No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court routinely makes exceptions to constitutional doctrines when the welfare of a child is at stake, but the Court has never addressed how Fourth Amendment and due process rights operate when a social worker takes temporary custody of a child based on suspected child abuse. Petitioners are social workers who, in 2002, took temporary custody of two children without a warrant and pre-deprivation hearing. Whether or not the social workers were correct in their assessment that further abuse was imminent, there is no dispute that the social workers had probable cause to believe the children already had been abused by their mother. Within seventy-two hours, a hearing was held before a state-court magistrate, who confirmed the social workers' probable-cause determination and ordered the children to remain in state custody, where they remained for the next ten months. None of the affected family members appealed the state-court decision.

In 2005, the children and their mother nevertheless filed a § 1983 action against the social workers alleging, as relevant here, that the social workers violated the children's Fourth and Fourteenth Amendment rights by taking them into temporary custody without a warrant and pre-deprivation hearing. The district court denied qualified immunity, and, on interlocutory appeal, the Sixth Circuit affirmed. The Sixth Circuit held, contrary to other courts of appeals, that probable cause to believe a child has *already been abused* is insufficient to justify temporarily taking custody of a

child without a warrant and pre-deprivation hearing absent some additional exigency based on *imminent abuse*. The Sixth Circuit further held that these principles were clearly established in 2002. The questions presented are as follows:

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

2. Whether the Sixth Circuit erred by conducting its qualified-immunity analysis of the children's Fourth Amendment claim at a high level of generality and holding that the "absence" of case law specifically mentioning social workers was enough to clearly establish that the Fourth Amendment applies in the context of child-safety seizures by social workers in the same manner as in the criminal-law context.

PARTIES TO THE PROCEEDING

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

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

No corporations are involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Patricia Campbell-Ponstingle, Pam Cameron, and Vikki L. Csornok respectfully petition for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 724 F.3d 687 (6th Cir. 2013), and reprinted in the appendix at Pet. App. 1a, and the court of appeals order denying rehearing en banc is reproduced at Pet. App. 50a. The district court's order denying qualified immunity is reported at *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 809 F. Supp. 2d 754 (N.D. Ohio 2011), and reprinted at Pet. App. 55a.

JURISDICTION

Petitioners filed an interlocutory appeal of the district court's order denying them qualified immunity. Pet. App. 52a. The court of appeals rendered its decision on July 31, 2013, and denied a timely petition for rehearing *en banc* on October 7, 2013. Pet. App. 50a. On December 11, 2013, Justice Kagan extended the time for filing this petition to and including February 4, 2014. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "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."

The Fourteenth Amendment to the United States Constitution provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

42 U.S.C. § 1983 states in relevant part, "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 . . . ."

STATEMENT OF THE CASE

1. While this case has a long and complicated history, the facts relevant to this petition are straightforward and undisputed. On March 26, 2002, petitioners—who were at the time social workers with the Cuyahoga County Department of Children and Family Services ("Family Services")—met with members of the Kovacic family and officers from the North Olmsted Police Department to discuss ongoing investigative concerns that respondents Daniel and Katherine Kovacic (children at the time) were being abused by their mother, Nancy Kovacic. The social workers intended to discuss the group's concerns with Ms. Kovacic, but she backed out at the last minute. At the conclusion of the meeting, petitioners determined that there was probable cause to believe the children had been abused and that it was necessary to remove them immediately from the custody of Ms. Kovacic. To effectuate that child-safety seizure, petitioner Campbell-Ponstingle received a Temporary Emergency Care ("TEC") Order, signed by the county attorney assigned to Family Services. A TEC Order permits a Family Services employee to remove a child on an emergency basis pending a judicial hearing.

Campbell-Ponstingle, accompanied by North Olmsted police officers, thereafter went to Ms. Kovacic's home and removed Daniel and Katherine from the home. Three days later, on March 29, 2002, the Cuyahoga County Juvenile Court conducted a hearing to determine whether there was probable cause for the removal of the children. Ms. Kovacic attended the hearing and was represented by

counsel. The court issued an order finding probable cause and granting temporary custody of the Kovacic children to Family Services. The children remained in the custody of Family Services for the next ten months. No one appealed the court's decision.

2. On November 28, 2005, Ms. Kovacic nevertheless filed an action under 42 U.S.C. § 1983 on behalf of herself and her children against, among others, Family Services and its employees, petitioners Patricia Campbell-Ponstingle, Pam Cameron, and Vikki L. Csornok. Ms. Kovacic alleged, among other things, deprivations of her and her children's constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. The district court dismissed Ms. Kovacic's claims, finding them time-barred, and dismissed the children's claims pursuant to the *Rooker-Feldman* doctrine. On appeal, the Sixth Circuit affirmed the dismissal of Ms. Kovacic's claims, but held that the district court did have jurisdiction over the children's constitutional claims related to the child-safety seizure. Pet. App. 61a.

