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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AUTHORITIES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS

The opposition brief does not respond meaningfully to the fundamental points raised in the petition. This Court has never addressed how Fourth and Fourteenth Amendment rights operate when a social worker takes temporary custody of a child due to suspicions of child abuse. Certiorari is thus warranted to resolve the split between the Sixth Circuit's decision and the decisions of other courts of appeals that has developed in the face of this Court's continued silence. *See* Pet. 13-18. Review is also necessary to address the Sixth Circuit's extreme departure from the Court's qualified-immunity precedents by defining the right at issue at a high level of generality and finding "clearly established law" in the "absence" of case law. *See* Pet. 18-26. Finally, certiorari is warranted because the Sixth Circuit's requirement of a pre-deprivation hearing before a social worker can take custody of a child threatens to expose already at-risk children to further risk of abuse. *See* Pet. 26-30.

Instead of offering meaningful rejoinder to these arguments, respondents devote nearly all of their opposition to asserting that "fact-bound issues" make this case unworthy of the Court's review. But that assertion could not be further from the truth. The relevant facts are few, and not in dispute. They are aptly summarized in Judge Sutton's dissent from the majority's qualified-immunity determination: petitioners, who are social workers, suspected that the Kovacic children were being abused by their mother; the social workers "faced an uncertain legal and factual landscape and decided to act" and removed the children from their mother's custody

without a warrant; "a state court judge found three days later that they acted properly [with probable cause]; and the affected family members did not challenge the state court decision; thus permitting the children to live outside their mother's care for the next ten months." Pet. App. 41a-42a (Sutton, J., dissenting). These are the only facts that really matter for purposes of the petition, and they are not reasonably in dispute.

Amici—including 13 States and the National Association of Social Workers—have underscored the need for review by detailing how the Sixth Circuit's decision deepens a circuit split and endangers children in the process. The petition should be granted.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM OTHER COURTS OF APPEALS.

Respondents do not disagree with the premise of the petition, namely, that a rule requiring a pre-deprivation hearing before social workers may conduct a child-safety seizure, even where there is probable cause to believe past abuse occurred, conflicts with a rule that permits the taking of temporary custody of a child pending a hearing where there is reasonable suspicion of past abuse. As explained in the petition, the Sixth Circuit's adoption of the first rule conflicts with the decisions of circuits adopting the latter rule. *See* Pet. 13-18; *see also* MI *Amicus* Br. 7-9.

Respondents, however, never squarely address the clear conflict between the Sixth Circuit's approach and the approach adopted by the First Circuit. In the First Circuit, "the Constitution allows

a case worker to take temporary custody of a child, without a hearing, when the case worker has a reasonable suspicion that child abuse has occurred (or, alternatively, that a threat of abuse is imminent)." *Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12, 22 (1st Cir. 2001). In stark contrast, the court below held that not even petitioners' probable cause of past abuse would justify taking custody of the Kovacic children without a pre-deprivation hearing. Pet. App. 12a-13a.

Nor do respondents meaningfully address the decisions from the Third and Tenth Circuits that allow a child-safety seizure without a pre-deprivation hearing where there is reasonable suspicion of past child abuse. *See Croft v. Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997) (removal is allowed when a social worker has "a reasonable suspicion that a child has been abused"); *Arredondo v. Locklear*, 462 F.3d 1292, 1294, 1298 (10th Cir. 2006) (holding that state officials may remove a child without a pre-deprivation hearing if they have evidence giving rise to a reasonable and articulable suspicion that the child has been abused or is in imminent peril of abuse and the seizure is followed by a post-deprivation hearing).

