In the

United States Court of Appeals

For the Seventh Circuit

No. 20-1525

NICOLE K., by next friend LINDA R., *et al.*,

Plaintiffs-Appellants,

v.

TERRY J. STIGDON, Director of the Indiana Department of Child Services, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:19-cv-01521-JPH-MJD — **James Patrick Hanlon**, *Judge*.

ARGUED OCTOBER 26, 2020 — DECIDED MARCH 5, 2021

Before EASTERBROOK, ROVNER, and WOOD, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. When officials in Indiana believe that children may be suffering from abuse or neglect, they initiate a process that they call CHINS, for Child in Need of Services. The plaintiffs in this suit are children (represented by next friends) about whom CHINS proceedings are under way. Indiana automatically appoints lawyers to represent the parents in CHINS proceedings but does not do

the same for children. Plaintiffs contend that the Constitution entitles each of them to appointed counsel at public expense. In other words, they seek a civil parallel to the holding in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that all criminal defendants are entitled to counsel when imprisonment is in prospect. But the district court declined to resolve this contention, ruling that *Younger v. Harris*, 401 U.S. 37 (1971), requires abstention. 2020 U.S. Dist. LEXIS 36844 (S.D. Ind. Mar. 3, 2020).

When *Younger* applies, participants must raise their federal arguments in the state proceeding, with review by the Supreme Court of the United States if the state judiciary ultimately rejects the constitutional arguments. Plaintiffs contend on appeal that they are not the kind of parties, and CHINS proceedings are not the sort of "quasi-criminal" litigation (their language), to which they believe *Younger* is limited.

Moore v. Sims, 442 U.S. 415 (1979), holds that *Younger* applies to some kinds of child-welfare proceedings, and *Milchtein v. Chisholm*, 880 F.3d 895 (7th Cir. 2018), adds that child-custody proceedings are among those governed by *Younger*. But, as plaintiffs see things, CHINS proceedings do not always entail the same state interests as child-custody matters. The state's brief describes the CHINS process, showing that it can span a variety of situations and correspondingly a wide range of state interests:

> The State's intervention begins with a report of suspected child abuse or neglect. Upon receipt of such a report, the Indiana Department of Child Services initiates an assessment of the allegation. See Ind. Code §§ 31-33-7-1 *et seq*., 31-33-8-1 *et seq*. If the Department is able to substantiate the allegation of abuse or ne-

glect, it may then initiate a CHINS proceeding by filing a CHINS petition on the child's behalf. See Ind. Code ch. 31-34-9 *et seq*.

The trial court must hold an initial hearing within ten days of the Department's filing of a CHINS petition, Ind. Code §31-34-10-2(a), earlier (within two days) if the child has been removed from the home upon the Department's assessment of the reported abuse or neglect. See Ind. Code §§ 31-34-5-1(a), 31-34-10-2(j). During the initial hearing, the parents are asked to admit or deny the allegations in the petition: If the parents deny the allegations, then the court must generally hold a fact-finding hearing within 60 days, Ind. Code §31-34-11-1, and if after that hearing the court determines that the child is a CHINS, it must then schedule a dispositional hearing to occur within 30 days of the CHINS determination. Ind. Code §§ 31-34-11-2, 31-34-19-1(a). But if the parents admit the allegations at the initial hearing, the court enters judgment and schedules a dispositional hearing. See Ind. Code §§ 31-34-10-8, 31-34-10-9(a), (c).

During the dispositional hearing, the court considers appropriate placement and treatment for the child and then enters a dispositional decree. See Ind. Code §31-34-19-1, ch. 31-34-20 *et seq*. The court's dispositional decree not only provides for the child's placement and services, but in most cases it also spells out the services in which the parent must engage to remedy the conditions that led to the CHINS adjudication. See Ind. Code §§ 31-34-20-1, 31-34-21-5.5; cf. Ind. Code §31-34-21-5.6 (providing for narrow circumstances under which services are not required).

After the court enters the dispositional decree, it periodically reviews the case—at least once every six months—to ensure that the child's case plan, services, and placement continue to serve the child's best interests. Ind. Code §§ 31-34-21-2, 31-34-21-4.5, 31-34-21-5(a). The court takes into account a host of considerations, including whether the child requires additional services or counseling and the extent to which the child's parent, guardian, or custodian has enhanced the ability to fulfill parental obligations and has cooperated with reunification efforts. See Ind. Code §31-34-21-5(b). In the course of its review, the court also