3. On remand, the parties filed cross-motions for summary judgment on the children's Fourth and Fourteenth Amendment claims relating to the child-safety seizure. *Id.* 4a. The district court (i) denied petitioners' motion for summary judgment on the basis of qualified immunity, (ii) granted in part and denied in part their motion for summary judgment on the basis of absolute immunity, and (iii) granted in part respondents' motion for partial summary judgment on the merits of their Fourth and Fourteenth Amendment claims. *Id.* 4a-5a.

4. Petitioners filed an interlocutory appeal challenging, as relevant here, the district court's denial of qualified immunity. The Sixth Circuit affirmed. *Id.* 3a. Petitioners also attempted to appeal the district court's grant of respondents' motion for summary judgment on the merits of their claims, but the Sixth Circuit held that it did not have jurisdiction over that non-final order, declined to exercise pendent appellate jurisdiction, and "reserved judgment" on ultimate liability until an appeal from a final judgment. *Id.* 5a, 15a.

5. As for the denial of petitioners' motion for summary judgment on qualified-immunity grounds, the court of appeals recognized that petitioners cannot be denied qualified immunity unless "(1) [they] violated a constitutional right; and (2) the right was clearly established" at the time of the alleged violation. *Id.* 9a (internal quotation marks omitted). The court, however, held that petitioners' qualified-immunity defense failed on both prongs as to both of respondents' claims.

a. *Respondents' due process claim.* With respect to respondents' due process claim, the court of appeals determined first that petitioners violated respondents' constitutional right to notice and a pre-deprivation hearing. The court held that, absent exigent circumstances, such as "an emergency situation [that] demands immediate police action," *id.* 10a (internal quotation marks omitted), the children had a right to notice and a pre-deprivation hearing. The court did not (and could not in light of the state court ruling) dispute that petitioners had probable cause to believe the children had been abused. But "[t]he relevant question," the court

explained, "is whether there was *exigency*, not probable cause [to believe the children had been abused]." *Id.* 13a. Absent an additional exigency on top of probable cause to believe the children had already been abused, the court reasoned, petitioners could not seize the children without a pre-deprivation hearing. The court further concluded that what the social workers relied on—"weeks-old incidents and [Ms. Kovacic] having missed the March 26 meeting," as the majority characterized the evidence—simply does not constitute exigent circumstances as a matter of law," notwithstanding probable cause to believe the children had already been abused. *Id.* 12a.

Turning to whether the children's right to advance notice and a pre-deprivation hearing was clearly established in 2002, the court of appeals found that it was. While acknowledging that other circuits permit temporary custody of a child based on probable cause or reasonable suspicion to believe a child has been abused, *see id.* 18a n.5, the court concluded that it was nevertheless clearly established in the Sixth Circuit prior to 2002 that "'parents [must] be given notice prior to the removal of the child . . . stating the reasons for the removal . . . [and that] [t]he parents be given a full opportunity at the hearing to present witnesses and evidence on their behalf.'" *Id.* 20a (quoting *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1996)). The court did not analyze whether the Sixth Circuit case on which it relied, *Doe*, involved probable cause to believe the children had already been abused, as the social workers and the state court had found here. The court also rejected the petitioners' argument that *Doe* established the rights of *parents*, as opposed to

their *children*, to receive notice and a pre-deprivation hearing, even though the only claims at issue in this case are the children's. *Id.* 20a (citing *Santosky v. Kramer*, 455 U.S. 745, 760 (1982)).

b. *Respondents' Fourth Amendment claim.* The court of appeals also found that petitioners violated respondents' Fourth Amendment rights by seizing them without a warrant. Relying on a Sixth Circuit decision issued in 2012, the court explained that a "'social worker, like other state officers, is governed by the Fourth Amendment's warrant requirement.'" *Id.* 9a (quoting *Andrews v. Hickman Cnty.*, 700 F.3d 845, 859 (6th Cir. 2012)). "'This would simply mean,'" the court continued, "'that social workers would have to obtain consent, have sufficient grounds 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.'" *Id.* 10a (quoting 700 F.3d at 859-60). And for the same reasons that the court found a lack of exigent circumstances for due process purposes, the court also found that the exception to the warrant requirement for exigent circumstances was not satisfied as a matter of law in this case. *Id.* 12a-13a.

Turning to whether the warrant and exception requirements in this specific context were clearly established in 2002, the court of appeals held that they were. The court reasoned that, in the "absence" of case law to the contrary, the Sixth Circuit's "binding precedent" required the court to presume the Fourth Amendment warrant requirement and exceptions to it apply to all state actors regardless of context:

> In sum, there is an 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 Fourth Amendment. We thus agree with the district court that at the time of the social workers' actions, it was clearly established that Fourth Amendment warrant requirements, including the exigent-circumstances exception, apply to the removal of children from their homes by social workers.

