No. 20-1525

In the United States Court of Appeals for the Seventh Circuit

NICOLE K., by next friend LINDA R., et al., Plaintiffs-Appellants,

v.

TERRY J. STIGDON, et al., Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:19-cv-01521-JPH-MJD (Hon. James Patrick Hanlon)

BRIEF OF THE INSTITUTE FOR JUSTICE, THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, THE INSTITUTE FOR FREE SPEECH, AND THE SOUTHERN POVERTY LAW CENTER AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND REHEARING

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are public-interest groups—each with a different mission—that often represent plaintiffs in federal-court litigation against state actors.

The **Institute for Justice** is a nonprofit law firm committed to securing constitutional protections for individual liberty.

The **American Civil Liberties Union of Illinois** (ACLU of Illinois) is a statewide, nonprofit, nonpartisan organization with more than 60,000 members dedicated to protecting and defending civil rights and civil liberties and promoting fairness and dignity for all Illinoisans. The organization has enforced constitutional rights in this Court and the U.S. District Courts through litigation against the Illinois foster system, juvenile detention system, prison healthcare system, institutions housing people with disabilities, and other state systems. The ACLU of Illinois will continue to use federal litigation against state actors to protect the constitutional rights of marginalized groups—including young people, people with disabilities, people in poverty, and people of color.

The **Institute for Free Speech** is a nonpartisan, nonprofit organization that promotes and defends the rights to free speech, assembly, press, and petition. In addition to scholarly and educational work, it represents individuals

and civil society groups in cases at the intersection of political regulation and First Amendment liberties.

The **Southern Poverty Law Center** (SPLC) is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. Over the last several years, the SPLC litigated complex federal civil rights lawsuits to end governments' overreliance on fines, fees, money bail to generate revenue, and other systems that criminalize poverty, resulting in the unconstitutional treatment of indigent defendants, particularly in Black and Brown communities. Additionally, the SPLC has worked with cities across the South to reform policies related to fine and fee collection, conflicts of interest, the use of for-profit probation, and money bail.

Because the panel decision in this case invites confusion about whether and when the federal courts may abstain from civil-rights cases, amici have an interest in the Court's rehearing this case.[1]

[1] No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person except amici curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

This should have been an easy appeal. The plaintiffs filed a putative class action, claiming that Indiana minors in "Child in Need of Services" proceedings (called "CHINS" cases) have a federal right to appointed counsel. The district court dismissed their suit, citing *Younger* abstention. On appeal, the parties joined issue on *Younger* and *Younger* alone. And at oral argument, remarkably, the State gave the game away: It conceded that *Younger* does not apply to seven of the ten named plaintiffs. Oral Arg. 16:52-17:59 (7th Cir. Oct. 26, 2020) ("Well, Your Honor, I don't think *Younger* would bar their claims in that sense . . . .").

As to those plaintiffs—at a minimum—the district-court judgment should have been a clear candidate for vacatur. But the panel chose a different path. Not only did it ignore the State's concession, it wrote off the *Younger* analysis altogether. "[I]t does not matter whether *Younger* applies," the panel reasoned, because the federal courts have freeform "discretion" to opt out of "any federal proceeding" that might overlap with a state-court case. The panel thus affirmed dismissal based not on any specific abstention principles, but on an abstract sense of the deference owed to state courts.

The panel's decision suffers from errors of substance and process alike. On substance, the decision conflicts with decades of Supreme Court precedent. In the panel's view, abstention is appropriate (or maybe required; it's not clear) whenever a state court (or perhaps even an agency) might "work[] its way through" federal issues on its own. But such "free-form *ad hoc* judicial balancing"—the Fourth Circuit's words—goes against the premise of abstention: that an Article III court may abdicate its jurisdiction only in narrow circumstances. In breaking with that premise, the panel injected uncertainty into an area that demands clear rules. And as this case spotlights, the confusion will fall hardest on those seeking to vindicate federally protected rights.

Process errors reinforce the need for further review. The district-court judgment—and this appeal—involved *Younger* abstention alone. At argument, the State conceded that *Younger* does not apply to a supermajority of the plaintiffs. Yet the panel overlooked that concession and the parties' arguments and resolved the appeal on a theory of its own making. Respectfully, short-circuiting our "adversarial system of adjudication" in this way disserved the parties, the lower courts, and future litigants in this Circuit. *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Rehearing should be granted.

ARGUMENT

A. In holding that an Article III court may surrender jurisdiction over "any federal proceeding" in deference to state courts, the panel decision conflicts with Supreme Court precedent.

