pleas, court of appeals, and, in counties having at the last or any future federal census more than seventy thousand

inhabitants, the probate court, may appoint one or more constables to preserve order, attend the assignment of cases in counties where more than two judges of the court of common pleas regularly hold court at the same time, and discharge such other duties as the court requires. When so directed by the court, each constable has the same powers as sheriffs to call and impanel jurors, except in capital cases. (Effective Date: 10-01-1953).

OHIO REVISED CODE § 5149.23

("Deputizing employees to effect return of violators")

(A) The chief of the adult parole authority may deputize any person regularly employed by another state to act as an officer and agent of this state in effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this state. In any matter relating to the return of such a person, any agent so deputized shall have all the powers of a police officer of this state.

Any deputization pursuant to this section shall be in writing, and any person authorized to act as an agent of this state pursuant to this section shall carry formal evidence of his deputization and shall produce the evidence upon demand.

(B) The chief may, subject to the approval of the director of budget and management, enter into contracts with similar officials of any other state for the purpose of sharing an equitable portion of the cost of effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this state. (Effective Date: 07-01-1985).

OHIO REVISED CODE § 5577.13

("Enforcement by deputies")

In those counties having forty miles or more of improved intercounty or state highways, the sheriff of each such county shall, and in all other counties may, detail one or more deputies for the work of enforcing sections 5577.01 to 5577.14, inclusive, of the Revised Code. The board of county commissioners shall appropriate such amount of money annually, from the road fund of the county, as is necessary to equip and compensate such deputy. The patrolmen of the county highways may be deputized by the sheriffs of the counties in which they are employed, as deputy sheriffs, but shall receive no extra compensation. (Effective Date: 10-01-1953).

RHODE ISLAND GEN. LAWS § 40-11-5(a)

("Protective custody by physician or law enforcement officer")

(a) Any physician or duly certified registered nurse practitioner treating a child who has suffered physical injury that appears to have been caused by other than accidental means, or a child suffering from malnutrition or sexual molestation, shall have the right to keep the child in the custody of a hospital or any licensed child care center or facility for no longer than seventy-two (72) hours, with or without the consent of the child's parents or guardian, pending the filing of an ex-parte petition to the family court. The expense for that temporary care shall be paid by the parents or legal guardian of the child or, if they are unable to pay, by the department.

42 U.S. CODE § 1983

("Civil action for deprivation of rights")

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

When two deputized Cuyahoga County social workers, accompanied by several North Olmsted police officers, pounded on a suburban Cleveland front door the evening of March 26, 2002, Nancy Kovacic refused to answer.[1] One officer telephoned her, demanding she permit entry under the threat of force. *Id.* Nancy declined consent and moments later, without warrant or exigency, police and Petitioners battered their way into the residence of Nancy and her son and daughter, Respondents Danny and Katy, who were children on that night long ago. *Id.*

With the shattered door behind her, Petitioner Ponstingle informed Nancy that Cuyahoga County Department of Job and Family Services ("CCDJFS") were seizing her children. JA 212. They burst into the residence because, according to Ponstingle, Nancy "never said they could not." JA 215. Beyond the splintered doorway stood the children, huddled with their mother in the foyer, weeping with fear. JA 217, 384. Ponstingle seized Danny and Katy from Nancy's arms and swept them out of the residence, not to return for almost a year. JA 383-84.

The Petitioners were involved in the Kovacic family's lives months before the illegal invasion. JA 168-70. As the primary case worker, Ponstingle interacted frequently with the family by telephone before the traumatic events of the unconstitutional search and

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[1] *Kovacic v. Cuyahoga Cty. Dep't of Children and Family Servs.*, 606 F.3d 301, 305-08 (6th Cir. 2010); Joint Appendix, pp. 183, 211 ("JA").

seizure.[2] In those months before conducting what the Ohio legislature deemed an "arrest," CCDJFS investigated accusations lobbed back and forth between the parents and other relatives. Throughout CCDJFS' investigation, staffers regularly contacted the father and his sister, Colleen Nola, who, like her brother, made numerous unsubstantiated allegations against Nancy.[3] *Id.*

CCDJFS personnel knew the family was mired in contentious divorce proceedings and the father actively sought custody. *Id.* Allegations made against Nancy included: a one-year-old incident during which Danny stabbed her with a pen; that she pushed the children; and allegedly slapped Katy, causing a nosebleed. JA 149-50.

The CCDJFS "investigation" consisted largely of documented interviews of the children and various accusers. JA 160. Nancy was not interviewed consistently about the accusations and her responses largely went undocumented. JA 160, 193. No healthcare provider was interviewed, no medical evidence existed, and no referrals were made by medical professionals, school officials, counselors, or other mandatory abuse reporters. JA 152, 155.

During the investigation, CCDJFS personnel, including Petitioners, took the children's accusations at "face value" but disregarded Katy's responses that Danny was a fibber, despite documentation that he fabricated rebellious stories about Nancy with hope he could reside with the father. JA 151, 155. De-

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[2] Petitioner Ponstingle had not met the Kovacics before March 26, 2002. JA 145-46.

[3] There is no evidence of record that Nancy was ever arrested for any accused misdeed.

spite CCDJFS' supposition that accusations of hair pulling, pushing and slapping were credible, it was determined it did not require police involvement; at least one CCDJFS staffer deemed the family's dysfunction insufficient for seizure. JA 152.

Between January and March of 2002, Petitioners substantiated just one accusation – the father choked Danny – causing the Domestic Relations Court to issue a January 18, 2002 prohibiting any other abuse of family members and, *inter alia*, unsupervised contact with the children and coming within 500 feet of the family. JA 165, 334; App. 5-11. Despite these stark findings, CCDJFS continued to favor the father and focus on Nancy. Among its reasons was her "uncooperative" participation when she required audio recordings of meetings, prompting the agency to terminate services at her residence. JA 185.[4]

As part of continued CCDJFS involvement and family monitoring, a "staffing" was scheduled for the afternoon of March 26, 2002 to discuss recent investigatory results and determine what next steps, if any, were appropriate. JA 109, 179. Petitioners admit seizure was not intended before the meeting, and CCDJFS personnel described child seizures generally as "extreme" measures. JA 125.

Both parents were invited to attend the meeting, but were later informed it would be rescheduled for March 27th. JA 181. Ponstingle maintained it was rescheduled at Nancy's request due to an employment conflict and safety concerns about attending a

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[4] A non-party CCDJFS employee conducted in-person interviews at Nancy's residence. *Id*.

meeting with the father.[5] JA 178-79. Nevertheless, the record establishes CCDJFS informed both parents the meeting was postponed. *Id.* Contending Nancy "backed out at the last minute" is disingenuous.[6] Pet. 3.

After rescheduling the meeting, Ponstingle telephoned Katy's school counselor and invited her to participate; she declined because there were "no issues" involving Katy. JA 187. When informed of the rescheduling, the father responded he would still appear on the 26th. JA 181. CCDJFS did not inform Nancy her now ex-husband would appear at CCDJFS on that date. JA 211.

The father arrived at CCDJFS offices early on the afternoon of March 26th. Joining him, without CCDJFS invitation, were his sister Ms. Nola, his father Edward (former Cleveland Police Department Chief), and three uniformed North Olmsted police officers.[7] JA 181-82.

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[5] Nancy was a protected person under the restraining order. App. 5.

[6] The District Court found genuine factual disputes exist about who rescheduled the meeting and why. Docket #88, p. 4; Docket #67, Ex. 1. Petitioner Csornok testified about the "belief" of "several" officers at the meeting "that Nancy's failure to attend the meeting was a sign that her behavior was escalating and that she intended to kill." Pet. 11a-12a. Csornok added, "no one inquired specifically as to how the police officers knew the children or when the most recent interaction between the officers and the children occurred." *Id.*

[7] The police officers participated in ostensible compliance with three substantially similar document

Despite Nancy's absence, the assigned case worker held the meeting anyway, the purpose of which was to review the case status and progress achieved. During that meeting, unfounded accusations were made regarding, *inter alia*, Nancy's mental health, based mainly on unqualified speculation, animus, and stale information.[8]

Paternal family members insisted Nancy would harm the children instead of risking removal. JA 343. North Olmsted Police Officer Chung claimed the children were at risk because she was "crazy" and "escalating."[9] JA 344-45; Pet. 11a. The Petition maintains many of the accusations were first made in the mid-1990s (*e.g.*, allegedly removing the father's firearm from the home), and untrained lay opinions asserting unspecific "concern" that Nancy was "capable" of murder, comparing her to Andrea Yates.[10] JA 100; Pet. 57a.

Despite these accusations, CCDJFS personnel did not contact Nancy to investigate before, during, or

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production subpoenas issued by the father's attorney in the divorce action; none were identified therein as records custodians. App. 12-20.

[8] Nothing of record suggests "ongoing and continuous" abuse. *Cf. United States v. Myers*, 106 F.3d 936, 939 (10th Cir. 1997) (Because activities were "ongoing and continuous . . . the passage of time did not render the information stale."). *Id.*

[9] No evidence exists suggesting Chung possessed credentials qualifying him to make competent determinations of this nature.

[10] Chung identified the father as the accusation source who claimed Nancy was "capable" of killing the children. JA 343.

after that fateful meeting. When it concluded, Ponstingle's supervisor, Petitioner Cameron, believed it merely "possible" the children might suffer harm without removal. JA 117. Cameron stated that among the reasons Respondents were seized was she observed no evidence permitting her "to feel that their lives would have been better had I not removed them," and if several possibilities coincided, some unspecified risk of harm might exist. JA 118.