Id. 19a-20a (footnote omitted). Thus, in the Sixth Circuit's view, petitioners were required to presume that the Fourth Amendment warrant requirement and exceptions to it applied in the context of child-safety seizures in the same manner as in the criminal-law context absent specific caselaw to the contrary.

The court reached this conclusion despite the fact that the Sixth Circuit itself had held on two occasions years *after* the social workers' actions here that the law concerning application of the Fourth Amendment to social workers was unsettled and therefore not clearly established. *See* Pet. App. 31a-32a (Sutton, J., dissenting) (discussing *Andrews*, 700 F.3d 845, and *Jordan v. Murphy*, 145 F. App'x 513 (6th Cir. 2005)). But the majority distinguished those cases as involving "warrantless *entry* of social workers into homes" rather than "warrantless *removal* of children from their homes." *Id.* 18a. Because this *subsequent* case law discussing social workers was, in the court's view, distinguishable, and because pre-2002 case law was silent on if and

how the Fourth Amendment applies to social workers, the court held that the presumptive applicability of the Fourth Amendment's warrant requirement and exigency exception to social workers engaged in child-safety seizures was clearly established in 2002. *Id.* 19a-20a.

c. *Judge Sutton's dissent.* Writing in dissent, Judge Sutton vigorously disagreed with the majority's qualified-immunity analysis. As an initial matter, Judge Sutton reasoned that petitioners' actions did not violate clearly established law because at least two sources of state authority authorized the social workers' conduct, giving them good reason to think their actions were legitimate. *Id.* 28a. Their actions, moreover, were affirmed by a court three days later.

Judge Sutton further explained that the state of Fourth and Fourteenth Amendment law in the specific context of actions by social workers to protect children was unclear in 2002. *Id.* 31a, 43a-44a. In his view, Fourth and Fourteenth Amendment doctrines "run side by side." *Id.* 43a. And the First and Third Circuits, he noted, have held that the Due Process Clause allows a social worker to take temporary custody of a child without a pre-deprivation hearing based on reasonable suspicion that a child has already been abused. In his view, those decisions at least suggest that the same result should obtain under the Fourth Amendment. It was unfair, he wrote, "to assume in 2002 that the Fourth Amendment meant the same thing with respect to all warrantless seizures and entries." *Id.* 32a. An official's engaging in "traditional law enforcement (trying to prevent the destruction of drugs or to seize

a criminal suspect)" is markedly different from "traditional social services (trying to prevent a parent from irreversibly hurting a child)." *Id.* "Protecting children often differs from solving crimes," and petitioners were not engaging in criminal investigation when they acted to remove the Kovacic children from the home. *Id.* 32a-33a.

Judge Sutton also criticized the majority's "baseline presumption for the clearly established inquiry . . . that the Fourth Amendment applies to everyone, including social workers, in the absence of contrary case law." *Id.* 33a. Not only was the Sixth Circuit's law unclear in 2002, but other circuits had sent "mixed messages" on the issue. *Id.* Indeed, Judge Sutton noted, this Court had even granted certiorari to answer the related question of whether the special-needs doctrine applies to temporary seizures of potentially abused children, but ultimately dismissed the case as moot. *Id.* 35a. In light of the Sixth Circuit's "previous silence, the Supreme Court's continued silence and the conflicting signals sent by other circuits," Judge Sutton would have granted petitioners qualified immunity. *Id.* 38a.

6. The court of appeals denied a timely petition for rehearing en banc on October 7, 2013. Pet. App. 51a. The District Court subsequently entered an order staying further proceedings in this matter until this Court rules on this petition for a writ of certiorari. Minutes of proceedings [non-document], *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, No. 05-2746 (N.D. Ohio Oct. 21, 2013).

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for three reasons. *First*, the courts of appeals are divided on whether probable cause to believe a child has already been abused allows a social worker to take temporary custody of the child without a pre-deprivation hearing, or whether, as in the criminal-law context, some additional exigency is required. The Sixth Circuit requires a pre-deprivation hearing even where there is probable cause to believe the child has already been abused. Other circuits hold that a reasonable suspicion of past abuse justifies taking temporary custody of a child pending a hearing, whether or not there is reason to believe the child will be abused again before that hearing can be held. Given this *current* circuit split, the Sixth Circuit's denial of qualified immunity to petitioners for actions they took *in 2002* is all the more perplexing.

Second, the Sixth Circuit's decision also represents an extreme departure from this Court's qualified-immunity precedents by defining the Fourth Amendment right at issue at a high level of generality and applying a "baseline presumption" that, regardless of context, "the Fourth Amendment applies to everyone, including social workers, in the absence of contrary case law." Pet. App. 33a (Sutton, J., dissenting). Finding "clearly established law" in the "absence" of law turns this Court's precedents on their head. This is not the first time in recent memory that the Sixth Circuit has charted its own course in analyzing qualified-immunity claims. And the court's statement that Sixth Circuit "binding precedent" *requires* the methodology used below

suggests it will not be the last time, absent this Court's review. *Id.* 19a; *see also, e.g.*, *Plumhoff v. Rickard*, No. 12-1117 (granting certiorari to resolve "whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was supported by subsequent case decisions as opposed to prohibited by clearly established law at the time the force was used").

