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Brief for the National Association of Social Workers and the Ohio Chapter of the National Association of Social Workers as Amici Curie in Support of Petitioners, No. 13-933, United States Supreme Court (Mar. 6, 2014)

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Doron M. Kalir, Carolyn I. Polowy, Brief for the National Association of Social Workers and the Ohio Chapter of the National Association of Social Workers as Amici Curie in Support of Petitioners, No. 13-933, United States Supreme Court (Mar. 6, 2014)

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IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA CAMPBELL-PONSTINGLE, PAM CAMERON,
AND VIKKI L. CSORNOCK,

Petitioners,

v.

KATHERINE KOVACIC AND DANIEL KOVACIC,

Respondents.

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

**BRIEF FOR THE NATIONAL ASSOCIATION
OF SOCIAL WORKERS AND THE OHIO
CHAPTER OF THE NATIONAL ASSOCIATION
OF SOCIAL WORKERS AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*

The National Association of Social Workers ("NASW") and its Ohio Chapter respectfully submit this brief as *amici curiae* in support of Petitioners.¹

NASW is the largest professional organization of social workers in the United States. It represents over 130,000 social workers with chapters in each of the fifty States, as well as in the District of Columbia, the Virgin Islands, Guam, and Puerto Rico. The Ohio Chapter of NASW has over 4,300 members. Since its inception in 1955, NASW has worked to develop and maintain high standards of professional practice in the field of social work, to advance sound social policies, and to strengthen and unify the social work profession. Its activities in furtherance of these goals include promulgating professional standards (including Standards for Social Work Practice in Child Welfare), enforcing the *NASW Code of Ethics*, conducting research, publishing materials relevant to the profession, and providing continuing education.

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than *amici*, its members, or its counsel made any monetary contribution towards the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief in a letter filed with the Clerk's office.

NASW and its Ohio Chapter have a significant and direct interest in this case. If the Sixth Circuit's decision is allowed to stand, NASW members will be exposed to personal liability under 42 U.S.C. § 1983. That, in turn, may ultimately lead to reduced protection of the profession's most valuable and vulnerable clients – abused children.

The Sixth Circuit's decision – denying qualified immunity to social workers who removed child-abuse victims without a warrant – may also alter the entire manner in which social workers evaluate child abuse matters. Child abuse is one of the most sensitive – and emblematic – areas treated by social workers. Indeed, the social work profession “has always advocated on behalf of those affected by poverty, neglect, and disadvantage. From this perspective, social work's efforts on behalf of at-risk children and their families are perhaps the profession's most perfect fit.” Tracy Whitaker, Toby Weismiller & Elizabeth J. Clark, *Assuring the Sufficiency of a Frontline Workforce: A National Study of Licensed Social Workers*, NASW, 8 (Mar. 2006), available at http://workforce.socialworkers.org/studies/children/children_families.pdf. But while “social workers have been steadfast in their professional and personal commitments to protect children... by developing programs and social supports that help prevent child abuse,” *id.*, at 8-9, the Sixth Circuit ruled that social workers should be held personally liable for a reasonable removal of these same abused children.

The Sixth Circuit's decision came despite the fact that the “social workers faced an uncertain legal and factual landscape,” *Kovacik v. Cuyahoga County*

Dep't of Children & Family Servs., 724 F.3d 687, 710 (6th Cir. 2013) (Sutton, J., dissenting); despite the fact that "a state court judge found three days later that they acted properly," *id.*; despite the "undisputed [fact] that [the social workers] held the subjective belief that their actions were authorized by the juvenile court's standing order and the circumstances," *Kovacik*, 809 F. Supp. 2d 754, 794 (N.D. Ohio, 2011) (District Court findings); and despite the fact that the social workers based their decision on legal advice provided by "an assistant prosecuting attorney." *Kovacik*, 724 F.3d at 692. Yet, despite all of these facts, the Sixth Circuit held that the social workers could be personally liable for their decision to remove the abused children.

Conversely, this Court has held — under considerably less favorable facts for both social worker and child — that no personal liability should attach where a social worker made a decision *not* to remove a child. *DeShaney v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189 (1989) (child not removed suffers permanent brain damage). NASW now invites this Court to hold the same for child removal cases.