1. Abstention doctrines are sometimes thorny, but their shared premise is simple: Article III courts have a "strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). Thus, abstention—relinquishing jurisdiction in deference to state courts—is consciously the "exception, not the rule." *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 82 (2013) (citation omitted). *Colorado River* abstention, for example, is warranted only in "exceptional circumstances." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983). *Burford* abstention applies only in a "narrow range of circumstances." *Quackenbush*, 517 U.S. at 726. *Younger* abstention, the basis for the district court's decision here, extends to "three 'exceptional circumstances'" and "no further." *Sprint Commc'ns, Inc.*, 571 U.S. at 82. Across this slate of doctrines, the core principles are the same. The courts start with a "virtually unflagging" duty to exercise their jurisdiction. *Id.* at 77 (citation omitted). And they can depart that baseline—they can abstain—only pursuant to a specific source of authority.

2. The panel's decision broke with these principles at a bedrock level. The district court and the litigants approached this case through the *Younger* framework. But the panel declined to follow suit. The panel maintained that "it does not matter whether *Younger* applies to all CHINS proceedings." Slip op. 5. For with or without *Younger*, the panel reasoned, the federal courts have "discretion" to give up their jurisdiction in deference to state courts. *Id.* The panel thus affirmed the district court's dismissal based not on any abstention doctrine, but on a gestalt judgment about the respect due to state courts.

In this, the panel erred. In the panel's view, federal courts have the authority (or even the duty) to abstain in "any federal proceeding" that overlaps with state-court litigation. *Id.* Time and again, however, the Supreme Court has said the opposite. That "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Commc'ns, Inc.*, 571 U.S. at 72. That "[w]e do not remotely suggest that every pending proceeding between a State and a federal plaintiff justifies abstention[.]" *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (*NOPSI*) (citations and quotation marks omitted). That expansive abstention requirements "would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case

in deference to the States." *Id.* On this front, the lesson is clear: The federal courts may abstain if a specific source of authority requires or permits it, but not otherwise.

The panel's gesture to comity is equally misplaced. "Principles of comity," the panel said, allow (or perhaps require) federal courts to abstain in deference to parallel state-court litigation—absent "some urgent need for federal intervention." Slip op. 5. Here, too, the Supreme Court has favored the opposite rule: The courts' task "is not to find some substantial reason for the *exercise* of federal jurisdiction," but to "ascertain whether there exist 'exceptional' circumstances . . . to justify the *surrender* of that jurisdiction." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25-26 (addressing *Colorado River* abstention). *Younger* itself cautioned that federalism "does not mean blind deference to 'States' Rights.'" 401 U.S. 37, 44 (1971). Simply, the panel's decision upended the presumption in favor of exercising federal jurisdiction and substituted one of abdication.

3. The panel's reasoning underscores its error.

First, the panel invoked a recent decision, *Courthouse News Service* v. *Brown*, to support its judgment. Slip op. 5 (citing 908 F.3d 1063 (7th Cir. 2018)). *Courthouse News Service* espoused something of an outlier view on

abstention.[2] But whether that decision was right or wrong, it supports nothing like the panel's bottom line here: the notion that federal courts have a free hand to abstain "while a state works its way through an administrative process." Slip op. 5. Were the panel's view correct, in fact, there would have been no need for the Supreme Court to cultivate 50 years of "carefully defined" abstention precedent in the first place. *NOPSI*, 491 U.S. at 359.

Second, the panel cited the rule against "federal-defense removal" as supporting its view of abstention. Slip op. 5. But the two concepts have nothing in common. "Federal-defense removal" reflects a statutory limit on the federal courts' subject-matter jurisdiction. *See Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 807-08 (1986). It emphatically does not, as the panel posited, give the courts *carte blanche* to opt out of cases (like this one) where federal jurisdiction exists. Far from honoring congressional limits, the panel decision conflicts both with precedent and with Congress's charge that the Judiciary

[2] *Compare Courthouse News Serv.*, 908 F.3d at 1072, 1073 (acknowledging that "this case does not fit neatly into the *Younger* doctrine" or "map exactly on" *Rizzo* v. *Goode*, 423 U.S. 362 (1976), or *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), but applying that precedent even so), *with Sprint Commc'ns, Inc.*, 571 U.S. at 82 ("[T]o guide other federal courts, we today clarify and affirm that *Younger* extends to the three 'exceptional circumstances' identified in *NOPSI*, but no further."); *see generally Courthouse News Serv.* v. *Planet*, 947 F.3d 581, 591 n.4 (9th Cir. 2020) (noting "disagree[ment]" with this Court's decision); *Courthouse News Serv.* v. *Schaeffer*, 429 F. Supp. 3d 196, 207 (E.D. Va. 2019) (similar), *appeal docketed* No. 20-1386 (4th Cir.).

hear and decide cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

B. The panel's error is important and invites confusion.

The panel's error is of great legal and practical importance. Few questions are more demanding of clear answers than whether and when an Article III tribunal can abdicate its jurisdiction. Yet the panel's decision invites all manner of uncertainty. For five decades, the Supreme Court has sought to "carefully define[]" its abstention doctrines. *NOPSI*, 491 U.S. at 359. On the panel's theory, though, anything goes. If a state court or agency might "work[] its way through" a federal issue on its own, the federal courts have "discretion" to bow out. Slip op. 5.