Based mainly on what the trial court dispatched as "subjective opinions and speculations, . . . none of which tended to indicate that Nancy had physically abused or threatened to abuse her children," CCDJFS, with an assistant prosecutor's help, determined to effect a Temporary Emergency Care ("TEC") order that afternoon and seize the Respondents at their home that evening. App. 3-4; Pet. 1a.; *but see* Pet. 14 ("considerable evidence"). Petitioners' faulty suppositions and the ensuing events were undertaken without investigating the veracity of self-serving accusations made during the impromptu meeting, and without affording Nancy opportunity to respond, as scheduled, on the 27th.

Ohio social workers are unauthorized to seize children without a warrant. That authority is left for law enforcement and duly appointed court officers. (Juvenile Rule 6 and O.R.C. § 2151.31). Cuyahoga County provided two child seizure methods in 2002: 1) judicial order (warrant), with round-the-clock magistrate access by electronic pager; and 2) the TEC order. The Ohio legislature designated § 2151.31 seizures as "arrests" for constitutional purposes.

The Cuyahoga County Juvenile Court Administrative Judge deputized all Cuyahoga County social workers by journal entry order dated March 18,

1999, appointing Petitioners "Duly Authorized Officers," and empowering them to function as deputies when seizing children pursuant to § 2151.31(A)(3) and Juvenile Rule 6.[11]

According to Cameron, the deputizing order authorized Petitioners to seize children solely on the "agency's authority," without judicial approval. App. 1; JA 132. As she tells it, "agency[ ] authority" flowed from that order. Cuyahoga County was unique in utilizing the order, effectively circumventing legislatively-intended judicial officer involvement *before* child seizures. It quietly abandoned use of the controversial deputizing tactic subsequent to March 26, 2002.[12]

A juvenile court magistrate held post-deprivation proceedings, on March 29th pursuant to § 2151.31. Nancy was present with appointed counsel, but Respondents were not, nor were they represented. Only state witnesses were permitted to testify, after which, Magistrate Chavers concluded the proceeding and granted Ms. Nola temporary custody,[13] determining the removal's propriety, contrary to control-

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[11] *Cf.* Pet. 22. ("… [P]etitioners could (and did) look to Ohio's statutory scheme.…"). *Id.*

[12] *Kovacic v. Cuyahoga Cty. Dep't of Children and Family Servs.*, 724 F.3d 687 (6th Cir. 2013), *en banc reh'g denied*, 2013 U.S. App. LEXIS 20653 (6th Cir. Oct. 7, 2013). *See* App. Br., *n.*7.

[13] During the roughly ten-month custody period, CCDFS personnel knew the children's father resided at the dwelling with Nola and the children, despite the restraining order. JA 350; Cameron Depo. 195, 200; App. 5.

ling law, because, "[f]amily preservation did not benefit the family." App. 24.

Neither Respondents, nor Nancy were permitted to offer witness testimony or present other evidence during the unconstitutional post-deprivation hearing.[14] Petitioners first argued for preclusive effect of the March 29, 2002 check-box magistrate opinion in their initial motion for summary judgment, but this argument was the first of many to be rejected. App. 21; JA 41. Petitioners made multiple successive failed attempts to obtain preclusive effect of the present-tense ("is") probable cause check-box, although the available past-tense ("was") check-box is blank. App. 21.

The circuit court determined the Petitioners "acted pursuant to § 2151.31(A)(3), an Ohio statute that required exigency, . . ." Pet. 25a. The Petition conspicuously omitted any reference to the controlling statute which partially guided the appeals court analysis.

Respondents filed a complaint on November 28, 2005, alleging § 1983 liability for violations of the Fourth and Fourteenth Amendments. The Fourteenth Amendment claim was originally dismissed by

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[14] *See Kovacic*, 606 F.3d at 305; Docket #88, p. 22 ("[I]t is entirely unclear whether this hearing bore any [ ] hallmarks of a 'full and fair' hearing, including the opportunity to present evidence or to cross examine adverse witnesses."). App. 21-26; *but see* Pet. 42a. The dissenting judge below acknowledged: "It is true that the state court decision found that there *is* probable cause, not that there *was* probable cause, . . ." and added ". . . the children offer[ed] no evidence, . . ." *Id.*

summary judgment on *Rooker-Feldman* grounds, but the Fourth Amendment claim survived. On appeal, the appellate court rejected the *Rooker-Feldman* theory, and vacated dismissal of Respondents' Fourteenth Amendment claim.

Both parties filed for summary judgment on remand. The district court granted summary judgment to Respondents regarding Fourth and Fourteenth Amendment liability, and denied absolute and qualified immunity to the Petitioners for the illegal search and seizure. Pet App. 55a. The appellate court affirmed denial of qualified immunity on interlocutory appeal, finding resolution of the Fourth and Fourteenth amendment issues grounded in the "exigency standard" of settled Fourth Amendment law and § 2151.31(A)(3). Pet. 18a, 25a. Both courts again rejected Petitioners' preclusive effect arguments about the magistrate's check-box opinion within the relevant decisions. App.13a; Pet. 74a-79a.

REASONS FOR DENYING THE PETITION

I. PETITIONERS FAILED TO ESTABLISH ANY CIRCUIT SPLIT

The claimed circuit split is mere mirage. The § 1983 qualified immunity reasonableness analysis below was based correctly on core Fourth Amendment principles and § 2151.31(A)(3), the statute controlling Petitioners when they seized Respondents from their home, which was inexplicably excluded from the Petition. That statute (*supra*) limits emergency warrantless child seizures to law enforcement officers or

"Duly Authorized Officers," as defined by O.A.C. § 5101:2-1-01(98).

Only the March 18, 1999 deputizing order authorized Petitioners to seize children without judicial oversight under § 2151.31(A)(3). App. 1; Pet. 3a. The deputizing order permitted seizures only when "imminent risk of serious physical or emotional harm" existed. Docket #70, Ex. B; App. 2. No exigency was established, and no authority was cited by Petitioners involving deputized social workers possessing police powers.

A. Distinguishable Authorities are Petitioners' Basis for Supposed Circuit Split

Cases cited by Petitioner and *amici* in support of a supposed circuit split do not include the statutory and judicial constraints imposed on Petitioners when they seized Respondents. For example, *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 123 (3rd Cir. 1997) and *Arredondo v. Locklear*, 462 F.3d 1292 (10th Cir. 2006) are based solely on common law standards and make no mention of statutory and/or judicial limits for social worker activity.

Hatch v. Dep't for Children takes a similar approach, although a controlling statute applied. *See* 274 F.3d 12 (1st Cir. 2001); R.I. Gen. Laws § 40-11-5(a). The Rhode Island statute authorizes physicians (and law enforcement) to take custody temporarily, pending judicial review, of *injured children*, who present with medical evidence of "physical injuries . . . caused by other than accidental means. . . ." *Id.* (emphasis added).

The statute in *Hatch* and its operative facts reveal close temporal proximity of the disputed removal with a child's fresh injuries, who, within hours of sustaining those injuries alleged abuse to mandatory reporters, and who was taken into initial custody by authorized healthcare personnel *at a hospital*. The *Kovacic* fact pattern, including the controlling statute and the outlier deputizing order conferring Petitioners with police powers, differs dramatically from this inapposite case, and demonstrates further why the supposed split is untenable.

Arredondo and *Hernandez* appear nowhere in the Petition, and, like *Hatch*, both involved medical evidence consistent with serious physical injuries, but were also coupled with inconsistent injury cause explanations, and each included follow-up investigation with home visits to confirm (or refute) abuse suspicions *before* taking custody. *See Arredondo*, 462 F.3d at 1295-97; *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463 (7th Cir. 2011). None of those salient facts are present here,[15] demonstrating additional reasons why *Kovacic* is distinguishable and creates no conflict with *Croft*, *Hatch*, *Hernandez* or *Arredondo*, as discussed further *infra*. Importantly, none of the authorities cited to support the Petition involved social workers who possessed (and exercised) police powers like the Petitioners did on March 26, 2002. These many fact-bound issues are unworthy of the Court's consideration.

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[15] *See*, *e.g.*, *Kovacic*, 606 F.3d at 305 ("The [Respondents] were taken to a local hospital for a routine examination, which found no signs of abuse or neglect by the mother."). *Id.*

B. Petition Omitted Controlling Statute

Petitioners neglected the law governing their misconduct by deed and later in words, because the Petition makes no mention of § 2151.31, or Juvenile Rule 6, or even the deputization order. Instead of addressing the circuit court's statutory analysis, the Petition's essence really seems to be an impermissible error correction entreaty, cloaked in an illusory binary choice between what it claims are conflicting qualified immunity interpretations in social worker § 1983 litigation.

This case offers no such binary choice and there is no *bona fide* circuit split. The similarities between *Kovacic* and *Hatch*, and far less so with *Croft* and those asserted by *amici*, all begin their end with the fact that each involved social workers and alleged child abuse. Clear factual and regulatory distinctions determined the respective outcomes, not conflicting legal standards.

C. "Duly Authorized" To Do What Exactly?

The operative phrase "duly authorized officer" necessarily begs the question: duly authorized to do what? The O.A.C. governs administrative agencies, including CCDJFS and its employees, and was referenced directly in the § 2151.31 annotations to guide Petitioners. The O.A.C. regulation defines "duly authorized" as "established approval by a juvenile court, granting permission to remove a child *only when at imminent risk when time does not permit obtaining a court order* or assistance from law enforcement." O.A.C. § 5101:2-1-01(98) (emphasis added). A lack of awareness has not and cannot be maintained by Petitioners.