In other words, NASW asks this Court to stand in the shoes of social — and other child protective services — workers, who are charged with the daily protection of abused children, and apply qualified immunity to those workers in all reasonable removal cases.

SUMMARY OF ARGUMENT

"Child abuse and neglect is one of the Nation's most serious concerns." U.S. Dep't of Health & Human Servs., Admin. For Children & Families, *Child Maltreatment 2012*, 1 (2012), available at <http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf>. There are many forms of child abuse – physical, psychological, sexual, and plain neglect. *Id.* at 21 (Exh. 3-E). At the end of the child-abuse harm spectrum lies death. And the numbers are staggering: From 2001 to 2010, more than 15,500 child-abuse deaths have been recorded in the U.S. – nearly threefold the amount of military deaths in both Iraq and Afghanistan during that same period (5,877). See Every Child Matters Educational Fund, *Child Abuse & Neglect Deaths in America* 1 (Table 1) (2012), available at http://www.everychildmatters.org/storage/documents/pdf/reports/can_report_august2012_final.pdf. In 2011 and 2012, 1,580 and 1,640 more children died, respectively, as result of abuse. *Child Maltreatment, supra*, at 52 (Exh. 4-A).

Congress, in an attempt to respond to the widespread problem of child abuse, passed the Child Abuse Prevention and Treatment Act (CAPTA). CAPTA was first signed into law on January 31, 1974, and reauthorized in 1978, 1984, 1988, 1992, 1996, 2003, and 2010 (42 U.S.C. § 5101 et seq.; 42 U.S.C. § 5116 et seq.). At the heart of CAPTA lies a federal grant program, allowing the States to develop better training programs and innovative responses "to reports of child abuse and neglect." (See 42 U.S.C. § 5106(a)(1-2)).

The fight against child abuse is also a legislative priority at the state level. All fifty states and the District of Columbia have child-abuse prevention laws; and each has provisions allowing social workers, under certain circumstances, to remove abused children from their home.²

² See ALA. CODE § 26-14-6 (1975); ALASKA STAT. § 47.10.142 (2003); ARIZ. REV. STAT. ANN. § 8-821 (2008); ARK. CODE ANN. § 12-18-1001 (2011); CAL. WEL. & INST. § 305 (1988); COLO. REV. STAT. ANN. § 19-3-308 (2010); CONN. GEN. STAT. ANN. § 17a-101 (2013); DEL. CODE ANN. TIT. 16 § 907 (1999); D.C. CODE § 4-1303.04 (2005); FLA. STAT. ANN. § 39.401 (2013); HAW. REV. STAT. § 587A-11 (2013); IDAHO CODE § 16-1608 (2005); 325 ILL. COMP. STAT. ANN. 5/5 (1998); IND. CODE § 31-34-2-1 (1997); IOWA CODE ANN. § 232.79 (2001); KAN. STAT. ANN. § 38-2231 (2014); KY. REV. STAT. ANN. § 620.060 (1998); LA. CHILD. CODE ANN. ART. 620 (2006); ME. REV. STAT. ANN. TIT. 22 § 4023 (2004); MD. CODE ANN. FAM. LAW § 5-709 (2012); MASS. GEN. LAWS ANN. CH. 119 § 24 (2008); MICH. COMP. LAWS § 722.630 (1999); MINN. STAT. § 260C.148 (2005); MISS. CODE ANN. § 43-21-303 (1980); MO. STAT. ANN. § 210.125 (1982); MONT. CODE ANN. § 41-3-301 (2011); NEB. REV. STAT. ANN. § 43-248 (2004); NEV. REV. STAT. ANN. § 432B.390 (2011); N.H. REV. STAT. ANN. § 169-C:6-a (2002); N.J. STAT. ANN. § 9:6-8.27 (2006); N.M. STAT. ANN. § 32A-4-6 (2005); N.Y. SOC. SERV. LAW. § 417 (2009); N.C. GEN. STAT. § 7B-500 (2001); N.D. CENT. CODE § 50-25.1-06 (2005); OHIO REV. CODE ANN. § 2151.31 (2002); OKLA. STAT. TIT. 10A § 1-4-201 (2009); OR. REV. STAT.