> considers whether to prepare or implement a permanency plan for the child. Ind. Code §31-34-21-5(b)(15).
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> CHINS cases remain open until "the objectives of the dispositional decree have been met," Ind. Code §31-34-21-11, which can mean several things, such as reunification or termination of parental rights and adoption, among others. If reunification is not a viable option, the State may initiate a termination of parental rights (TPR) proceeding. See, e.g., Ind. Code §§ 31-34-21-7.5, 31-35-2-1. The CHINS case continues until the child achieves permanency, which often does not occur until after the TPR proceeding (including any appeals) concludes. See Ind. Code §§ 31-19-11-6; 31-34-21-11.
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> In a CHINS or TPR proceeding, state law entitles the child's parents to counsel as a matter of right, while the child does not have such a statutory entitlement, see Ind. Code §§ 31-32-4-1, 31-34-4-6(a)(2)(A)—though the state trial court does have discretion to appoint counsel for the child, see Ind. Code §31-32-4-2(b), and the Department can request appointment of counsel for the child as well. But in practice, trial courts rarely have occasion to consider whether to appoint counsel to children in CHINS cases.
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> The child's interests … are neither unrepresented nor disregarded. In addition to the State's *parens patriae* protection, most children are represented by a Guardian ad Litem (GAL), a Court Appointed Special Advocate (CASA), or both. See Indiana Youth Institute, *2019 Indiana Kids Count Data Book* 23 (2019) ("In 2017, 29,630 Hoosier children were designated as Children in Need of Services. … In 2017, 4,273 volunteers spoke for abused and neglected Hoosier children in 30,480 CHINS cases."). Indeed, one of the first things a court does upon the filing of a CHINS petition is to determine whether appointment of such an advocate is warranted. Ind. Code §31-34-10-3. State law requires the court to appoint a GAL or CASA in abuse and neglect cases, *id*., but courts may appoint a GAL or CASA even if not required, see Ind. Code §31-32-3-1; *Gibbs v. Potter*, 77 N.E. 942, 943 (Ind. 1906).

Indiana Br. 3–6 (cleaned up).

The variety of goals and outcomes in this kind of proceeding makes us reluctant to decide categorically whether *Younger* does, or does not, apply across the board. Ten children are plaintiffs, and Indiana does not contend that all of them have been separated from their parents or are at risk of that outcome.

We also conclude that it does not matter whether *Younger* applies to all CHINS proceedings. Although, when *Younger* applies, abstention is compulsory, a federal court has discretion to put any federal proceeding on hold while a state works its way through an administrative process that was under way before the federal suit began. See, e.g., *Courthouse News Service v. Brown*, 908 F.3d 1063 (7th Cir. 2018). Principles of comity entitle the states to make their own decisions, on federal issues as well as state issues, unless there is some urgent need for federal intervention. This is summed up in the rule that there is no such thing as federal-defense removal. See, e.g., *Chicago v. Comcast Cable Holdings, L.L.C.*, 384 F.3d 901, 904 (7th Cir. 2004). Many a federal issue will arise in the resolution of a proceeding under state law, but the norm is that the state tribunal handles the entire proceeding, with review of the federal question (if one matters in the end) by the Supreme Court rather than a federal district judge.

Withholding peremptory federal adjudication of a single issue in the state proceedings is the appropriate disposition. Indiana represents, and plaintiffs do not deny, that state judges have the authority to appoint counsel for children. What's more, most children have adult representatives—either guardians *ad litem* or special advocates. Some of those adult representatives may be lawyers; others may engage counsel to advise them how best to represent the children's

interests. Unless there is a "civil *Gideon*" principle requiring counsel in every case, the state's procedures suffice—at least in the sense that they permit an adult to argue, to the state judiciary, that a lawyer is necessary in a particular case.

Gideon overruled a series of cases, exemplified by *Betts v. Brady*, 316 U.S. 455 (1942), that abjured any rule about whether counsel is necessary in criminal prosecutions. *Betts* held that courts must decide whether each particular defendant could represent his own interests adequately. The Justices stated in *Gideon* that the program of *Betts* had failed because judges just can't tell, even with the benefit of hindsight, what a lawyer might have done had one been appointed. The only reliable solution, *Gideon* held, is to appoint counsel all the time. This understanding lies behind plaintiffs' argument that every child in every CHINS proceeding is entitled to an appointed lawyer.

But the Justices have not taken *Gideon* as far as they might. They treat it as a decision about the scope of the Counsel Clause in the Sixth Amendment rather than the Due Process Clause in the Fifth. They have not extended *Gideon* to courts martial, see *Middendorf v. Henry*, 425 U.S. 25 (1976), or to civilian misdemeanor criminal prosecutions that do not end in sentences of imprisonment, see *Nichols v. United States*, 511 U.S. 738 (1994). Revocation of probation or supervised release does not entail an automatic right to counsel, even though the consequences may include imprisonment. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). In these and other situations, the Justices have used the case-by-case approach of *Betts*.

The situations the Justices have approached one dispute at a time under the Due Process Clause include civil child-

welfare proceedings. So, for example, a parent is not automatically entitled to counsel in a civil-contempt proceeding arising out of a child-welfare adjudication, even though the remedies for defiance to a court may include imprisonment until the recalcitrant litigant obeys. See *Turner v. Rogers*, 564 U.S. 431 (2011). And in *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–19 (1996), while analogizing child-custody-termination proceedings to criminal prosecutions for the purpose of determining whether a state may condition appeal on ability to prepay the cost of a transcript (the Due Process Clause bars this, the Court held), the Justices reaffirmed the holding of *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), that the Constitution does not automatically entitle parents to appointed counsel before a court terminates parental rights. No decision since *M.L.B.* has even hinted at restiveness about the holding of *Lassiter*. In other words, there is no "civil *Gideon*" principle for child-custody or child-welfare proceedings.

Because children are not automatically entitled to lawyers—as opposed to the sort of adult assistance that Indiana routinely provides—it would be inappropriate for a federal court to resolve the appointment-of-counsel question in any of the ten plaintiffs' state proceedings. A state judge may appoint counsel, if that seems necessary, or may explain why that step is unnecessary under the circumstances. In the absence of a "civil *Gideon*" analog, that question is a proper part of the state proceeding, subject (as all federal issues are) to the possibility of review by the Supreme Court once a final decision has been rendered.

AFFIRMED