No reasonable reading of the governing statute and rule, or the deputizing and TEC orders, can ever be interpreted as permitting warrantless seizures except in genuine emergencies. It is reasonable to conclude these controlling authorities were crafted intentionally to comport with constitutional constraints, couched clearly in exigency. *See Katz v. United States*, 389 U.S. 347 (1967).

The appellate court analysis was grounded solidly in core Fourth Amendment principles and Ohio law. Section 2151.31(B)(1) makes clear "for the purpose of determining its validity under the constitution of this state or of the United States," any seizure under § 2151.31 shall be "deemed an arrest." *Id.* This legislative language is logical regarding the authorized state actors, as much as for those whom it aims to protect. None of the Petitioners' supporting authorities include such a statute, imbued with obvious legislative intent that the disputed social worker activity was really ordained police activity.

The law enforcement parallel is emphasized further by the provisions of § 2153.11, which authorized the juvenile court appointments to "perform such other duties as such judge requires," and refers to § 2701.07, which addresses constable powers comparably with sheriffs. Petitioners were police officers on March 26, 2002, acting in violation of the relevant statute, definitions, rules, orders *and* the Fourth Amendment when they arrested Respondents.

D. Magistrate Opinion from Unconstitutional Hearing Does Not Create Circuit Split

The search and seizure appellate review was unquestionably guided by core Fourth Amendment

principles, as discussed in further detail *infra*. Absent a warrant, or one of the settled exceptions, Petitioners' misconduct was unlawful and unreasonable. Notwithstanding bluster about a magistrate's checkbox probable cause opinion made during an unconstitutional hearing, there is no *stare decisis* conflict between *Kovacic* and the decisions of other Courts of Appeals, let alone the Court's Fourth Amendment jurisprudence.

Petitioners' repeated references to the flawed magistrate opinion as indicia of "reasonableness" are unsupportable by the District Court record or any appellate court opinion below. In the first appeal, the circuit court found while Nancy was "present at the hearing and represented by counsel . . . neither she nor any of the witnesses she had brought was permitted to testify." *Kovacic*, 606 F.3d at 305. No ruling or record below, subsequent to this determination, has disturbed that critical finding.[16]

After years of asserting non-existent exigency to excuse the warrantless seizure, Petitioners now abandon that stratagem and attempt to reframe the case as one about probable cause based on the magistrate's flawed opinion. This argument was not before the courts below, and contrary to Petition rhetoric, use of the opinion as evidence of probable cause, and its dubious relevance, has been disputed repeatedly. *Compare* Pet. 5, ¶ 5a, *with Kovacic*, 606 F.3d at 305, 308; Docket #88, p. 22; App. 21-26; JA 435-36; Pet. 10a, 13a, 81a.

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[16] Only when one had a "full and fair opportunity" to litigate in earlier state proceedings is s/he precluded from subsequent litigation on that issue in a federal forum. *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980).

One must sift through volumes of additional relevant facts elicited over a near-decade of litigation to make a "reasonableness" determination about the Petitioners' tortious misconduct, which was reviewed already by two circuit court panels. Petitioners raise a new theory at the eleventh hour not subject to previous discovery, seeking to relitigate fact-bound issues under the guise of a new standard by way of a manufactured circuit split.

E. Waiver Effect of Newly Raised Issues

After almost a decade of litigation, Petitioners have asserted for the first time that a "reasonable suspicion" standard, pursuant to the factually and legally distinct *Hatch* and *Croft*, is now somehow the appropriate standard for all warrantless invasions involving child seizures.[17] The moment for such an assertion has long since passed; it should have been set forth long ago in pleadings, or at least within either of Petitioners' prior summary judgment motions, their reply briefs, appellants' briefs, or even their appellants' reply briefs. Nevertheless, the record below is bereft of even a hint of the espoused new theory that has become the Petition's centerpiece.

Instead, Petitioners had placed an almost singular focus, at least until the Petition's filing, on an un-

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[17] *See Glover v. Unites States*, 531 U.S. 198, 205 (2001) (citation omitted) (The Court "do[es] not decide questions neither raised nor resolved below, . . ."); *United States v. Jones*, 132 S. Ct. 945, 954 (2012); *DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 195, *n*.2 (1989) (citations omitted); *Howard v. Catholic Social Servs.*, 70 Ohio St. 3d 141, 145 (Ohio 1994).

founded insistence that exigency existed, despite settled review by no less than seven different federal judges and a denied *en banc* request. This newly proposed "reasonable suspicion" standard appears nowhere in the Petitioners' previous papers; it only first surfaced following the dissent below. This further belies their contemporary argument and that alone warrants the Petition's denial. Pet. 13a-14a.

F. Interlocutory Appeal Standard Applies

The Petition seeks interlocutory review of a qualified immunity denial on summary judgment, but Petitioners' recitation fails to raise genuine disputes of law; instead it seeks to unwind years of adverse fact finding. The record, developed over almost a decade, through numerous trial court decisions, including, two summary judgments, followed by two interlocutory appeals, supports a vividly divergent version of the events from that presented by Petitioners.

Ordinarily an immunity defense provides "special procedural treatment" only for defendants' legal theory as analyzed in light of the facts as plaintiff asserted (or alternatively, those surviving summary judgment), it does not, however, provide special treatment for factual disputes. *See*, *e.g.*, *Osborn v. Haley*, 549 U.S. 225, 259 (2007) (citing *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995)).

If Petitioners are permitted to advance their newest theory to the Court, along with its supporting premises, extensive lower court rulings and fact-finding must be overturned and substantial *de novo* fact finding would be needed before legal analysis could commence anew. Many of those existing facts are materially inconsistent with Petitioners' recita-

tion and reveal numerous fact-bound issues inherent in the Petition. This Court "does not sit" as an error correcting tribunal, making this case additionally unworthy for the Court's further consideration. *Halbert v. Michigan*, 545 U.S. 605, 611 (2005). Moreover, Supreme Court Rule 10 discourages granting a writ when this type of recitation exists, and makes equally clear the improvident Petition is improper for the Court's review.

II. THE COURT OF APPEALS FOUND CLEARLY ESTABLISHED RIGHTS WERE VIOLATED WITH OBVIOUS CLARITY, USING FOURTH AMENDMENT AND STATUTORY TEXT TO GUIDE ITS DETERMINATION THAT THE STATE ACTORS' MISCONDUCT, WHILE PERFORMING LAW ENFORCEMENT FUNCTIONS, WAS OBJECTIVELY UNREASONABLE, OBVIATING A NEED FOR SPECIFICITY

A. Proper Generality Level Applied

The gravamen of this dispute is a forcible, non-emergency, non-consensual, warrantless entry into a private dwelling by Petitioners with police powers who ripped two children from their home during a classic illegal search and seizure, squarely within the ambit of Fourth Amendment protections. This Court has long protected the Fourth Amendment principle that ". . . the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . ." *Mapp v. Ohio*, 367

U.S. 643, 647 (1961) (citing *Weeks v. United States*, 232 U.S. 383, 391-92 (1914)).

Following the lead of the Bill of Rights text, Chief Justice Rehnquist properly conducted Fourth Amendment analysis at a high level of generality, just as the appellate court faithfully did here. *See Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (Rehnquist, C.J.) ("The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.") (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). *Id*. at 396. The illegal search and seizure here is but one key aspect which dramatically distinguishes it from inapposite opinions Petitioners insist provide support, when in fact, the rules of *Hatch*, *Hernandez*, *Croft* and *Arredondo* all coexist properly with *Kovacic*, due in large part to significant factual distinctions of each.

Chief Justice Rehnquist taught us that "because the Fourth Amendment provides an explicit textual source of constitutional protection against [ ] physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham*, 490 U.S. at 395.

The appellate court analyzed the facts of this case to render its determination appropriately, employing the Fourth Amendment text and the controlling Ohio statute as its guide. *See*, *e.g.*, *Kovacic*, 724 F.3d at 696-98. The appellate court reasoned appropriately, a "'social worker, like other state officers, is governed by the Fourth Amendment's warrant requirement.'" *Kovacic*, 724 F.3d at 696 (quoting *Andrews v. Hickman Cty*., 700 F.3d 845, 859 (6th Cir. 2012)).[18] This

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[18] The court of appeals explained that "'social workers [ ] have to obtain consent, have sufficient grounds

has always been the rule and is especially so when deputized social workers act with police powers, as Petitioners did on that March 2002 evening.[19]

The deputized Petitioners conducted what the legislature deemed an "arrest" in the pertinent statute, with consent and exigency lacking to justify the illegal entry.[20] *See generally*, *Katz*, 389 U.S. 347. Nevertheless, Petitioners attempt to cast *Hatch* and *Croft* as somehow analogous to this case, despite never having cited either opinion for any purpose at any previous point throughout years of litigation.

This dispute is not about a child injured hours earlier in temporary custody at a hospital, pursuant to Rhode Island's "physician's hold" statute, such as in *Hatch*, which comported with the relevant Rhode Island statute and involved no warrantless search. Similarly, this case is not about coercive social worker rhetoric prompting a suspect to "voluntarily" vacate his residence during an investigation, as in *Croft*, which did not violate the Fourth Amendment because Croft consented to the entry and the claims

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to believe that exigent circumstances exist, or qualify under another recognized exception to the warrant requirement before engaging in warrantless entries and searches of homes.'" *Kovacic*, 724 F.3d at 695 (quoting *Andrews*, 700 F.3d at 859-60).