The Sixth Circuit's approach deepens an absence of uniformity in the lower courts' analysis of constitutional limitations on social workers suspecting past abuse. *See* Pet. 13-18; *see also* MI *Amicus* Br. 7 (identifying the circuit split as between the First, Third, and Tenth Circuits and the Sixth and Seventh Circuits). If this case were litigated in

the First, Third, or Tenth Circuits, the court would have considered whether there was reasonable suspicion to suspect past abuse, regardless of the occurrence of a pre-deprivation hearing, and the existence of probable cause would have clearly entitled petitioners to qualified immunity. In contrast, the Sixth Circuit focused narrowly on whether an exigency justified petitioners' conduct. Pet. App. 12a. But that singular focus on exigency does not account for the fact that a social worker with a reasonable suspicion of child abuse has no way of knowing when abuse will occur again. The First, Third, and Tenth Circuits would say that petitioners acted consistent with the law; in the Sixth Circuit they are liable for money damages.

Respondents attempt to hide this clear circuit split by interjecting various factual, statutory, and "judicial constraints" that, they argue, distinguish this case. Opposition Brief (Opp.) 18. But the issues identified by respondents have no bearing on the basic doctrinal conflict between the Sixth Circuit and its sister circuits. Pet. 13-18; MI *Amicus* Br. 7-9.

Here, the Sixth Circuit focused its qualified-immunity inquiry on "whether the law was clearly established on March 26, 2002, that a social worker could not seize children from their home without a warrant, exigent circumstances or another recognized exception." Pet. App. 16a. The Sixth Circuit found that there was a lack of exigency as a matter of law, *id.* 12a, and concluded that "in the absence of exigency," due process requires a pre-deprivation hearing before social workers may conduct a child-safety seizure even where there is

probable cause to believe the children have already been abused. *Id.* 12a-13a.

The court of appeals reached that decision without relying on the supposed "distinguishing" factors proffered by respondents. Opp. 18-19. Indeed, nothing in the decision below suggests that the holding would be any different if, for example, petitioners were not "deputized," *id.* 18, as respondents allege,[1] or if "medical evidence" was available, as respondents claim, *id.* 18-19. Nor do the decisions of the First, Third, or Tenth Circuits turn upon the existence or absence of these factors. Rather, the Sixth Circuit zeroed in on whether an exigency existed and concluded, regardless of whether there was probable cause (or reasonable suspicion), that the absence of a pre-deprivation hearing violated the Constitution. In short, the Sixth Circuit's decision (just like the other cases cited by respondents) was a function of due process, not the individual factors identified by respondents.

Respondents also claim that the circuit split depends on giving preclusive effect to the magistrate judge's probable cause determination, which they say the Court should not do. *See* Opp. 21-23, 42-43. Respondents go so far as to propose wiping the magistrate court's finding of probable cause off the books, and suggest that it had absolutely no bearing on the Sixth Circuit decision, and consequently, has no bearing on this petition. *See id.* But that is not

[1] Even if this were otherwise relevant, the authorities respondents cite, *see* Opp. 18-21, 40-41, do not establish that the social workers were the functional equivalent of law-enforcement officers for purposes of state or local law, let alone for purposes of the constitutional analysis.

how the Sixth Circuit treated the magistrate court's determination, and that is not how this Court should analyze the petition now. [2]

Rather than ignoring or discrediting the magistrate judge's decision, the Sixth Circuit acknowledged that the magistrate judge found "that probable cause existed to support the removal," Pet. App. 4a, and held that a warrant and pre-deprivation hearing are required *even where probable cause exists*, *id.* 12a-13a. In other words, the Sixth Circuit concluded that even in the presence of probable cause, a pre-deprivation hearing is required. It is *that decision* that creates the circuit split and it is *that decision* that cries out for this Court's review.[3]

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[2] Respondents also mischaracterize the Sixth Circuit's treatment of the magistrate judge's order in the court of appeals' 2010 decision. *See* Opp. 42 (citing *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 606 F.3d 301, 305 (6th Cir. 2010)). Although the Sixth Circuit noted that the hearing was "not intended to be a full adjudication of [parental] rights," the court concluded it was "a judicial review of whether Family Services had *probable cause* to remove the children." *Kovacic*, 606 F.3d at 305 (emphasis added).