Third, the decision below is an important one, with potentially dangerous implications for the sensitive and already difficult mission of social workers in protecting children from abuse. The Sixth Circuit's requirement of 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. Indeed, the impact of this requirement is not theoretical: State child-protection agencies are contemplating changes to their policies in response to the decision below—changes that critics say will endanger children.

Equally threatening to the safety of children are the perverse incentives the Sixth Circuit's qualified-immunity analysis provides. Under this Court's precedents, a social worker is shielded from liability for failing to protect abused children, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), but, under the Sixth Circuit's analysis, is exposed to personal liability for taking good-faith actions to protect children. The message to social workers within the Sixth Circuit is clear: unless you know a parent is about to deliver another blow, err on the side of waiting for a warrant and pre-deprivation hearing, even in the face of evidence

a child has already been abused. Either that, or face personal liability, despite your good-faith actions. That is wrong. Indeed, the Sixth Circuit's qualified-immunity analysis is so plainly flawed that summary reversal might be appropriate. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

A. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM OTHER COURTS OF APPEALS PERMITTING A SOCIAL WORKER TO TAKE TEMPORARY CUSTODY OF A CHILD WITHOUT A PRE-DEPRIVATION HEARING WHERE THERE IS AT LEAST A REASONABLE SUSPICION THE CHILD HAS ALREADY BEEN ABUSED.

The significant responsibility to investigate and prevent child abuse is often conducted against the backdrop of "an uncertain legal and factual landscape." Pet. App. 41a (Sutton, J., dissenting). To temper the effect of that uncertainty on social workers' reasonable execution of their duties, "[q]ualified immunity gives [social workers] breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (per curiam) (citation omitted).

The Sixth Circuit here found that petitioners were not entitled to qualified immunity for taking temporary custody of the Kovacic children from their home without a pre-deprivation hearing.[1] The Sixth

[1] The Sixth Circuit discusses the process due generally as pre-deprivation notice and a hearing.

Circuit reached that conclusion despite never doubting the veracity of the accounts of child abuse that petitioners received about the Kovacic children, some of which were confirmed in part by Daniel Kovacic himself. Nor does the Sixth Circuit dispute that the March 26, 2002 meeting between petitioners, the Kovacic family, and the police heightened the petitioners' concern that the children were at risk of ongoing abuse. And the Sixth Circuit acknowledges that the petitioners acted to take temporary custody of the children in conjunction with other government officials, according to state law (the constitutionality of which the Sixth Circuit does not dispute), and their actions were affirmed three days later by the juvenile court, which found that probable cause existed to believe the children had been abused.

Yet the considerable evidence of past abuse, the shared concerns of disparate governmental agencies, and the probable cause determination of the juvenile court were insufficient, in the Sixth Circuit's view, to warrant a grant of qualified immunity. To condone the Sixth Circuit's reasoning is to accept the proposition that petitioners either were "plainly incompetent" or "knowingly violate[d] the law."

(continued…)

See Pet. App. 20a-21a. But what is actually at issue here is respondents' entitlement to a pre-deprivation hearing, not notice. The claims at issue, after all, are those of the children, not the mother. The court of appeals did not address whether children taken during a child-safety seizure are themselves due notice, or how that notice would operate.

Stanton, 134 S. Ct. at 5. Not even the Sixth Circuit can bring itself to articulate such conclusions.

Instead, the Sixth Circuit concluded that there was a lack of exigency as a matter of law. Pet. App. 12a. In the Sixth Circuit's view, petitioners' probable cause of past abuse did not justify taking temporary custody of the Kovacic children without a hearing, even though the juvenile court approved of petitioners' conduct in a post-deprivation hearing. The absence of "exigency" on top of "probable cause" was enough to deny petitioners immunity. *Id.* 12a-13a.

This approach directly conflicts with decisions of other courts of appeals—most notably the First Circuit—which have held that "suspicions of *past* abuse, rather than *impending* abuse" are sufficient to permit taking temporary custody without a pre-deprivation hearing. *Id.* 34a (Sutton, J., dissenting). In a case that "would have covered the social workers here," *id.*, the First Circuit granted qualified immunity where social workers took temporary custody of a child without a pre-deprivation hearing. *See Hatch v. Dep't for Children*, 274 F.3d 12, 18, (1st Cir. 2001). The First Circuit did so despite a subsequent finding of the family court in that case that "there was *no* probable cause" to find abuse—the exact opposite conclusion the family court here reached. *Id.* (emphasis added). The First Circuit "reject[ed] the appellant's view that a case worker, even after he has a reasonable suspicion of child abuse, must conduct a full-blown investigation and elevate that suspicion to the level of probable cause before assuming temporary custody." *Id.* at 22. Instead, as the First Circuit reasoned, "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)." *Id.* (emphasis added); *see also 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").