[19] *Cf.* Jack N. Rakove, *Declaring Rights*, p. 197 (Bedford Books 1998) ("Any constitutional text is a dead letter, unless citizens and officials are imbued with the principles and norms that a constitution expresses and promotes."). *Id*.

[20] The deputizing order authorized "emergency" seizures only. App. 1.

sounded in Fourteenth Amendment Due Process.[21] First and Third Circuit warrantless search and seizure jurisprudence is in accord with the Sixth Circuit determination in this case, as discussed *infra* at § II (C)(4). In sum, *Hatch*, *Croft* and *Kovacic* all coexist properly on distinct facts.

B. Traditional Rights are Fundamental

The rights at risk in this dispute are among our most culturally traditional and precede the very founding of this nation. *See*, *e.g.*, *Blackstone's Commentaries on the Laws of England Book the First: Of Parent and Child* (Ch. 16) (1765-69) ("The next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child."). *Id*.

The American family has been characterized by the Court as "perhaps [our] most fundamental social institution. . . ." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (Stevens, J.) (citing *Trimble v. Gordon*, 430 U.S. 762, 769 (1977)). The Court has also construed these interests as "cardinal" because family functions and freedoms "include preparation for obligations the state can neither supply nor hinder." *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (finding a "private realm of family life which the state cannot enter"). These rights have been deemed "essential" for the "orderly pursuit of happiness by [a] free [society]."

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[21] Petitioners mischaracterized the circuit court's analysis of *Hatch* and *Croft*. The majority observed correctly that those cases, "concern Fourteenth Amendment due-process rights rather than the Fourth Amendment exigency requirement." *See* Pet. 16, 18a.

Meyer v. Nebraska, 262 U.S. 390 (1923). Because the family liberty interests at issue here are imbedded so deeply within societal tradition they constitute fundamental rights. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989) (Scalia, J.).

There can be no dispute the "fundamental liberty interest" of a natural parent regarding the "care, custody, and management of their child[ren]," is sacrosanct, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (Blackmun, J.), and those liberty interests inure concomitantly to Respondents. *See*, *e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (determining children are not "mere creature[s] of the state"); *Powell v. Alabama*, 287 U.S. 45, 50, 57–58 (1932) (finding children entitled to due process under Fourteenth Amendment); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *In re Gault*, 387 U.S. 1, 78 (1967) (identifying child's "right to be represented by counsel"); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (citations omitted) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."); and *Wallis ex rel. Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 1999) (determining false accusations of abuse case involved "the rights of children [ ] to be free from arbitrary and undue governmental interference").

The Court has concluded these rights constitute "an interest 'far more precious' than any property right." *May v. Anderson*, 345 U.S. 528, 533 (1952). In fact, the sanctity of the family generally may not be invaded by the state without risking the peril of prospective civil rights liability. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (O'Connor, J.) (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)) ("there is normally no reason for the State to inject itself into the private

realm of the family"). Through almost a century of jurisprudence, the Court has determined the sanctity of the family is a liberty interest "established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). The constitutional protections of the family are axiomatic. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

The right to be secure from warrantless government invasions within one's home is equal to family liberty as a fundamental right. These traditions can be traced back to England when Sir Edward Coke crafted the "knock and announce" limiting rule for warrant execution, still a pillar of our civil liberty jurisprudence four centuries later. *Semayne's Case*, 5 Coke Rep. 91 (1604). Coke coined the maxim that the "house of every one is to him as his castle and fortress, as well for his defen[s]e against injury and violence as for his repose." *Id.*; *see Boyd v. United States*, 116 U.S. 616, 626 (1886) (citing *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765)). The precious rights at risk in this case, those between child and parent, and the sanctity of the home, are without question among those "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Michael H.*, 491 U.S. at 122 (1989) (quoting *Snyder v. Mass.*, 291 U.S. 97, 105 (1934) (Cardozo, J.)).

C. The Circuit Court Applied Core Fourth Amendment Principles

1) Magistrate Review was Neglected

Especially egregious in this case was Petitioners' disregard for the readily available magistrate review when their unconstitutional plan was hatched with-

out a hint of exigency on March 26, 2002. *Groh v. Ramirez*, 540 U.S. 551, 560 (2004) (Stevens, J.) (citing *McDonald v. United States*, 335 U.S. 451, 455 (1948)) (reasoning that, "[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police . . . so that an objective mind might weigh the need to invade [the citizen's] privacy in order to enforce the law").

Within the context of a contentious divorce and custody battle, the Petitioners' plan was premised on conjecture, stale facts and self-serving accusations presented by obviously adverse parties and enlisted agents, including Nancy's ex-father-in-law, former Cleveland Police Department Chief (and Respondents' paternal grandfather), Edward Kovacic. These accusations were asserted by an imposing uniformed posse of speculating suburban police officers whose department assisted Petitioners to batter down the dwelling door later on that same date.

2) Bright Line at the Dwelling Doorstep

The illegal plan to invade Respondents' home was conjured by the Petitioners, mainly at the insistence of paternal relatives,[22] on the afternoon of March 26, 2002, during business hours, and with assistance from a prosecutor. *Tenn. v. Garner*, 471 U.S. 1, 7-8 (1985) (White, J.) (noting the "'reasonableness' of a particular seizure depends not only on when it is

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[22] The restraining order resulted from the father's past violence against the family. The father was prohibited from being within 500 feet of Nancy and the children, and had not yet "done" the ordered "Batterer's Assessment," on March 19, 2002. App. 5; JA 165.

made, but also on how it is carried out"). *Id.* It is black letter law that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980) (Stevens, J.). The Petition acknowledges the appellate court identified this case as one that "simply does not constitute exigent circumstances." Pet. 6.

3) Exigency Analysis Was Correct

The appellate court determined correctly "the relevant question is whether there was exigency, not probable cause: in the absence of exigency, a warrant is required, *even 'when probable cause is clearly present*.'" *Kovacic*, 724 F.3d at 696 (quoting *Payton*, 445 U.S. at 589). (emphasis added).[23] *Id.* The controlling statute, deputizing order, and TEC order, all conditioned seizures on emergencies, as did the OAC definition of "Duly Authorized Officer." App. 1, 3.

The Petition seeks the invention of an overly-generalized *parens patriae* expansion with a new Fourth Amendment exception cut from whole cloth.[24]

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[23] Respondents do not waive their challenge of the erroneous check-box opinion from the unconstitutional hearing.

[24] Robert H. Bork, *The Tempting of America*, p. 352 (MacMillan 1990). Judge Bork cautioned against imprudent jurisprudence deviating from the Framers' true spirit and intent to satisfy politicized whims.

> It is essential, however, that the new developments always be weighed in the light of the

Based on the context of this case, such an invention would establish a nationwide "stop and frisk" standard allowing deputized state actors to invade private homes, justified only by suspicion.[25] Put another way, the Petition's proposed standard to a great extent beckons return to the "general warrants" era eliminated by the Bill of Rights.[26]

4) First and Third Circuits in Accord with Sixth Circuit Jurisprudence

The appellate court that resolved *Croft* reasoned elsewhere, in a substantially more factually relevant social worker search and seizure case, it is a "basic principle of Fourth Amendment law" that government invasion into a private residence by warrantless entry is the "chief evil against which the . . .

> lessons history provides about the principles meant to be enforced. Doctrine must be shaped and reshaped to conform to the original ideas of the Constitution, to ensure that the principles intended are those which guide and limit power, and that no principles not originally meant are invented to deprive us of the right to govern ourselves. The concept of original understanding itself gains in solidity, in articulation and sophistication, as we investigate its meanings, implications, and requirements, and as we are forced to defend its truths from the constitutional heresies with which we are continually tempted.

[25] *See generally*, *Terry v. Ohio*, 392 U.S. 1 (1968).

[26] Bork, *The Tempting of America*, at 160 ("Without adherence to original understanding, even the Bill of Rights could be pared or eliminated."). *Id.*

Fourth Amendment is directed." *Good v. Dauphin Cty. Soc. Servs. for Children and Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989) (citation omitted). Not surprisingly, the First Circuit is also in accord regarding the bright line at the dwelling doorstep. *See*, *e.g.*, *Doe v. Moffat*, 1997 U.S. App. LEXIS 13748, at *1 (1st Cir. June 11, 1997) (citing *Good*, 891 F.2d at 1094) (finding exigency); *see generally*, *Joyce v. Town of Tewksbury, Mass.*, 112 F.3d 19, 21–22 (1st Cir. 1997).

No warrant was obtained before the deputized Petitioners invaded Respondents' home and no exception existed to the timeless warrant requirement. *Kovacic*, 724 F.3d at 696, *n.*1. *See Groh*, 540 U.S. at 572 (Thomas, J., dissenting) (collecting cases); *id.* at 573 (observing that "a search conducted pursuant to a defective warrant is constitutionally different from a 'warrantless search.'"). *Kovacic*, *Hatch* and *Croft* all coexist properly because of, *inter alia*, the vastly different fact-intensive analyses, but the First, Third and Six Circuits all agree in the respective analyses on core Fourth Amendment principles.

D. Reasonable Officers Would Know Respondents' Clearly Established Rights Were Violated

For qualified immunity review, the sole purpose of this interlocutory appeal, the relevant question is whether Petitioners violated clearly established fundamental liberties on that evening twelve years ago, such that "a reasonable person would have known." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1239 (2012) (Roberts, C.J.) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

The principle guiding that immunity analysis is that warrantless searches and seizures are "presumptively unconstitutional," *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 996 (6th Cir. 1994), unless exigency exists. *Hancock v. Dodson*, 958 F.2d 1367, 1375 (6th Cir. 1992). Petitioners failed to prove any "'real immediate and serious consequences' that would [have] certainly occur[ed]" if they delayed by obtaining a warrant. *O'Brien*, 23 F.3d at 997 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984)).