Social workers, as part of the child protective services (CPS) workforce, stand at the forefront in the fight against child abuse. In 2012 alone – the last year for which data is available – child protective services responded to well over three million reports of child abuse. *Child Maltreatment, supra*, at 18 (Exh. 3-A) (3,184,000 unique reports responded to in 2012). The removal of a child from his or her home – never an easy decision – is a measure taken by social workers only after the child is found to be in some form of imminent danger – either of physical harm (as in the instant case, or in the case of Joshua DeShaney), of death (as nearly three children die every day in America from child abuse), or other type of harm. Only under those circumstances would a social worker decide to remove a child from the home, attempting to prevent irreparable consequences.

And that is precisely what happened in this case. In a meeting preceding the decision to remove the children, family members and police officers reported to the social workers that the children “were in

§ 419B.150 (2001); 23 PA. CONS. STAT. § 6369 (1995); R.I. GEN. LAWS. § 40-11-5(d) (1996); S.C. CODE ANN. § 63-7-660 (2011); S.D. CODIFIED LAWS § 26-7A-12 (1996); TENN. CODE ANN. § 37-1-114(a)(2) (1999); TEX. FAM. CODE ANN. § 262.104 (2005); UTAH CODE ANN. § 78A-6-106 (2006); VT. STAT. ANN. TIT. 33 § 5301 (2009); VA. CODE ANN. § 63.2-1517 (2003); WASH. REV. CODE ANN. § 26.44.050 (1999); W.VA. CODE § 49-6-3 (2012); WIS. STAT. § 48.19 (1997); WYO. STAT. ANN. § 14-3-405 (2005).

‘imminent risk’ of physical harm” from their mother. *Kovacik*, 809 F. Supp. 2d at 764 (District Court findings). Based on that information, the social workers concluded that “the Kovacic children were at a more elevated risk than they first thought, and determined it was immediately necessary to remove Daniel and Katherine from [their mother]’s home in light of [the social workers]’ belief that the children were in imminent danger of physical harm.” *Id.* The social workers then sought legal advice, and received “the signature of the assigned assistant prosecuting attorney.” *Id.* Only then did they proceed to remove the children. And three days later a juvenile court magistrate approved. Yet, three years later, in a federal court, the social workers were denied the benefit of the qualified immunity defense.

NASW’s first argument is simple. To protect children from abuse – a major congressional and state legislative goal – this Court should apply qualified immunity to protect social workers from personal liability where a reasonable decision has been made to remove a child without a warrant.

NASW’s second argument is equally cogent. *DeShaney* was decided 25 years ago. Since then, this Court’s “continued silence” on the issue, *Kovacik*, 724 F.3d at 708 (Sutton, J., dissenting), has failed “to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment.” *Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011). In light of the circuit split on this issue – compare *Hatch v. Dep’t for Children*, 274 F.3d 12 (1st Cir. 2001) with *Kovacik*, 724 F.3d (6th

Cir. 2013) – guidance from this Court is more necessary today than ever.

ARGUMENT

I. TO PROTECT CHILDREN FROM ABUSE – A MAJOR CONGRESSIONAL AND STATE LEGISLATIVE GOAL – THIS COURT SHOULD GRANT QUALIFIED IMMUNITY TO SOCIAL WORKERS MAKING A REASONABLE DECISION TO REMOVE A CHILD WITHOUT A WARRANT.

A. Congress And The States Place Child-Abuse Protection, Including Removal, As A Top Legislative Priority.

Child-abuse prevention and treatment are major Congressional priorities. By title alone, the Child Abuse Prevention and Treatment Act – which has been reauthorized seven times since first being signed into law in 1974 – epitomizes that approach. Congress still considers the issue of “abuse, neglect, and [child] fatalities” to be “of significant social concerns in our Nation.” Opening Statement of Ranking Member Platts, U.S. House Comm. On Educ. & Labor’s Subcomm. On Healthy Families & Cmtys., *Preventing Child Abuse and Improving Responses to Families in Crisis*, 1 (Nov. 5, 2009), available at archives.republicans.edlabor.house.gov/hearingsMarkup_details.aspx?NewsID=1337.