The import of this issue is obvious. In the First Circuit, reasonable suspicion of past abuse is sufficient for social workers to conduct a child-safety seizure without a hearing. In the Sixth Circuit, not even petitioners' probable cause is enough for petitioners to enjoy qualified immunity. In the First Circuit, petitioners would clearly receive immunity; here, they are personally liable for money damages.

What is all the more remarkable is that both *Hatch* and *Croft* were on the books *before* petitioners acted in 2002, and thus could be reasonably relied upon even if petitioners did not act pursuant to exigent circumstances. The Sixth Circuit acknowledged that both *Hatch* and *Croft* come out the other way on the due process claim, *see* Pet. App. 18a n.5, but simply ignores the potential impact those opinions may have had on petitioners' conduct. Instead, the Sixth Circuit concludes that its opinion in *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983) clearly established that "in the context of child removal," due process requires advance notice and a hearing regardless of whether there was probable cause to believe the children have already been abused. Pet. App. 20a.

In *Doe*, the Sixth Circuit held that the removal of a child already "in the temporary legal custody of [the county welfare department] from his or her natural parents," must be preceded by notice and a hearing absent any exigency. *Doe*, 706 F.2d at 986-87. Even assuming that petitioners here would know to look to *Doe* for guidance on how to resolve the Kovacic matter (and it is far from clear that *Doe* provides such guidance), an overriding question remains: how could petitioners be found to violate clearly established law when the circuits disagree on what due process requires in the situation petitioners faced? Although the majority sidesteps that question, other panels of the Sixth Circuit have concluded that a disagreement among the circuit courts is evidence that a certain matter of federal law is *not* clearly established. *See Baranksi v. Fifteen Unknown Agents of Bureau of ATF*, 452 F.3d 433, 449 (6th Cir. 2006) (en banc) ("[T]his disagreement among the circuits . . . shows that the [government] did not violate clearly established law."); *see also Wilson v. Layne*, 526 U.S. 603, 618 (1999) (noting that when judges "disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy").

When faced with "an uncertain legal and factual landscape," Pet. App. 41a (Sutton, J., dissenting), and competing interpretations of what due process requires, it is especially inequitable to subject petitioners to liability for electing the option intended to prevent abuse in the face of past child abuse. The First Circuit's rule in *Hatch* acknowledges the difficulty that social workers like petitioners face when they possess reasonable

suspicion of past abuse and a fear that the abuse will continue. In this context, it makes little sense to focus strictly on exigency, as the Sixth Circuit did, when a social worker with a reasonable suspicion that a child has been abused has no way of knowing when exactly the abuse might begin again. The Sixth Circuit says petitioners were wrong (unreasonably wrong) to act to prevent child abuse in these circumstances without a pre-deprivation hearing; the First Circuit would say that petitioners acted consistent with the law regardless of whether the juvenile court subsequently found probable cause (and here it did).

B. THE SIXTH CIRCUIT'S DECISION REPRESENTS AN EXTREME DEPARTURE FROM THIS COURT'S PRECEDENTS REGARDING QUALIFIED IMMUNITY.

In addition to resolving the yawning gap between the Sixth Circuit's approach to the due process question and that of other courts of appeals, the Court should grant review to restore order to qualified-immunity analysis in the Sixth Circuit. The Sixth Circuit gets off on the wrong foot by ignoring this Court's repeated admonition that, for qualified-immunity purposes, the court must consider the specific circumstances of the alleged constitutional violations rather than analyzing them at a high level of generality. But the wheels really come off when the court holds that in the "*absence*" of case law specifically discussing social workers, social workers were required to presume that Fourth Amendment principles applicable in the criminal-law context apply no differently in the child-safety

context. Pet. App. 19a (emphasis added). This reasoning inverts the qualified-immunity analysis: Under the Sixth Circuit's logic, the absence of clearly established law in itself creates clearly established law, regardless of context.

The Sixth Circuit's first error is a familiar one. Although this Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality" when considering qualified immunity, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011), that error persists. Just two years ago the Court refused to accept the court of appeal's attempt to "define clearly established law at such a 'high level of generality.'" *Reichle v. Howards*, 132 S. Ct. 2088, 2094 n. 5 (2012) (quoting *al-Kidd*, 131 S. Ct. at 2084). Rather, when determining whether a government official is entitled to qualified immunity, the inquiry "'must be undertaken in light of the *specific context of the case*, not as *a broad general proposition*.'" *Brosseau*, 543 U.S. at 198 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (emphases added)); *see also Saucier*, 533 U.S. at 200 (reversing the court of appeals because "whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals"); *Wilson*, 526 U.S. at 615 ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."); *see also Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Indeed, the Court granted certiorari this term to resolve whether the court of appeals erred by evaluating the constitutional claim at issue "at a high level of generality." *See Wood v. Moss*, No. 13-115.