[3] Equally spurious is respondents' suggestion that petitioners are arguing for the application of a "reasonable suspicion" standard, and that the argument is waived. *See* Opp. 23-24. Petitioners are not arguing for the application of a "reasonable suspicion" standard, but rather that, because reasonable suspicion of past abuse suffices in other circuits regardless of exigency, *a fortiori* probable cause more than suffices in those circuits, thus creating a direct conflict with the decision of the Sixth Circuit here.

II. THE DECISION BELOW DEPARTS FROM THIS COURT'S PRECEDENTS.

Instead of looking to "'controlling authority'" or "a robust 'consensus of cases'" to evaluate whether the law was clearly established, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)), the Sixth Circuit held that the "*absence*" of pre-2002 case law discussing social workers, Pet. App. 19a (emphasis added), coupled with "basic Fourth Amendment principles," constituted clearly established law, *id.* 17a. This error was twofold: it impermissibly defined the right at issue for qualified-immunity purposes at too general of a level and it inverted the analysis by finding the absence of case law created clearly established law.

Respondents downplay the chasm between the Sixth Circuit's treatment of the qualified-immunity analysis and this Court's repeated admonition "not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *al-Kidd*, 131 S. Ct. at 2084; *see* Pet. 18-26. In fact, respondents *concede* that the Sixth Circuit "conducted Fourth Amendment analysis at a high level of generality," Opp. 26, and argue that clearly established law controlled petitioners' conduct because "*[n]o case existed* suggesting [that] state actors' tortious misconduct was reasonable," *id.* 40 (emphasis added). In other words, according to respondents, the absence of clearly established law makes the law clearly established.

But that is not what this Court has held. Indeed, this Court has "*repeatedly* told courts . . . *not* to define clearly established law at a high level of

generality" when considering qualified immunity. *al-Kidd*, 131 S. Ct. at 2084. This means that whatever principle is proffered as clearly established law must be examined "'in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Identifying law as clearly established does not "require a case directly on point, but *existing precedent* must have placed the statutory or constitutional question *beyond debate*." *al-Kidd*, 131 S. Ct. at 2083 (emphases added). Such specificity in defining the proposition of law, and certainty in its being clearly established through relevant precedent, are necessary because the ultimate issue in qualified immunity is whether the government actor "had fair notice" that her "conduct *would* violate the Constitution." *Brosseau*, 543 U.S. at 198 (emphasis added). But respondents never grapple with what this Court has consistently required to show clearly established law.

Instead, respondents invoke the so-called "doctrine of obvious clarity," Opp. i (Questions Presented), and claim that this doctrine—which appears *nowhere* in the Sixth Circuit's opinion—eliminates the need for specificity and existing precedent that this Court requires.

Respondents argue that "[w]hen traditional and fundamental liberties exist with 'obvious clarity,'" then "state actor misconduct can 'violate a clearly established right even in the total absence of case law.'"[4] Opp. 39 (quoting Amelia A. Friedman, Note,

[4] Respondents' emphasis on the "obvious clarity" of *rights*, rather than the obvious clarity with which law applies to a particular case, is a misinterpretation of Supreme Court law.

Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law, 90 Tex. L. Rev. 1283, 1292 (2012)). Respondents accordingly claim that "core Fourth Amendment principles" and state law alone, in the *absence* of contrary caselaw, clearly established the law at the time the social workers acted here. Opp. 39-40. But respondents' argument fails because it misinterprets this Court's precedent, ignores the unclear nature of Fourth Amendment law in 2002, and rests upon false premises about the facts of this case.

First, this Court's references to an "obvious case," *Brosseau*, 543 U.S. at 199, and "obvious clarity," *Hope*, 536 U.S. at 741 (internal quotation marks omitted), do not change the fundamental analysis courts must undertake to determine clearly established law—looking to existing precedent that addresses the constitutionality of relevant government actions. And those statements certainly do not apply when there is a question of whether the relevant Constitutional standard governs the state actor, as there was here.