While CAPTA does not deal directly with the issue of child removal, the States – which are the grantees under CAPTA – have all enacted provisions allowing the removal of child abuse victims from their homes.³

Ohio, for example, had two statutory provisions in 2002, which are still valid today, authorizing social – and other child protective services – workers to remove children from their homes in cases of suspected abuse. See OHIO REV. CODE ANN §§ 2151.31(A)(3)(a), (A)(6)(a); *Kovacic*, 724 F.3d at 700 n.7. In this case, the social workers relied on section 2151.31(A)(3)(a), which authorizes child removal by social workers when “[t]here are reasonable grounds to believe that the child is suffering from illness or injury and is not receiving proper care, ... and the child removal is necessary to prevent *immediate or threatened* physical or emotional harm.” (Emphasis added).

In the case at bar, not only were the social workers of the (reasonable) opinion that all these conditions had been met, but so too was the prosecuting attorney who signed the Temporary Care Order allowing the removal, *id.* at 692, and the family-court judge who reviewed the matter three days later. *Id.* The Ohio statutory wording is not unusual. Many state legislators use similarly-worded provisions, requiring some degree of “imminent danger,” to authorize the removal of children without a prior hearing.⁴

³ See *supra*, Note 2.

⁴ See *supra*, Note 2.

B. Protecting Children From Abuse, Including Removal, Is Often Performed By Social Workers As Part Of A Child Protective Services Team.

To protect children from abuse – to effectuate the legislative goals articulated by Congress and the States – the law requires agents. In many cases, those State agents are social workers. As a recent NASW standards' publication suggests: "Child welfare systems across the country serve some of the most vulnerable children, youths, and families. These systems are designed to support families and to protect children from harm through an array of prevention and intervention services; in particular, they are designed to support children who have been or are at risk of abuse or neglect. Historically, social workers have played critical roles in these systems. Studies indicate that social work degrees are the most appropriate degrees for this field of practice and have been directly linked to better outcomes for children and families and retention of staff." Kim Day, Carol Harper & Carmen D. Weisner, *NASW Standards For Social Work Practice In Child Welfare*, 5-6 (2013) (citations omitted), available at <http://www.socialworkers.org/practice/standards/childwelfarestandards2012.pdf>.

Indeed, social workers were accurately described as the "frontline workforce" in the fight to protect children from abuse. See *Assuring the Sufficiency of a*

Frontline Workforce, supra, at 10 (“The study confirms that licensed social workers are highly involved in providing direct services to children and their families in a variety of community settings. In fact, 78 percent of all licensed social workers provide services to clients age 21 or younger, regardless of the[ir] practice setting of focus.”). And being on the frontlines calls, almost inevitably, for the need to make extremely difficult decisions under extremely difficult conditions.

Thus, for example, in the county from which this case has emerged, “every day the frontline social workers for the Cuyahoga County’s Department of Children and Family Services fight to save kids. Their job calls for making difficult decisions, and a lot of them. The 450 case workers deal with nearly 8,000 families a year, including 1,800 children in foster care or other forms of custody.” Laura Johnston, *Cuyahoga County Children and Family Services Workers Strive to Save Kids*, THE PLAIN DEALER, Nov. 24, 2012, available at http://www.cleveland.com/metro/index.ssf/2012/11/cuyahoga_county_childrens_serv.html. And the type of work performed by those social workers often takes a considerable emotional toll. As recently noted with regards to the Cuyahoga County social workers: “Social workers rarely leave their jobs at the office. Some try, but more often than not, they fail. The round-the-clock demands and emotional toll of dealing with abused or neglected children inevitably bleed into evenings, weekends and vacations. And just as inevitably, the workers’ spouses and children share in the pain and disappointments.” Laura

Johnston, *Children's Services Job Takes Toll on Workers, Families*, THE PLAIN DEALER, Nov. 26, 2012, available at http://www.cleveland.com/metro/index.ssf/2012/11/childrens_services_job_takes_t.html.