Reasonable conduct would have included obtaining a warrant that identified the "persons or things to be seized," instead, Petitioners acted unlawfully, with only a Temporary Emergency Care order in a situation that lacked emergency. *See Groh*, 540 U.S. 551; *cf. Southerland v. City of New York*, 680 F.3d 127, 157-59 (2d Cir. 2011), *en banc reh'g denied*, 681 F.3d 122 (2d Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 980 (2013) (finding it clearly established the Fourth Amendment and Due Process Clause prohibit *non*-deputized social workers from removing children from their homes without a warrant, absent exigency, or another settled exception). *Id.*

Petitioners unreasonably believed forcible invasion of Respondents' home was lawful, after Respondents' mother denied consent. The longstanding "rule is in keeping with the well-established principle that 'except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.'" *Groh*, 540 U.S. at 560. (citations omitted). Even retrospective probable cause cannot excuse failures to secure warrants prior to entries into private homes when mak-

ing arrests, absent exigency or consent.[27] *See Kovacic v. Cuyahoga Cty. Dep't of Children and Family Servs.*, 809 F. Supp. 2d 754, 773 (N.D.Ohio 2011) (citing *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984)); *cf. Croft*, 103 F.3d 123 (consent provided). Neither consent nor warrant was obtained by Petitioners, nor was exigency or any "hazy border" present between the excessive and the acceptable—the dividing line was bright and Petitioners crossed it without excuse. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (Breyer, J.) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

The appeals court appropriately resolved whether these state actors "reasonably misapprehend[ed] the law governing the circumstances." *Kovacic*, 724 F.3d at 696, *n.*1 (quoting *Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002) ("[W]e must look to the information that was known to the social workers on March 26, 2002, so that we can evaluate whether 'an objectively reasonable officer confronted with the same circumstances could reasonably believe that exigent circumstances existed.'"). *Id.* There was no so-called "social worker exception" to the Fourth Amendment in 2002 (nor is there today);[28] there was

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[27] The juvenile court magistrate found only "that there *is* probable cause [on March 29, 2002], not that there *was* probable cause [on March 26, 2002], of the requisite exigency." Pet. 42a. (emphasis in original).

[28] *Kovacic*, 724 F.3d at 699; *id.* (citing *Camara v. Muni. Court*, 387 U.S. 523, 530-31 (1967)). The appellate court determined the "absence of pre-2002 case law specifically mentioning social workers, which under our binding precedent is insufficient to upset the presumption that all government searches and seizures are subject to the strictures of the

no warrant (or consent) to permit forcible entry (although magistrate review was available); and there was no exigency to excuse the illegal search and seizure. *Id*. at 696.

Whether by plainly incompetent misapprehension, conscious disregard, or intentional misconduct (coerced or otherwise), the notion that Petitioners were somehow "reasonable" is simply not credible. *Saucier*, 533 U.S. at 206. The "contours of the right[s]" at issue are traditional and fundamental and were abundantly clear. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (Scalia, J.). Within the context of an obvious case, such as this one, even without a scavenger hunt for narrowly on-point decisions to review, "these standards can 'clearly establish' the answer." *Brosseau*, 543 U.S. at 199 (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)).

E. Obvious Clarity Obviates Need for Specificity

Without forcibly entering their home there would have been no removal of Respondents. As much as the Petition attempts it, the seizure simply cannot be severed from the obviously unconstitutional search preceding it. The appellate court's implied logic[29] is

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Fourth Amendment." *See Wyman v. James*, 400 U.S. 309, 320-21 (1971) (Blackmun, J.) ("Forcible entry or entry under false pretenses . . . are *forbidden*.") (emphasis added). *Id*.; *but see* Pet. 21.

[29] The appellate court implied its use of the obvious clarity doctrine: "More important for our purposes, though, is that while *Andrews* addressed the warrantless *entry* of social workers into homes, our case at bar involves the warrantless [entry and] *removal*

apparent in its qualified immunity determination, because the state actors eschewed available magistrate review and instead forged ahead, invading the home illegally.[30] The obvious clarity of the constitutional rights violated by deputized government agents who kicked in the dwelling door was ignored by Petitioners on that evening over twelve years ago, just as it is now by the Petition.

A case directly on point was not required for the appellate court to conclude properly that clearly established rights existed at the relevant time period,

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of children from their homes, an area of Fourth Amendment law that is not tainted by the same 'lack of clarity' present in *Andrews*. In fact, 'it is core Fourth Amendment doctrine that a seizure without consent or a warrant is a 'reasonable' seizure if it is justified by 'exigent circumstances.'" *Kovacic*, 724 F.3d at 699 (citations omitted) (emphasis in original).

[30] The appellate court noted the search and seizures were unreasonable in part because Petitioners neglected ample opportunity to seek magistrate approval by electronic pager, technology dedicated specifically for warrant requests like the one missing here. The *Kovacic* majority noted, "[r]ather, we agree with the Second Circuit that if 'caseworkers have special needs, we do not think that freedom from ever having to obtain a predeprivation court order is among them. Caseworkers can effectively protect children without being excused from *whenever practicable*, obtaining advance judicial approval of searches and seizures.'" *Id.* at 699, *n.*6 (citing *Tenenbaum v. Williams*, 193 F.3d 581, 604 (1999), *cert. denied*, 2000 U.S. LEXIS 3033 (May 1, 2000) (internal quotations and alterations omitted) (emphasis in original).

particularly with guidance from the Fourth Amendment's "explicit textual source of constitutional protection." *Graham*, 490 U.S. at 395. Existing precedent addressing the traditional fundamental rights of families safely within their private homes was well "beyond debate" on March 26, 2002, just as it remains today. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (Scalia, J.); *see Michael H.*, 491 U.S. at 125.

Contrary to the Petition, no need exists for narrowly controlling decisions resolving the specific offending misconduct to find clearly established rights were violated and the correlative immunity denial was proper. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377-78 (2009) (Souter, J.) (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (citation omitted)). This is equally true with "novel" facts. *Hope*, 536 U.S. at 741 (quoting *Anderson*, 483 U.S. at 640) (reasoning "a constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful"). *Id.* (brackets in original).

When traditional and fundamental liberties exist with "obvious clarity," as they assuredly do here, state actor misconduct can "violate a clearly established right 'even in the total absence of case law,'" as it did in 2002. Amelia A. Friedman, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 Texas L. Rev. 1283, 1292, *n.*57 (2012) (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1350–52 (11th Cir. 2002)). The available magistrate review, coupled with the forcible, nonconsensual, warrantless search and seizure, absent exigency, represented obvious violations of: 1) core Fourth Amendment principles; 2) the controlling

statute; 3) the 1999 deputizing order; 4) the TEC order; 5) the OAC definition of "Duly Authorized Officer"; and 6) Juvenile Rule 6(A)(3)(a)-(c). No case existed suggesting the state actors' tortious misconduct was reasonable. The Respondents' rights were clearly established and obviously violated. The qualified immunity denial below followed the Court's teachings faithfully. The appellate court analysis was conducted correctly, consistent with original understanding principles.

F. Petitioners Possessed and Exercised Police Powers

Despite the Petition's reference to peremptory Fourth Amendment applicability, *vis-a-vis* law enforcement, and as noted by the "criminal-law context" clause of the question presented and citation to *Wilson v. Layne*, the Petitioners were, at all times relevant to this dispute, deputized law enforcement officers, analogous to sheriff's deputies, when they violated Respondents' fundamental rights. *See*, *e.g.*, O.R.C. §§ 2151.31(A)(3) and 5577.13; O.A.C. § 5101:2-1-01(98); App. 1, 3; Pet. 17.

Parallel statutory language regarding deputized state employees reveals, "any agent so deputized shall have all the powers of a police officer of this state." *See*, *e.g.*, O.R.C. § 5149.23. Because of the deputy status conferred on Petitioners by the deputizing order, premised exclusively in exigency,[31] and

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[31] *See* App. 1 ("authorizing removal of children in emergency circumstances"), issued with § 2151.31(A)(3) and Juvenile Rule 6 as its backdrop. Pet 89a. The now-abandoned order confined removals by "Duly Authorized Officers" only to "provide

because their conduct was deliberately designated by the Ohio legislature as an arrest for constitutional rights analysis, the Petition's "criminal-law context" clause is a canard.

These "Duly Authorized Officers" performed police functions when forcibly invading Respondents' home to arrest them, and committed obvious violations of clearly established rights in doing so. The Petition's *parens patriae* position equates to the notion that "governmental power should supersede parental authority in all cases because some parents abuse and neglect children," which this Court has derided as "repugnant to American tradition." *Parham v. J.R.*, 442 U.S. 602, 603 (1979) (Burger, C.J.).

The Petition's level of generality question is misguided because it fails to consider the obvious clarity doctrine, readily apparent under the facts of this case, and because the Fourth Amendment text is the proper primary source for review. While proposed judicial invention of neoteric exceptions is understandable from Petitioners' perspective, and that of *amici* who seek to avoid liability for future constitutional violations, it nevertheless neglects to include any original understanding analysis of the Fourth Amendment and is precisely the sort of political activism jurists and scholars have warned about for decades.

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temporary *emergency* care and shelter for children who are *at imminent risk of serious physical or emotional harm*." *Id.* (emphasis added). Because of the absence of exigency in this case, it necessarily follows the Petitioners unlawfully and therefore, unreasonably, exceeded the scope of the order, as well as, *inter alia*, the TEC order, and governing state law.