Here, the court of appeals stated it would evaluate whether it "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. But the court's analysis belies that it defined the right so specifically. Indeed, the court of appeals looked neither to "'controlling authority'" nor "a robust 'consensus of cases,'" to evaluate whether petitioners violated clearly established law. *al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson*, 526 U.S. at 617). Instead, the Sixth Circuit concluded that the "absence" of pre-2002 case law discussing social workers, Pet. App. 19a, when coupled with "basic Fourth Amendment principles . . . that government officials must obtain a warrant to conduct a search or seizure on private property," constituted clearly established law that the social workers here should have followed, *id.* 17a. In doing so, the Sixth Circuit ignored this Court's repeated admonition that the constitutional right at issue must be defined by reference to the specific context of the case, and turned the qualified-immunity analysis on its head.

"Basic" Fourth Amendment principles, and the "absence" of case law specifically discussing social workers, hardly resolves how such principles should be applied when balancing the interest of the state in preventing harm to children, *see, e.g.*, *Gates v. Tex. Dep't of Protective & Reg. Servs.*, 537 F.3d 404, 427-28 (5th Cir. 2008), with the general right to be free from unreasonable searches and seizures, *see Wilson*, 526 U.S. at 615 (rejecting the proposition "that any violation of the Fourth Amendment is 'clearly established,' since it is clearly established that the protections of the Fourth Amendment apply

to the actions of police"). This is especially true because in 2002 (and in the present as well), the law was hardly settled whether "traditional" Fourth Amendment principles, a "balancing standard," or a "special needs" standard applied to seizures of children. *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995) (discussing "special needs" exceptions to the warrant requirement). As Judge Sutton noted in dissent, Sixth Circuit precedent was so unsettled in 2002 that it "could lead a reasonable social worker to think that the Fourth Amendment did not apply to them *at all*." Pet. App. 33a. *See 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]"); *Andrews v. Hickman Cnty.*, 700 F.3d 845, 863 (6th Cir. 2012) ("[I]t was not evident [in 2008] under clearly established law whether [social workers] were even required to comply with the strictures of the Fourth Amendment."). And although this Court was set to provide guidance in a related context in *Camreta v. Greene*, *see* Petition for Writ of Certiorari, *Camreta*, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478), 2010 WL 2190432, the Court found the case moot, *see id.* at 2035-36, thus leaving the question unresolved.

The "absence" of any guidance from this Court or the Sixth Circuit on the constitutional implications of seizing abused children from their homes should have ended the inquiry and led the court of appeals to grant petitioners qualified immunity. This is especially true here because, as Judge Sutton reasoned, the "absence" of case law applicable to social workers does not mean that the logical place

for the petitioners to look for applicable law would be to general Fourth Amendment principles traditionally applied to law enforcement, as the Sixth Circuit did. Pet. App. 32a-33a (Sutton, J., dissenting). Instead, the petitioners could (and did) look to Ohio's statutory scheme providing for seizure of endangered children, "the only clearly established requirement in the case." *Id.* 29a (Sutton, J., dissenting). Reasonable social workers could have readily believed that it was permissible to seize the Kovacic children knowing they had been abused in the past and based on a belief that the children were at a risk of ongoing harm, as state law and an order of the juvenile court permitted them to do. *Id.* 26a (Sutton, J., dissenting). Indeed, at every step, the social workers complied with "all of the procedural requirements of [Ohio's child endangerment] law"—law that the Sixth Circuit refused to find unconstitutional—but nonetheless wound up in the "exceedingly strange" position of complying with the law at the time but being denied qualified immunity eleven years after the fact. *Id.* 28a-29a (Sutton, J., dissenting).

No court has doubted the legitimacy of petitioners' good-faith concerns for the Kovacic children. The social workers knew, among other things, that Ms. Kovacic had slapped and pushed Katherine, and pulled Katherine's hair; that she struck Danny on a regular basis, and that her aggression towards her children was escalating. *Id.* 39a (Sutton, J., dissenting). When Ms. Kovacic failed to show for the meeting with the social workers, the social workers, the police, and members of the Kovacic family expressed concern that Ms. Kovacic's mental state was worsening and that she was

capable of killing the children. *See id.* 11a-12a. Given these and other risks to the children, the social workers concluded that this "urgent situation" required that Danny and Katie be removed from the home "now." *See id.* 39a-40a (Sutton, J., dissenting) (internal quotation marks omitted). Indeed, confronted with "an uncertain legal and factual landscape," the petitioners elected to act; their judgment was confirmed three days later when the state court found probable cause; and "the affected family members did not challenge the state court decision." *Id.* 41a-42a (Sutton, J., dissenting). "If ever there were a reason for granting qualified immunity, it would be this." *Id.* 41a.