Finally, child removal – the act of taking a child “from his or her normal place of residence to a foster care setting,” *Child Maltreatment*, *supra* at 119 – is perhaps the hardest task performed by social workers. Indeed, “the cases that really get to the [Cuyahoga County social workers], the ones that they can’t leave at the office, are the unusual ones: emaciated toddlers, 8-year-olds pocked with cigarette burns, teenagers abandoned because their parents don’t want them anymore. The worst cases, they agree, require them to take a child away from a parent, sometimes even wrench an infant from the arms of a sobbing mother. Those cases can haunt for life.” *Social Workers Strive to Save Kids*, *Id.* at 3.

C. Therefore, To Protect Children From Abuse, This Court Should Protect Social Workers By Granting Qualified Immunity When A Reasonable Decision To Remove A Child Has Been Made.

Since protection from child abuse is a major federal and state legislative priority, and since the persons entrusted with such a task includes social workers, the logical conclusion is that (legislative) protection of children from abuse requires (judicial) protection of social workers from personal liability when they act reasonably. While NASW does not

contend that every decision to remove a child without a warrant should be exempted from liability, it does contend that *reasonable* decisions to remove should be granted qualified immunity. *See, e.g., Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (“Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.”) (citation omitted).

What constitutes a “reasonable” decision to remove? As in this case, three elements may satisfy a *prima facie* case of reasonableness. First, the social workers engaged in a pre-removal consultation with family members, other social workers, and, as appropriate here, the police, to assess the current level of risk to the child. *See Kovacic*, 724 F.3d at 702 (“Say you are a social worker ... On March 26, 2002 you and five other social workers and officers along with several members of the Kovacic family meet to discuss the situation, and, with your operational silos removed, discuss the risk that the mother might imminently harm the two children.” (Sutton, J., dissenting)). Second, the social workers obtained a pre-removal consultation with, and approval of, a state attorney, presumably finding the removal to comply with state-law requirements. *See Kovacic*, 809 F. Supp. 2d at 764 (removal order issued only after social workers received “the signature of the assigned assistant prosecuting attorney.”). Third, the social workers took part in a post-removal judicial hearing that took place as soon as possible after the removal. (While judicial confirmation of the removal’s necessity is not required for determination

of reasonableness,⁵ such finding may increase its likelihood. *See Kovacic*, 724 F.3d at 703 (“Within three days, and again consistent with state law, a state court judge holds a hearing. She finds that the requisite endangerment and emergency existed, requiring the children to remain in state custody.” (Sutton, J., dissenting))).

Establishing these three elements – the pre-removal peer consultation, the legal approval, and the post-removal judicial hearing – provides a prima facie case of reasonableness warranting the grant of qualified immunity. The inquiry into the reasonableness of the decision alone – rather the constitutionality of the actions taken by the social workers – may also alleviate some of the concerns voiced by Justices Scalia, Kennedy, and Thomas in their dissenting opinions in *Camreta*, regarding the unnecessary inquiry into complex constitutional issues. *See* 131 S.Ct. at 2036 (Scalia, J., dissenting); *see also id.* at 2037 (Kennedy, J., joined by Thomas, J., dissenting).⁶

⁵ *See, e.g., Hatch v. Dep’t for Children*, 274 F.3d 12 (1st Cir. 2001) (qualified immunity granted despite judicial finding to the contrary).

⁶ Such a simple inquiry may also prevent fractured opinions by the federal Court of Appeals, such as when five judges of the same court were in favor of granting qualified immunity in case of child removal – even willing to “shake [the social worker’s] hand” for the work he has done to prevent child abuse – while others vote to deny an *en banc* hearing entirely following a finding of no qualified immunity.

II. THIS COURT'S "CONTINUED SILENCE" ON THE ISSUE SINCE *DESHANEY* (1989), AND THE CIRCUIT SPLIT THAT EMERGED, MERIT TIMELY GUIDANCE FOR THOSE CHARGED WITH PROTECTING CHILDREN FROM ABUSE.

A. *DeShaney* (1989) Left The Issue Of Personal Liability In Cases Of Child Removal Unresolved.

In *DeShaney*, this Court dealt with the matter of 4-year-old Joshua DeShaney, who was beaten so severely by his father that "he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he [was] expected to spend the rest of his life confined to an institution for the profoundly retarded." 489 U.S. at 194.