III. *KOVACIC* PROMOTES LAWFUL CHILD PROTECTION

The Petitioners apparently misapprehend the holding below. The appellate court determined a pre-deprivation hearing is required only when exigency is lacking. This holding was grounded properly in settled Fourth Amendment authority and controlling Ohio statutes.

A. "Full and Fair" Hearing was Lacking

Petitioners' argument is seemingly predicated on this Court's acceptance of the proposition there was somehow "probable cause to believe children have already been abused." Pet. 26. That position, however, is unsupported in the record and related lower court opinions below. *Kovacic*, 606 F.3d at 305-08; Docket #88, p. 22; App. 21-26; JA 435-36; Pet. 81a. Petitioners point to the March 29, 2002 juvenile court hearing as if putative evidence of this premise, yet that too is unavailing.

The courts below determined consistently that the juvenile court opinion provides no preclusive effect, despite multiple attempts by Petitioners, and both the trial court and a prior appellate court panel determined no evidence existed to support the notion that hearing was "full and fair." Docket #88, pp. 21-23. In fact the opposite was true, the appellate court found that Respondent's mother was "present at the hearing and represented by counsel . . . [but] neither she nor any of the witnesses she had brought was permitted to testify." *Kovacic*, 606 F.3d at 305. Respondents were not present and went without representation. App. 21-26. Because this finding remains undisturbed since 2010, any arguments predicated

on the magistrate's opinions from the March 29, 2002 hearing are fatally flawed and unworthy of this Court's consideration. Moreover, this argument is nothing more than reiteration of the previously unsuccessful "preclusive effect" rhetoric advanced at least twice before and rejected for want of factual support. Docket #88, pp. 21-23; Pet. 74a-76a.

B. Sixth Circuit Adheres to Constitution

If the appellate court opinion advocated for anything, it was for Fourth Amendment adherence by state actors, requiring they obtain a court order before seizing children forcibly, except under exigent circumstances. This conclusion is clearly consistent with the § 2151.31 language, a statute directly addressing child seizures, the same sort of legislative activity which NASW claims is supportive of overturning the decision as somehow inconsistent with child protection.[32]

Petitioners conceded that implementing 24-hour judicial access systems to facilitate warrant applications is entirely practicable and acknowledged this reform was already underway in Tennessee. Pet. 26-

---

[32] NASW string-cited state child seizure laws and maintained § 2151.31 supposedly "allow[s] social workers" to seize children. *See* NASW Br. at 5, 9. However, as discussed at length *supra*, a plain reading of the statute only authorizes two classes of state actors to perform emergency seizures: 1) "a law enforcement officer"; and 2) a "duly authorized officer of the court." *Id*. Absent the deputizing order, Petitioners would have been like any other Ohio social worker, in counties other than Cuyahoga, excluded by the contours § 2151.31. App. 3.

27. What Petitioners have not accomplished is identification of any case law or statistical support showing increased risk of harm from adopting such systems in constitutional compliance.

Should the Court be inclined to address this issue, the arguments and facts relevant to any such evaluation are completely undeveloped in the proceedings below, primarily due to the fact that this too is another untimely issue. Instead, Petitioners have presented mere platitudes to bolster an untenable position, and neither Petitioners nor *amici* acknowledged the manifest risks of illegal government intrusions, which can result in, *inter alia*, "grave and irreversible consequences . . . anguish for the family, public humiliation, developmental setbacks for the children, distrust, or divorce." *Arredondo*, 462 F.3d at 1294.

C. Previously Unsuccessful Argument Recycled

The NASW argument is just a resurrection of its unsuccessful *amicus* brief in *Southerland*. Case No. 12-215. The Court previously found the argument unavailing and this rather old case provides nothing new that should change the Court's treatment of this argument. The NASW argument is accurate, however, to the extent that the controlling statute does permit seizures *only* when it "is necessary to prevent *immediate or threatened* physical or emotional harm." NASW Br. at 9 (citing § 2151.31) (emphasis in original).

NASW reiterated the underlying theme of the Petition and urged the Court to fashion a bookend im-

munity standard to *DeShaney*.[33] 489 U.S. at 189. While tragic for Joshua, the crux of the *DeShaney* logic correctly determined the Framers established a series of negative rights and the *DeShaney* petitioners sought a newly-created positive right that did not, and could not, exist under the Constitution.[34] Here, the Petitioners and *amici* alike effectively ask this Court to convert social worker qualified immunity into something much closer to absolute immunity. Yet again, this issue is altogether absent from the pleadings, and as such, does not merit this Court's consideration.[35]

---

[33] *But see* Pet. 25 (citation omitted) ("…immediate removal is *required*. . . ."). *Id.* (emphasis added).

[34] NASW declined to participate in *DeShaney*.

[35] Counsel for Respondents sincerely thank those who assisted with the preparation of this brief, including: attorneys Brendan Crimmins, Timothy Delizza, Thomas Difloure, Suzanne Harrington-Steppen, and Genavieve Shingle; law professors Jill I. Gross, Vanessa Merton, and Birgitta Seigel; and recent law graduates, Christopher Shipp and Jaclyn Walker.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD PEKAREK
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April 7, 2014

COURT OF COMMON PLEAS,
CUYAHOGA COUNTY, OHIO
JUVENILE COURT DIVISION

JOURNAL ENTRY
Appointing Duly Authorized
Officers of the Court and
Authorizing Shelter Care

This matter came for consideration before the Honorable John W. Gallagher, Administrative Judge.

On the Court's own motion, *IT IS ORDERED* that all previous orders entered relative to the subject referenced herein are hereby terminated.

IT IS FURTHER ORDERED that all direct service social workers employed by the Cuyahoga County Department of Children and Family Services, who are responsible for the investigation of child abuse, neglect, or dependency matters, are hereby reappointed as Duly Authorized Officers of the Court in accordance with Section 2151.31 of the Ohio Revised Code and Ohio Juvenile Rule 6.

IT IS FURTHER ORDERED that said social workers shall have the authority to remove and provide temporary emergency care and shelter for children who are at imminent risk of serious physical or emotional harm.

IT IS FURTHER ORDERED that whenever a child is taken into custody under authority of this order, a complaint shall be filed before the end of the next business day and a hearing shall be held in

accordance with Section 2151.31 and 2151.314 of the Ohio Revised Code.

IT IS FURTHER ORDERED that the Cuyahoga County Department of Children and Family Services is hereby designated to provide shelter care in accordance with this entry and Juvenile Rules 2, 6, and 7.

IT IS FURTHER ORDERED that in carrying out the above authority, said social workers may request the assistance of appropriate law enforcement officers, including but not limited to municipal police officers and county deputy sheriffs.

/s/ John W. Gallagher
JUDGE JOHN W. GALLAGHER
ADMINISTRATIVE JUDGE

3/18/99
DATE

[LOGO] COMMISSIONERS
Jane L. Campbell
Jimmy Dimora
Tim McCormack

Children and Family Services

3955 Euclid Avenue, Cleveland, Ohio 44115
(216) 431-4500
[24-Hour KIDS Hotline: 696-5437]

TEMPORARY EMERGENCY CARE
Authorizing the Taking of Child(ren) into Custody
Ohio Revised Code Section 5153.16(A)(7)
and 2151.31(A)(3)

On this 26th day of March, 2001, at 4:15 ☐a.m. ☒p.m. the Cuyahoga County Department of Children and Family Services took the following child(ren) into protective custody:

1. Daniel Kovacic Date of Birth: _____
2. Katherine Kovacic Date of Birth: _____
3. _____ Date of Birth: _____
4. _____ Date of Birth: _____
5. _____ Date of Birth: _____

/s/ Patty Campbell
Social Worker

/s/ Pamela Cameron
Supervisor –
Approving the Removal

/s/ Cheryl Rice Lane
Assistant Prosecuting
Attorney – Consulted
216-443-8400

This matter is set for hearing at 8:30 am. on the 29th day of March ___, ~~2001~~ 2002, at the Cuyahoga County Juvenile Court, Metzenbaum Children's Center, 3343 Community College Avenue, Cleveland, Ohio, before Magistrate Dana Chavers.

The complaint must be filed no later than noon 27th of March 2002

The staffing must be held not later than 10:30a.m. on the date that the complaint is due.

IN THE Domestic Relations COURT
Cuyahoga COUNTY, OHIO

Nancy Kovacic on behalf of Daniel Kovacic Petitioner Date Of Birth: [redacted]	:	Case No. D284466 Judge 100 [Illegible]
v. Thomas J. Kovacic Respondent Date Of Birth: [redacted]	:	DOMESTIC VIOLENCE *EX PARTE* CIVIL PROTECTION ORDER R.C. 3113.31

NOTICE TO RESPONDENT:
SEE THE ATTACHED WARNING AND NOTICE OF FULL HEARING BELOW

PERSON(S) PROTECTED BY THIS ORDER:
PETITIONER: Nancy Kovacic DOB [redacted]
FAMILY OR HOUSEHOLD MEMBER(S):
Daniel Kovacic DOB [redacted]
Katherine Kovacic DOB
DOB
RESIDENCE: [redacted]

This proceeding came on for an *ex parte* hearing on Jan 18, 2002. The Court finds: 1) the facts contained [illegible] the Petition are true in that Respondent engaged in domestic violence against the family or household member(s) named in the Petition as defined in R.C. 3113.31; and 2) the following orders are equitable and fair, necessary to protect the family or

household member(s) named in the Petition from domestic violence, and supported by good cause as shown at the *ex parte* hearing. Violence Against Women Act, 42 U.S.C. 13981, Full Faith and Credit Declaration: The Court further finds that it has jurisdiction over the parties and matter under Ohio law and that notice and an opportunity to be heard will be provided to respondent within the time required by Ohio law.