Unsurprisingly, the Sixth Circuit's decision creates an irreconcilable split with decisions of other circuits refusing to apply the "baseline presumption" that the Fourth Amendment applies to all state actors equally absent countervailing law. *Id.* 33a (Sutton, J., dissenting). Again, the First Circuit's decision in *Hatch* would authorize petitioners' conduct. There, the First Circuit reasoned, the qualified-immunity analysis "need go no further" because "[t]he record shows that [the social worker] had a reasonable basis both for suspecting child abuse and for believing [the child] to be in danger." *Hatch*, 274 F.3d at 25. Although *Hatch* involved a Fourteenth Amendment claim rather than a Fourth Amendment claim, those "two doctrines run side by side," and a social worker could reasonably think that conduct endorsed under one framework would be equally acceptable under the other. Pet. App. 43a (Sutton, J., dissenting).

As in *Hatch*, other circuits have refused to conclude that "basic" constitutional principles developed in the criminal-law context constitute clearly established law in the specific context of social workers. The Second Circuit, which recognized that the Fourth Amendment applies in the context of child seizure cases, has declined to decide what standard applies to determine whether a seizure is "reasonable" under the Fourth Amendment in cases where the State seizes a child in the context of a child-abuse investigation. *See Southerland v. City of New York*, 680 F.3d 127, 157-59 (2d Cir.), *reh'g en banc denied*, 681 F.3d 122 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 980 (2013); *see also Gomes v. Wood*, 451 F.3d 1122, 1130 (10th Cir. 2006) (holding in the Fourteenth Amendment context, that "state officials may remove a child from the home without prior notice and a hearing when they have a reasonable suspicion of an immediate threat to the safety of the child if he or she is allowed to remain there"); *cf. Costanich v. Dep't of Social & Health Servs.*, 627 F.3d 1101, 1115-16 (9th Cir. 2010) ("[I]t is clear that Washington foster care licensees' and custodial guardians' interests do not rise to the level of a criminal defendant's interests, which are clear and long-established. While these factors do not excuse deliberate fabrication of evidence, there are sufficient distinctions between criminal prosecutions and civil foster care proceedings that the right had not yet been clearly established in the civil context.").

While the extra-circuit split created by the panel's opinion is unsurprising, the intra-circuit split is. In *Jordan v. Murphy*, a case involving events in 1998, the Sixth Circuit stated that "neither the Supreme Court nor this Court have explicitly held

that the Fourth Amendment does not create a social worker exception." 145 F. App'x at 517 n.2; *see also Andrews*, 700 F.3d at 863 ("[I]t was not evident [in 2008] under clearly established law whether [social workers] were even required to comply with the strictures of the Fourth Amendment."). The court thus granted qualified immunity to a social worker for a warrantless entry into a child's home where a police officer concluded that "immediate intervention" was required. *Jordan*, 145 F. App'x at 517. Judge Sutton reasoned that the Sixth Circuit's holding in *Jordan* meant that "for better or worse [the Sixth Circuit] had not yet decided *whether* the Fourth Amendment applied to a child-safety seizure." Pet. App. 32a. But according to the court of appeals' reasoning here, "basic" constitutional principles should have constituted clearly established law in *Jordan* just as the court held they did here. As Judge Sutton aptly noted in dissent: "If the majority were right—that the baseline presumption for the clearly established inquiry is that the Fourth Amendment applies to everyone, including social workers, in the absence of contrary case law—*Jordan* was incorrectly decided." *Id.* 33a.

As Judge Sutton noted in dissent, "[w]hen a social worker has concerns that immediate removal is required and when a state court judge later vindicates those concerns after a hearing, it is a strange notion of qualified immunity that would permit the social workers to be found liable under § 1983." *Id.* 42a-43a. But the Sixth Circuit created that result by erroneously defining the issue too broadly and finding clearly established law based on the "absence" of law. This Court should grant certiorari.

C. THE SIXTH CIRCUIT'S DECISION UNDERMINES EFFORTS TO PROTECT CHILDREN FROM ABUSE.

The Sixth Circuit's decision implicates important issues in the area of child safety. By concluding that the social workers here do not enjoy qualified immunity, the Sixth Circuit's decision risks curtailing the efforts of social workers to investigate and prevent ongoing child abuse and creates disincentives for social workers possessing probable cause to remove children from dangerous situations.

The Sixth Circuit holds that 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.* It is one thing to say that the law in 2013 requires a warrant in these circumstances. A system can be put in place to allow warrants to be obtained quickly, even telephonically. It is another thing to say that, even where there is probable cause to believe a child has already been abused, advance notice and a full-blown hearing, where the parents put on evidence and witnesses, must be scheduled and held before social workers can take temporary custody of the child. It will not always be possible to know when further abuse might occur. Exigency requirements developed in the context of investigating crime might not be satisfied, but that does not mean children are not at risk. Past abuse suggests further abuse might occur at any time.