In *DeShaney*, the question before the Court was whether, under those circumstances, the social worker should be held personally liable under § 1983 for her decision *not* to remove the child – her "failure to intervene to protect him." *Id.* at 193. The Court held that no personal liability would attach "for

Southerland v. City of New York, 681 F.3d 122, 138-39 (2d Cir. 2012) (Jacobs, C.J., dissenting from denial of rehearing *en banc*).

failure to act in situations such as the present one.” *Id.* at 203. The opinion was not unanimous, however, containing a moving dissent.⁷ It is still applicable law, however, and has been for the past 25 years.

Importantly, the Court acknowledged – but left open – the question of the correct law to apply in opposite cases, where social workers intervened and removed a child *before* a tragedy occurred: “In defense of [the social workers] is must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate

⁷ See Justice Brennan, with whom Justices Marshall and Blackmun joined, dissenting: “Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents [social workers] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, ‘dutifully recorded these incidents in [their] files.’ It is a sad commentary upon American life, and constitutional principles ... that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.” *id.* at 213 (Brennan, J., dissenting) (citation omitted).

protection.” *Id.* at 203. This, in essence, is the question before the Court today.⁸

B. Since *DeShaney*, A Circuit Split Has Emerged With Regards To Social Workers’ Personal Liability In Cases Of Warrantless Removal.

DeShaney was decided 25 years ago. Since then, this Court’s “continued silence” on the issue, *Kovacic*, 724 F.3d at 708 (Sutton, J., dissenting), has failed “to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment.” *Camreta*, 131 S. Ct. at 2032. Beyond the lack of guidance, however, lies a deeper issue. *DeShaney* left many a social worker wondering – just before the proverbial “knock on the door,” just prior to committing to the life-altering decision of removing a child – whether they should take any action at all. Should they refrain from acting, no personal liability would attach. As one commentator observed, “[following *DeShaney*,] the social worker is expected not only to make an incredibly difficult and consequential decision with imperfect information, but to do so in a legal

⁸ *Amici* are aware of the fact that the decision below rests both on Fourth and Fourteenth Amendment grounds. For purpose of the present context, however – the acknowledgement that social workers may be personally exposed for acting either too early or too late – *Amici* respectfully submit that this Court’s remarks apply equally on both grounds.

framework that provides dramatic incentives for inaction.... *DeShaney* tells the social worker that it is safer from a standpoint of personal liability to leave an endangered child in the home than to attempt to remove him." Rebecca Aviel, *Restoring Equipoise to Child Welfare*, 62 HASTINGS L.J. 401, 404, 413 (2010).

NASW agrees with that commentator, who also recommends that "a system that has been characterized as approaching at, or past the breaking point should not be further stressed with a legal framework that skews the incentives for its decision makers by punishing only erroneous decisions to act." *Id.* at 404. But such "punishment" is precisely what the Sixth Circuit has inflicted with its decision below. It leaves social – and other child protective service – workers with a substantial disincentive for carrying out CAPTA's mission, to protect children from harm. NASW now urges this Court to reverse this undesirable result.

Since *DeShaney*, the Circuit Courts have been split with regards to whether qualified immunity should be granted to social workers in cases of warrantless removal. Obviously, the Sixth Circuit's decision below held that no qualified immunity should be accorded in such a case, based on both Fourth and Fourteenth Amendment grounds. *Kovacik*, 724 F.3d at 702. Similarly, the Second Circuit held in 2011 that qualified immunity should be denied to a social worker under somewhat similar circumstances, on both Fourth and Fourteenth Amendment grounds. *Southerland v. City of New York*, 680 F.3d 127 (2d Cir. 2011).

Conversely, the First Circuit held in a case that “would have covered the social workers here,” *Kovacik*, 724 F.3d at 706 (Sutton, J., dissenting), that a social worker should be granted qualified immunity in a warrantless removal case — even where the family court, which initially issued an ex-parte order of temporary custody, ultimately found “that there was no probable cause to believe that [the child] had been abused.” *Hatch v. Dep’t for Children*, 274 F.3d 12, 18 (1st Cir. 2001). Although *Hatch* was decided on Fourteenth Amendment grounds alone, its holding is still instructive: “We need to go no further. The record shows that [the social worker] had a reasonable basis both for suspecting child abuse and for believing [the child] to be in danger (and, therefore, that he acted justifiably in taking the boy into temporary custody). The fact that this suspicion proved, in the long run, to be unfounded does not strip [the social worker] of his entitlement to qualified immunity in regard to a claim of damages. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (emphasizing that the qualified immunity standard protects many mistaken judgments.)” *Hatch*, 274 F.3d at 25.⁹