[Illegible] Court hereby issues the following orders to Respondent (the applicable orders are marked in the boxes below):

1. RESPONDENT SHALL NOT ABUSE the family or household member(s) named in this Order by harming, attempting [illegible] harm, threatening, molesting, following, stalking, bothering, harassing, annoying, contacting, or forcing sexual relations on [illegible]. [NCIC 01 and 02]

~~2. RESPONDENT SHALL IMMEDIATELY VACATE the following residence: _____.~~

~~3. EXCLUSIVE POSSESSION OF THE RESIDENCE located at: _____ [illegible] to: _____. Respondent shall not interfere with this individual's right [illegible] occupy the residence by canceling utilities or insurance, interrupting phone service, mail delivery, or the delivery of any [illegible] documents or items. [NCIC 03]~~

~~4. RESPONDENT SHALL SURRENDER all keys and garage door openers to the above residence at the~~

~~earliest [illegible] opportunity to the law enforcement officer who serves Respondent with this Order or as follows: _____.~~

5. RESPONDENT SHALL STAY AWAY FROM THE FAMILY OR HOUSEHOLD MEMBER(S) NAMED IN THIS [ILLEGIBLE]. Respondent shall not be present within 500 (distance) of them, and shall refrain from entering any [illegible] where they may be found. This order to stay away includes, but is not limited to, the buildings, grounds, and parking lots [Illegible] residences, schools, businesses, places of employment, day care centers, and babysitters. If Respondent accidentally [illegible] in contact with the family or household member(s) named in this Order in any public or private place, Respondent must [illegible] immediately. [NCIC 04]

6. RESPONDENT SHALL NOT CONTACT, the family or household member(s) named in this Order or their residences, [illegible], places of employment, schools, day care centers, and babysitters. Contact includes, but is not limited to, [illegible], fax, e-mail, and voice mail. [NCIC 05]

IT IS FURTHER ORDERED that the Clerk of Court shall cause a copy of the Petition and this Order to be delivered to [illegible] Respondent as required by law. "Delivered" for this purpose means service in accordance with Rules 4 through 4.6 of the Rules of Civil Procedure. The Clerk of Court shall also provide certified copies of the Petition and this Order to Petitioner [illegible] upon request [illegible].

This Order is granted without bond, and is effective through the following date Jan 18, 2007.

IT IS SO ORDERED.

/s/ [Illegible]

MAGISTRATE JUDGE

[Illegible].T.
7 days till hearing

A FULL HEARING on this Order, and on all other issues raised by the Petition shall be held before ~~Judge~~/Magistrate Pellegrin, on Jan. 29, 2002 at 1:30 ~~a.m.~~/p.m. at the following location:
306 B. Old Court House

SERVICE OF ALL DOCUMENTS TO:

☑ Respondent (by personal service)
☑ Police Dept. Where Petitioner Resides:
No. Olmsted P.D.
☑ The Cuyahoga County Sheriff
☐ Police Dept. Where Petitioner Works:
☐ OTHER:

RECEIVED FOR FILING
JAN 18 2002
GERALD E. FUERST, CLERK
BY /s/ [Illegible] Porter DEP.

WARNING CONCERNING THE ATTACHED DOMESTIC VIOLENCE PROTECTION ORDER

NOTE: Rules of Superintendence 10.01 and 10.02 require this Warning to be attached to the FRONT of all civil and criminal domestic violence protection orders issued by the courts of the State of Ohio.

D284466

WARNING TO RESPONDENT/DEFENDANT

Violating the attached Protection Order is a crime, punishable by imprisonment or fine or both, and [illegible] *cause your bond to be revoked or result in a contempt of court citation against you.*

This Protection Order is enforceable in all 50 states, the District of Columbia, tribal lands, and U.S. Territories pursuant to the Violence Against Women Act of 1994, 18 U.S.C. Section 2265. Violating this Protection Order may subject you to federal charges and punishment. You may also be subject [illegible] federal penalty for possessing, transporting, or accepting a firearm under the Gun Control Act, [illegible] U.S.C. Section 922(g)(8).

Only the Court can change this order. The Petitioner cannot give you legal permission to change this order. If you go near the Petitioner, even with the Petitioner's consent, you may be arrested. If you [illegible] and the Petitioner/Complainant/Victim want to resume your relationship you must ask the Court to [illegible] modify or dismiss this Protection Order. Unless the Court modifies this order, you can be arrested for violating this Protection Order. *You act at your own risk if you disregard this WARNING.*

WARNING TO PETITIONER/
COMPLAINANT/VICTIM

You cannot change the terms of this order by your words or actions. Only the Court can allow the Respondent/Defendant to contact you or return to your residence. If you and the Respondent want to resume your relationship, you must ask the Court to modify or dismiss this Protection Order.

NOTICE TO ALL LAW ENFORCEMENT
AGENCIES AND OFFICERS

The attached Protection Order is enforceable in all jurisdictions. Violation of this Protection Order, regardless of whether it is a criminal or civil Protection Order, is a crime under R.C. 2919.27. Law enforcement officers with powers to arrest under R.C. 2935.03 for violations of the Ohio Revised Code must enforce the terms of this Protection Order as required by R.C. 2919.26, 2919.27 and R.C. 3113.31. If you have reasonable grounds to believe that Respondent/Defendant has violated this Protection Order, it is the preferred course of action in Ohio under R.C. 2935.03 to arrest and detain Respondent/Defendant until a warrant can be obtained.

IT IS FURTHER ORDERED that the Clerk of Court shall cause a copy of the Petition and this Order to be delivered to [illegible] Respondent as required by law. "Delivered" for this purpose means service in accordance with Rules 4 through 4.6 of the Rules of Civil Procedure. The Clerk of Court shall also provide certified copies of the Petition and this Order to Petitioner [illegible] upon request [illegible].

This Order is granted without bond, and is effective through the following date Jan 18, 2007.

IT IS SO ORDERED.

/s/ [Illegible]

MAGISTRATE JUDGE

[Illegible].T.
7 days till hearing

A FULL HEARING on this Order, and on all other issues raised by the Petition shall be held before ~~Judge~~/Magistrate Pellegrin, on Jan. 29, 2002 at 1:30 ~~a.m.~~/p.m. at the following location:
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SERVICE OF ALL DOCUMENTS TO:

☑ Respondent (by personal service)
☑ Police Dept. Where Petitioner Resides:
No. Olmsted P.D.
☑ The Cuyahoga County Sheriff
☐ Police Dept. Where Petitioner Works:
☐ OTHER:

RECEIVED FOR FILING
JAN 18 2002
GERALD E. FUERST, CLERK
BY /s/ [Illegible] Porter DEP.

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

IN THE COURT OF COMMON PLEAS
SUBPOENA CIVIL RULE 45

THE STATE OF OHIO

ss.

Cuyahoga County

Nancy Kovacic
Plaintiff

No. DV 284466

vs.

Judge Joseph Cirigliano

Thomas Kovacic
Defendant

To North Olmsted Police Dept
Officer Frank Chung.

☐ YOU ARE COMMANDED to appear in the Court of Common Pleas to testify as witness on behalf of the (PLAINTIFF/DEFENDANT) in the above entitled case and not depart the Court without leave. Fail not under penalty of the law. Your appearance is required on the _____ of _____ _____ at _____o'clock _____.M. in Courtroom No. _____ of the:

☐ Justice Center-Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113

☐ Cuyahoga County
Courthouse
One Lakeside Avenue
Cleveland, Ohio 44113

☐ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of deposition the above case.

PLACE OF DEPOSITION DATE TIME

☐ YOU ARE COMMANDED to produce and permit inspection, copying, testing or sampling of the following documents or objects at the place, date, and time specified below (list documents or objects): Any and all Police Reports and CAD entries relating to Nancy Kovacic (Plaintiff) and memorandums.

3104 W. 25 2nd floor (C&FS)	3-26-02	2 pm
PLACE	DATE	TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE	TIME

To insure taxation of their fees, witnesses must report each attendance to the Clerk of Court of Common Pleas on the first floor of the Justice Center-Courts Tower.

Section 2335.06 of the Ohio Revised Code provides that witnesses are entitled to receive $12.00 for each full day's attendance and $6.00 for each half day's attendance, plus ten cents per mile traveled to and from his place of residence outside of the City of Cleveland proper. Such fees are taxed as costs and mailed to the witness upon payment of the costs.

Carl Lo Presti	2402 Eardley Rd. Univ. Hghts, Ohio
ATTORNEY NAME	ADDRESS

/s/ Tom Kovacic	Tom Kovacic	3-22-02
SIGNATURE	REPRESENTING	DATE

GERALD E. FUERST, Clerk of Courts

by D.R. Bydash Deputy Clerk

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

IN THE COURT OF COMMON PLEAS
SUBPOENA CIVIL RULE 45

THE STATE OF OHIO [Illegible Stamp]

ss.

Cuyahoga County

Nancy Kovacic
Plaintiff

No. DV 284466

vs.

Judge Joseph Cirigliano

Thomas Kovacic
Defendant

To North Olmsted Police Dept.
Sagt. Micheal Kilbane

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Carl Lo Presti	2402 Eardley Rd. Univ. Hghts	
ATTORNEY NAME	ADDRESS	
/s/ Tom Kovacic	Tom Kovacic	3-22-02
SIGNATURE	REPRESENTING	DATE

GERALD E. FUERST, Clerk of Courts

by D.R. Bydash Deputy Clerk

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

IN THE COURT OF COMMON PLEAS
SUBPOENA CIVIL RULE 45

THE STATE OF OHIO [Illegible Stamp]

ss.