For would-be plaintiffs in this Circuit—and for entities like amici, which represent them—this view of abstention promises endless confusion. On the panel's reasoning, in fact, any number of this Court's past decisions might well have turned out differently. For example, take *Mulholland* v. *Marion County Election Board*, where the Court reversed an abstention ruling because a state proceeding did not fall squarely within *Younger* and *Sprint*. 746 F.3d 811, 816-18 (7th Cir. 2014). (*Mulholland* reversed on another ground also.)

Were the panel's approach correct here, that case (and others) might just as easily have been affirmed with a nod to discretion and comity.

That disconnect drives home the potential for uncertainty that follows from the panel's decision. "[T]he Supreme Court has *never* allowed abstention to be a license for free-form *ad hoc* judicial balancing of the totality of state and federal interests in a case." *Martin* v. *Stewart*, 499 F.3d 360, 364 (4th Cir. 2007). And for good reason: People with federal claims are presumptively entitled to federal-court protection. That is why "judge-made doctrine[s] of abstention" are so "narrowly limited." *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967) (discussing *Pullman* abstention). In contravening these principles, the panel decision will make it harder for people to vindicate their federal rights. It will close federal courthouses to people who have every right to be there. And by impeding valid civil-rights actions, it will harm "society at large." *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989). The panel's error warrants immediate correction.

C. The panel's decisional process was flawed.

The panel's decisional process reinforces the need for further review. As detailed above, the panel introduced uncertainty into an important area of federal law. In doing so, it departed from "the principle of party presentation" in

several ways. *Sineneng-Smith*, 140 S. Ct. at 1579. That breakdown in the adversarial process further counsels in favor of rehearing.

Consider, first, the oral argument, where the State conceded that *Younger* should not apply to seven of the ten named plaintiffs. *See* page 3, above. That admission should have taken abstention off the table entirely as to those plaintiffs. For "abstention serves no point" when the State forswears it. *See Kendall-Jackson Winery, Ltd.* v. *Branson*, 212 F.3d 995, 997 (7th Cir. 2000). Yet the panel forged ahead, overlooking the State's concession and affirming the district court's dismissal across the board.[3]

Equally troubling, the panel overlooked the basic contours of the case. As discussed, the plaintiffs' appeal presented the question of *Younger* abstention alone. Yet the panel passed over that issue. Slip op. 5. It declined even to consider whether the district court applied *Younger* correctly, developing a "discretion[ary]" doctrine instead—a form of freestyle abstention. No party had argued for that doctrine or briefed it. And it differs fundamentally from the district court's *non*-discretionary application of *Younger* in the decision under review. *See id.* Adding insult to injury, the panel then scuttled the

[3] The State opined that, as to the seven plaintiffs with completed CHINS proceedings, this case is now moot. That issue would best be addressed in the first instance by the district court on remand. *Cf. Ciarpaglini* v. *Norwood*, 817 F.3d 541 (7th Cir. 2016).

plaintiffs' merits theories (also unbriefed), before affirming on non-merits grounds. *Id.* 6-7.

Respectfully, the plaintiffs—and everyone in this Circuit—deserve better. Circuit-court precedent matters, not just to the parties but to the community at large; appellate opinions affect the rights of litigants in countless cases to come. Respect for the judicial role thus strongly disfavors what the panel did here in "sally[ing] forth" to address matters the case did not present and the parties did not brief. *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008) (citation omitted). Such a practice disserves the litigants. It conflicts with the judge's duty as a "neutral arbiter." *Id.* at 243. It can raise serious due-process concerns. *Cf. Dr. Robert L. Meinders, D.C., Ltd.* v. *UnitedHealthcare, Inc.*, 800 F.3d 853, 858 (7th Cir. 2015). And it creates a special risk of courts' getting things wrong. Substantive errors combine with process errors to make this case a strong candidate for rehearing.

CONCLUSION

The petition for rehearing should be granted. Given the State's concession that abstention is unwarranted for seven of the ten named plaintiffs, the Court also may wish to invite the State to advise whether it intends to waive abstention for the remaining named plaintiffs as well.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) and 7th Cir. R. 32(c) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 2,596 words.

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 29(b)(4) and 32(a)(5) and 7th Cir. R. 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Century Expanded font.

/s/ Samuel B. Gedge
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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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