Further, "[w]hen confronted with evidence of child abuse, [social workers] may be required to make on-the-spot judgments on the basis of limited and often conflicting information, with limited

resources to assist them." *Gomes*, 451 F.3d at 1138 (internal citation and quotation marks omitted). This means that social workers must make "anguished decisions," *Southerland v. City of New York*, 681 F.3d 122, 138 (2d Cir. 2012) (Jacobs, C.J., dissenting from denial of rehearing *en banc*), not only to address obvious exigencies, but also the "unseen risks of a non-seizure (irreversible harm to the children)," when past abuse is suspected, Pet. App. 27a (Sutton J., dissenting). While before this case social workers could intervene to ensure that at risk children are not subjected to abuse once they have probable cause, and have their actions evaluated (and the parents' competing rights determined) in a post-deprivation hearing held shortly thereafter, process must now precede such a child safety seizure. *See* Anita Wadhwani, *DCS Limits Removal of Kids*, The Tennessean, Oct. 31, 2013, at A1, *available at* 2013 WLNR 27526598 (describing removal procedures in place in Tennessee, Michigan, Kentucky, and Ohio); Anita Wadhwani, *DCS Child Removal Policy Reversed*, The Tennessean, Nov. 2, 2013, at A1, *available at* 2013 WLNR 27824637 (describing change in Tennessee's policy); *see also* Charlton Stanley, *Sixth Circuit Ruling*, Jonathan Turley Blog (Nov. 3, 2013) http://jonathanturley.org (commenting on Tennessee's initial change in policy after the ruling in this case). But this raises the very real risk that further abuse will occur before the process is provided and the social workers can intervene to help. And now, when social workers do act in response to concerns of past abuse, but are wrong on the exigency, the court of appeals' opinion "allows the abused children to sue their rescuer for allegedly

effecting the rescue prematurely." *Southerland*, 681 F.3d at 135 (Jacobs, C.J., dissenting from denial of rehearing *en banc*).

What's more, overlaying the risk of personal liability for money damages pursuant to § 1983 unnecessarily interferes with a social worker's performance of her job. As Judge Sutton explains, "[t]he point of qualified immunity is to give social workers room to operate reasonably between these extremes [of waiting too long to act or acting too quickly], not to expose them to liability whenever they err in one direction or the other." Pet. App. 41a (Sutton, J., dissenting). By incentivizing social workers to wait for more certainty—even when faced with evidence children have already been abused and could be "irreversibl[y] harm[e]d" by further abuse, *id.* 27a—the majority increases the probability that social workers will fall short of their calling: protecting children.

This balancing act would be difficult enough in a vacuum. But the *Kovacic* opinion must be read in the context of what law already frames social workers' behavior. Accordingly,

> [w]hen the panel opinion in this case is considered together with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L.Ed.2d 249 (1989), holding that state officials have no constitutional duty to protect children against domestic abuse, *a perverse incentive is created*. A child welfare worker is shielded from liability when she recklessly fails to protect abused children, but she is exposed to personal liability when she acts in good faith

> to protect them. *Faced with these choices, a rational child welfare worker will err on the side of caution every time—and children who otherwise would have been rescued from dangerous and abusive situations will live in peril.*

Southerland, 681 F.3d at 138 (Jacobs, C.J., dissenting from denial of rehearing *en banc*) (emphases added). In other words, the majority's decision provides dangerous incentives for social workers. *DeShaney* means social workers face no risk of personal liability for constitutional torts if they simply wait for a pre-deprivation hearing. This is true even where the child is abused in the interim. *See DeShaney*, 489 U.S. at 191. Under the majority's analysis, second-guessing and the prospect of personal liability arise if social workers—even if determined to have probable cause—take temporary custody of a child without pre-deprivation process.

Here, the Juvenile Court's probable cause determination makes clear that the Kovacic children belonged in the custody of Family Services. Yet the Sixth Circuit imposes liability on the social workers because, the court reasons, petitioners were responding with probable cause to a situation that had not yet become an exigency. But when such exigencies fail to materialize because social workers intervene, then both the governmental interest in protecting a child from abuse and the child's interest in a life free from abuse are equally served.

The majority's opinion serves neither interest. As one commentator notes, "[t]he failures of the child welfare system are too well documented for us to be sanguine about these perverse incentives for

inaction." Rebecca Aviel, *Restoring Equipoise to Child Welfare*, 62 HASTINGS L.J. 401, 404-05 (2010) (footnotes omitted). Social workers dedicated to investigating and preventing child abuse "serve[] society's most vulnerable and dependant members," and "should not be further stressed with a legal framework that skews the incentives for its decisionmakers by punishing only erroneous decisions to act." *Id.* As Judge Sutton counsels, "[w]hen a social worker has concerns that immediate removal is required and when a state court judge later vindicates those concerns after a hearing, it is a strange notion of qualified immunity that would permit the social workers to be found liable under § 1983." Pet. App. 42a-43a.

The Sixth Circuit's decision departs significantly from the way that qualified immunity should be evaluated and applied, particularly in the context of social workers. It should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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