Cuyahoga County

Nancy Kovacic
Plaintiff

No. DV 284466

vs.

Judge Joseph Cirigliano

Thomas Kovacic
Defendant

To North Olmsted Police Dept.
Officer James Calvetti

☐ YOU ARE COMMANDED to appear in the Court of Common Pleas to testify as witness on behalf of the (PLAINTIFF/DEFENDANT) in the above entitled case and not depart the Court without leave. Fail not under penalty of the law. Your appearance is required on the _____ of _____ _____ at _____o'clock _____.M. in Courtroom No. _____ of the:

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Carl Lo Presti	2402 Eardley Rd. Univ. Hghts.
ATTORNEY NAME	ADDRESS

/s/ Tom Kovacic	Tom Kovacic	3-22-02
SIGNATURE	REPRESENTING	DATE

GERALD E. FUERST, Clerk of Courts

by D.R. Bydash Deputy Clerk

COURT OF COMMON PLEAS,
JUVENILE COURT DIVISION
CUYAHOGA COUNTY, OHIO

IN THE MATTER OF: Daniel Kovacik (✓) **et al.**

CASE NO(s). 02901 247-248

JUDGE: ( ) RUSSO ( ) SIKORA
(✓) CORRIGAN ( ) GALLAGHER
( ) BURNEY ( ) FLOYD

BELIEVED TO BE
( ) DEPENDENT
(✓) NEGLECTED
(✓) ABUSED

MAGISTRATE'S PRE-TRIAL ORDER AND FINDINGS OF FACT RELATIVE TO PROBABLE CAUSE AND SHELTER CARE HEARINGS

This matter was presented this 29th day of March, 2002, for hearing before Magistrate Dana C. Chavers, upon a **Motion for Order of Pre-Dispositional Temporary Custody** filed on 3-27-2002, pursuant to section **2151.33(B)(1)** of the Revised Code by the Cuyahoga County Department of Children and Family Services ("Agency"), to determine whether a complaint has been filed and, whether the child(ren) should remain or be placed in shelter care pursuant to **R.C. 2151.314** or whether there are any relatives willing and appropriate to serve as temporary custodians of the child(ren), and whether reasonable efforts were made to prevent removal of child from home, eliminate continued removal, or make it possible for child(ren) to return home pursuant to **R.C. 2151.419**.

The Magistrate finds that on 3-26-2002, social service workers employed by the Agency removed the child(ren) pursuant to R.C. 5153.16(A)(7) and 2151.31(A). **The Magistrate further finds** that the Agency filed a complaint alleging that the above named child(ren) is/are (✓) Neglected/ R.C. 2151.03 (✓) Abused/R.C. 2151.031 ( ) Dependent/ R.C. 2151.04 child(ren).

The Magistrate further finds that notice/ waiver requirements (✓) have ( ) have not been met and that the following persons were present for the hearing: ( ) Atty. Coury, (✓) Atty. Harden, ( ) Atty. Myers, ( ) Atty. Seifert, ( ) Atty. Semanco, ( ) Atty. Solyn, ( ) Atty. Walker, ( ) Atty. Amata, ( ) Atty. Atzberger, ( ) Atty. Cavallo, ( ) Atty. Haller, (✓) Atty. Hencke, ( ) Atty. Isquick, Legal Intern (✓) Walt Edwards, (✓) Atty. Carl Lo Presti for Father, Legal Intern ( ) Rachel Martin, (✓) Atty. Andrena Dobroshi for Mother, ( ) Atty. _____ – GAL for child(ren), Social Worker Patty Campbell, Social Worker _____, Supervisor Pamela Cameron, (✓) Mother, (✓) Father, Thomas Kovacik ( ) Father, _____, ( ) Alleged Fa. _____ ( ) Alleged Fa. _____, ( ) MGM _____, ( ) PGM, _____, ( ) Legal Cust. _____, ( ) Other_____ _____.

The Magistrate further finds that ( ) reasonable efforts were made to notify the parents, guardian, custodian of the child(ren) that the child(ren) may be placed into shelter care and the reasons for placing

the child(ren) into shelter care or that ( ) notification was not attempted because it would jeopardize the physical or emotional safety of the child(ren) or result in the child(ren) being removed from the jurisdiction of the Court.

( ) The parties stipulate to ( ) the **Motion** ( ) through counsel.

(✓) The Magistrate heard sworn testimony.
(✓) Parties deny the allegations of the complaint.

FINDING PROBABLE CAUSE R.C. 2151.31(E)

Based upon the above testimony and/or stipulations, **the Magistrate finds** that there (✓) is/ ( ) was ( ) was not was probable cause for removal of the child(ren) pursuant to Revised Code Section ( ) 2151.31(A)(3)(a), (✓) 2151.31(A)(3)(b), (✓) 2151.31(A)(3)(c).

( ) Child(ren) ordered released to the custody of the child(ren)'s ( ) mother ( ) father, ( ) legal guardian, or ( ) legal custodian by _____ a.m./ p.m. on ___-___-2002.

FINDING WHETHER CHILD(REN) SHOULD REMAIN IN SHELTER CARE R.C. 2151.314

(✓) The continued residence of the child(ren) in or return to the home will be contrary to his/her/their best interest and welfare for the following reasons: (✓) see complaint.

The Magistrate further finds that (✓) there is ( ) there is not a suitable relative of the child(ren) who is

willing to be a temporary custodian of the child(ren), pending hearing on the complaint.

( ) _____ is appointed as the temporary custodian of the child(ren).

FINDING WHETHER REASONABLE EFFORTS WERE MADE BY AGENCY R.C. 2151.419

The Magistrate further finds that reasonable efforts (✓) were made ( ) were not made ( ) were not possible to be made to prevent the removal of the child(ren) from the home, to eliminate the continued removal of the child(ren) from home, or to make it possible for the child(ren) to return home. ( ) The parties stipulate to a reasonable efforts finding ( ) through counsel. The relevant services provided by the Agency to the family of the child(ren) and why those services did not prevent the removal of the child(ren) from home or enable the child(ren) to return home are as follows: ( ) **THE SITUATION WAS ASSESSED. REMOVAL WAS NECESSARY.** Family preservation did not benefit the family. _____.

( ) Parties stipulate to placement/continued placement. **The Magistrate finds that** the child(ren) ( ) is/are ( ) is/are not to be ( ) continued ( ) placed in shelter care pursuant to Section ( ) 2151.31.(A)(3)(a), ( ) 2151.31(A)(3)(b), ( ) 2151.31(A)(3)(c) of the Revised Code. ( ) Atty. _____ entered ( ) an oral ( ) written motion for/to ( ) Withdraw the Emergency Custody Motion, ( ) Other _____ _____.

The Magistrate ( ) grants ( ) denies said motion.

(✓) **IT IS ORDERED THAT** the child(ren) is/are committed to the emergency care and custody of the Agency pending further hearing. The ( ) Cleveland ( ) East Cleveland (✓) North Olmsted School District shall bear the costs of educating the child(ren).

( ) **IT IS ORDERED THAT** emergency custody of the child(ren) to the Agency is terminated and that the child(ren) be placed with the ( ) mother ( ) father or ( ) above named temporary custodian by _____ a.m./p.m. on _____, 2002.

(✓) **OTHER TEMPORARY ORDERS** pending hearing: ( ) **Mother**, ( ) **Father** _____, ( ) **Alleged Father** _____, ( ) **Legal Custodian** is referred to **The Public Defender**.

Attorney _____ is appointed to represent the **mother**. **Attorney** _____ is appointed to represent the **father**. **Attorney** _____ is appointed to represent the **father**. **Attorney** _____ _____ is appointed to represent **alleged father**. **Attorney** _____ is appointed to represent **alleged father**. **Attorney** _____ _____ is appointed to represent **legal custodian**. **Attorney** _____ is appointed **GAL** for **mother**. **Attorney** _____ is appointed **GAL** for father _____. **Attorney** _____ is appointed **GAL** for **alleged father** _____. **Attorney** _____ is appointed **GAL** for **legal custodian**. ( ) Alleged father(s) is/are to **establish**

paternity. ( ) The matter is referred for a **Mediation Hearing** at 8:30 a.m. on ___-___-, 2002.

(✓) Mother (✓) Father ( ) Alleged Father ( ) Legal Custodian is/are to submit to **psychological evaluation(s)** that must be completed by staff at the Cuyahoga County Juvenile Court Clinic. The Agency will investigate the 30 yr. old sister to determine her suitability re: placement.

(✓) **IT IS ORDERED THAT** THIS MATTER BE CONTINUED TO (✓) a later date 4-29, 2002 at 8:30 (✓) a.m. ( ) p.m. before Judge ( ) **JFR**, ( ) **PMS**, ( ) **PFC**, ( ) **JWG**, ( ) **JEB**, ( ) **ALF**, ( ) **VJ-PC**. Magistrate ( ) **MRM**, ( ) **PMY**, (✓) **PAM**, ( ) **EML**, ( ) **LAW**, ( ) **DDA**, ( ) **RFW – DRUG COURT**, for hearing on the complaint.

( ) The parties were informed of the right appeal to the assigned judge within ten (10) days of the entry of this order.

FILED WITH THE CLERK OF COURT AND JOURNALIZED ON 4/4/02 [BWK]
BY _____ **DEPUTY CLERK**

/s/ Dana C. Chavers
MAGISTRATE
Date 3-29-2002