In *Brosseau*, the Court found that, "in an obvious case," Fourth Amendment standards derived from caselaw and already known to govern the police officer's use of excessive force "[could] clearly

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(continued…)

In the Court's precedents, "obvious" refers to whether the law or already-existing right applies to government action based on the overt and undeniable facts of a case—i.e., the "obvious case." *Brosseau*, 543 U.S. at 199. The phrase does not, as Respondents maintain, refer to the clarity of the *rights* at issue. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

establish" the answer to a specific qualified-immunity problem. 543 U.S. at 199 (internal quotation marks omitted). The Court did not relax the requirement that qualified-immunity inquiry requires analyzing clearly established law in the "specific context of the case" and "*against the backdrop of the law at the time of the conduct*." *Id.* at 198 (emphasis added) (internal quotation marks omitted).

Similarly, in *Hope*, there was no doubt that the Eighth Amendment's "general rule appli[ed] to the particular type of conduct at issue." 536 U.S. at 741 (internal quotation marks omitted). Indeed, the situation was one where "a general constitutional rule *already identified in the decisional law*" applied with "*obvious clarity* to the specific conduct in question." *Id.* (emphases added) (internal quotation marks omitted).

In contrast to *Brosseau* and *Hope*, here it was not clear in 2002 that general Fourth Amendment principles derived from criminal law applied to the social workers' performance of a child-safety seizure. That exact point was made by the Sixth Circuit in *Andrews v. Hickman County*—a case decided *after* the social workers here acted—where the court held that "it was not evident [in 2008] under clearly established law whether [social workers] *were even required to comply with the strictures of the Fourth Amendment*." 700 F.3d 845, 863 (6th Cir. 2012) (emphasis added); *see also Jordan v. Murphy*, 145 F. App'x 513, 517 n.2 (6th Cir. 2005) ("[N]either the Supreme Court nor this Court have explicitly held that the Fourth Amendment does not create a social worker exception [to the Fourth Amendment].").

In any event, by no reasonable measure of conduct can this be deemed an "obvious" case. The social workers knew that Ms. Kovacic had struck both of her children on multiple occasions; that her aggression was escalating; and that there was reason to think her capable of killing her children. *See* Pet. App. 11a-12a. Furthermore, the magistrate judge found that probable cause existed to support the children's removal, *id.* 4a, and Ms. Kovacic never appealed this finding, *id.* 27a (Sutton, J., dissenting). Taking immediate action in light of such facts, and in full compliance with all of the procedural requirements of the relevant statute, *see id.* 28a (Sutton, J., dissenting), is hardly an obvious case of behavior by the "plainly incompetent," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), that would warrant a denial of qualified immunity.

In sum, the Sixth Circuit did not apply the so-called "obvious clarity" standard; this is not an "obvious case"; and finding it to be one would *still* not condone the Sixth Circuit's complete inversion of the qualified-immunity analysis.

III. THE DECISION BELOW RAISES ISSUES OF NATIONAL IMPORTANCE.

Respondents do not dispute that issues of child safety are a matter of national importance. Nor do they seriously dispute that guidance from this Court would be useful in defining the constitutional obligations of social workers going forward. Respondents nonetheless contend that this case is "unworthy" for the Court's consideration, Opp. 25, but offer little in the way of support for that conclusion. At most, respondents suggest that "the argument and facts relevant to" an evaluation of the

impact of the Sixth Circuit's ruling are undeveloped at the lower court. *Id.* 44.

But that assertion does not hold water. No factual development is necessary to know that applying qualified immunity to protect social workers would protect children from abuse. *See* NASW Br. 8-9. Nor is factual development necessary to know that the Sixth Circuit's requirement of notice and a full-blown pre-deprivation hearing before a social worker can take temporary custody of a child—even when there is probable cause to believe the child has already been abused—will put children at risk. *See id.* 10; Pet. 26-27. This is confirmed by evidence that state child-protection agencies are contemplating changes to their policies in response to the decision below—changes that critics say will endanger children. Pet. 27. These issues are ripe for the Court's consideration *now*, and do not require the unspecific "factual" development respondents claim is necessary.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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