⁹ *Hatch* is still good law. See *Hootstein v. Collins*, 928 F. Supp. 2d 326, 333 (D. Mass. 2013) (citing *Hatch* for the proposition that “the state may separate the child from the parent, before any hearing in which it would be required to show cause for such a separation.”).

Similarly, the Tenth Circuit, relying on *Hatch*, held in a warrantless removal case that qualified immunity should be granted. *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006). Here, too, the court's summary is instructive: "When 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,' *Hatch*, 274 F.3d at 22, with limited resources to assist them. They must balance the parents' interest in the care, custody, and control of their children with the state's interest in protecting the children's welfare. ... In the circumstances of this case, imposing the added burden of potential liability for damages under § 1983 would interfere unnecessarily with the performance of a difficult and essential job." *Gomes*, 451 F.3d at 44-45.

The split is clear. In *DeShaney*, this Court explained the grant of certiorari both "[b]ecause of the inconsistent approaches taken by the lower courts," and "the importance of the issue to the administration of state and local governments." *DeShaney*, 489 U.S. at 194. Respectfully, NASW suggests that the same applies in this case.

C. Today, More Than 130,000 Social Workers And Fellow Child Protective Services Staff Await This Court's Guidance On The Issue.

Following the Sixth Circuit decision, more than 130,000 NASW members find themselves in a

confused legal landscape: should they decide to refrain from action and leave a child abused they are protected from personal liability by *DeShaney*; should they decide to take action, however, and remove the child from abuse their exposure to personal liability is circuit dependent.

Thus, for example, should the removal take place in Cleveland, Ohio, the social workers will likely be personally liable for their actions. If, however, the same removal takes place in Denver, Colorado, no such personal liability will attach.

This legal landscape provides negative incentives to take action (exposing not only the social workers to personal liability, but also the children to unnecessary and preventable risk). This legal landscape is also inconsistent, arbitrary, and unjust. It presents social workers with a dilemma of almost Solomonic proportions: should they refrain from action, exposing the child to risk of permanent harm or even death while remaining protected legally (*DeShaney*), or should they act, saving the child but exposing themselves to personal liability? Indeed, "[t]he decisions caseworkers make every day would challenge King Solomon, yet most of them lack Solomon's wisdom, few enjoy his credibility with the public, and none command his resources." Richard Behrman, Mary Lerner & Carol Stevenson, *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, 8 FUTURE OF CHILDREN NO.1, 4, (1998), available at http://futureofchildren.org/futureofchildren/publications/docs/08_01_Analysis.pdf.

For these reasons, this Court's guidance is timely and this case provides the appropriate vehicle for doing so. Thus Ohio, the state from which this case emerged is, unfortunately, one of leaders in child-abuse statistics nationwide. While in terms of overall population Ohio is seventh in the nation, it ranked fifth in 2010 in terms of per-capita child abuse-related deaths, with 83 deaths reported that year alone. *See Child Abuse & Neglect Deaths, supra*, at 17. Some of these deaths could have been potentially prevented had the children been removed. In addition, 29,250 incidents of child abuse and neglect were reported in Ohio in 2012 alone, with each of the preceding four years registering over 30,000 abuse cases a year. *See Child Maltreatment 2012, Id.* at 30. In light of this data, the need for legal guidance is clear.

CONCLUSION

Allowing the Sixth Circuit decision to stand would substantially impair the ability of social workers to protect children from abuse – a major Congressional and States' legislative priority. This Court has protected social workers from personal liability before, under less favorable circumstances (*DeShaney*). Today, this Court is called to extend this protection of qualified immunity from inaction to reasonable action. Such a result would properly align the social workers' interests with that of Congress's and the States' – to protect children from abuse. To address these important issues, *amici* respectfully ask that the Court grant Certiorari in this matter.

Respectfully submitted,

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